

COMMENT

A FUNERAL FOR FREE SPEECH? EXAMINING THE CONSTITUTIONALITY OF FUNERAL PICKETING ACTS*

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declaring that God is killing American soldiers as vengeance for the nation's tolerance of homosexuality⁷ has outraged many family members and friends of deceased soldiers.⁸

At the center of democracy lies the importance of communication and debate.⁹ Since the adoption of the Bill of Rights, American society has curbed free speech only when the message is of such minimal social value that any benefit derived from it is clearly outweighed by society's interest in order and morality.¹⁰ Courts have noted the importance of ensuring that the government cannot suppress unpopular ideas or messages from society without the government's actions first being subjected to judicial scrutiny.¹¹ Therefore, when speech does not fall within the narrow categories of prohibited expressions, government restrictions based on content are not absolute; rather, such restrictions must be enacted neutrally.¹² However, recent developments in First Amendment jurisprudence seem to provide the government

FOXNEWS.COM, Oct. 4, 2006, <http://www.foxnews.com/story/0,2933,217839,00.html> (opining on Westboro Baptist Church's picketing of Amish school girls' funeral); Keen, *supra* note 1 (noting that in response to Phelps's protests, Congress and numerous states have enacted funeral picketing laws).

7. Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, Apr. 17, 2006, at A14 (observing that the church group kicked around an American flag, and when someone approached they shouted that the dead soldiers were rotting in hell).

8. *Id.* ("It's an emotional issue and not something that is going to get a lot of political opposition." (quoting David L. Hudson, Jr., research attorney for the First Amendment Center)).

9. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964) (noting the importance of uncensored debate); *see also* Frisby v. Schultz, 487 U.S. 474, 479 (1988). ("Because of the importance of 'uninhibited, robust, and wide-open' debate on public issues, we have traditionally subjected restrictions on public issue picketing to careful scrutiny." (internal citation omitted)).

10. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (articulating the fighting words doctrine as a limitation on the freedom of speech). In a unanimous decision, the Supreme Court held "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.*

11. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that a law requiring criminals to provide their victims income from publications describing their crimes violated the First Amendment). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it." *Id.* at 118 (alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)); *see also* *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (stating that states may not ban indecent, non-obscene sexual expression merely because some people find it offensive); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive.").

12. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 393–94, 396 (1992) (finding unconstitutional a statute prohibiting cross-burning on the grounds that government can not prohibit speech based on content or subject matter).

with the ability to silence any speech with which it does not agree.¹³ Phelps should be worried.

For over two hundred years, the First Amendment has symbolized the heart of American values and freedoms.¹⁴ The First Amendment provides, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁵ The First Amendment, however, does not fully protect every word uttered by citizens regardless of the content of speech.¹⁶ Historically, courts have failed to consistently evaluate First Amendment protections.¹⁷ No Supreme Court case addresses the rights of protestors at military funerals.¹⁸

Despite the rights granted by the First Amendment, the Supreme Court recognizes that free-speech rights are not equal in all places and at all times.¹⁹ Based on the fundamental nature of the First Amendment right of freedom of speech, a return to a strict analysis is needed. Whether funeral picketing legislation is constitutional is an important inquiry that cannot be answered without the proper methodology: a return to the public forum doctrine.²⁰ Therefore, the question arises: does funeral protesting, like fighting words and abortion protesting, deserve First Amendment protection?

13. See, e.g., *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006) (holding public employees are not protected under the First Amendment when making statements pursuant to their official duties); see also Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, The Vanishing Public Forum and the Need for An Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 182 (2001) (asserting that *Hill v. Colorado*, 120 S. Ct. 2480 (2000), “has opened the door widely to a new era of restrictive speech regulation within traditional public fora”).

14. See Raskin & LeBlanc, *supra* note 13, at 180 (stating the “character of the public forum ha[s] given free speech central instrumental and symbolic value in American life”).

15. U.S. CONST. amend. I.

16. See *Cohen v. California*, 403 U.S. 15, 19 (1971) (“[The First Amendment has] never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses.”); see also *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic.”).

17. See Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 309 (1999) (describing the public forum doctrine created by the Court as “a labyrinth of conflicting rules”).

18. See *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 976–78, 998 (E.D. Ky. 2006) (granting a preliminary injunction against enforcement of a Kentucky state law that would have prevented Westboro Baptist Church from picketing funerals).

19. See, e.g., *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”).

20. See *infra* notes 220–22 and accompanying text (arguing that free speech analysis should return to the traditional public forum analysis).

How can the government balance the need to respect the privacy of funeral mourners and also protect the protestors' First Amendment rights? This Comment argues that current First Amendment jurisprudence allows the government to silence American voices through restrictions that exceed the limitations granted by the Constitution. Funeral picketing presents the Court with an opportunity to reevaluate the rights of Americans under First Amendment jurisprudence.²¹

This Comment examines the constitutionality of funeral picketing acts under the public forum doctrine. The sidewalk area where Reverend Phelps and members of Westboro Baptist Church conduct their protests is a traditional public forum.²² As such, laws regulating speech within this area should be content-neutral or otherwise face strict scrutiny analysis. Furthermore, restrictions on the time, place, and manner of speech should be subject to intermediate scrutiny review. This Comment asserts that the current funeral picketing laws are unconstitutional because, while the text of the statute is content-neutral, for Reverend Phelps and his church members, the statute: (1) was enacted in a viewpoint-discriminatory manner; (2) will be discriminatorily enforced; and (3) leaves no adequate alternative channels for Phelps to convey his message.

Part II of this Comment provides background on Westboro Baptist Church and its leader, Reverend Fred Phelps, and examines current funeral picketing acts and related litigation. Part III summarizes the history of freedom of speech under the public forum doctrine and the doctrine's development over the past several decades. Part IV explains and analyzes the funeral picketing acts under the traditional public forum doctrine and explores the applicability of content-neutral rules, strict and intermediate scrutiny, and alternative means of communication. Finally, this Comment concludes these funeral picketing acts provide the Supreme Court with an opportunity to revise current First Amendment jurisprudence and provide a clear and concise framework for evaluating free-speech rights under such laws.

II. BACKGROUND

Families attend funerals to pay their last respects and to grieve. To their dismay, families of fallen soldiers have

21. See *infra* note 219 and accompanying text (arguing the Court should reinforce the importance of free speech rights by minimizing the expansion of speech regulation).

22. See *infra* Part IV.A (noting that public sidewalks have traditionally been considered a public forum by the Court).

experienced an unwelcome intrusion on this typically private ceremony.²³ Phelps has defied what military families expect to see at their relatives' funerals by picketing with signs that read "Thank God for Dead Soldiers."²⁴ The actions of Westboro Baptist Church have ignited outrage among community members, setting off a series of laws seeking to restrict funeral protests.²⁵

A. *Public Enemy Number One: Reverend Fred Phelps and Westboro Baptist Church*

*"The filing of a frivolous lawsuit seeking to stop the picketing of [Westboro Baptist Church] changes nothing. We will boldly stay on message: God hates the USA and America is doomed."*²⁶

Phelps and his congregation have chosen an unconventional way of spreading what they believe to be a Christian view—a view that condemns the alleged "sins" of America.²⁷ The members of this small church, which is based in Topeka, Kansas, and led by Reverend Fred Phelps, preach that the September 11, 2001, attacks on the United States and the deaths of American troops abroad are God's punishment for a nation who continues to tolerate homosexuality.²⁸ Ordained by the Southern Baptists in 1947,²⁹ Phelps and the members of Westboro Baptist Church identify themselves as Baptists, but

23. Alvarez, *supra* note 7 (commenting on the funeral of Corporal David A. Bass, a 20-year-old marine who was killed in Iraq on April 2, 2006, during which Phelps protested with a sign that read: "Thank God for [Improvised Explosive Devices]"); see also Ryan Masse, *Funerals Not Place For Protest*, BADGER HERALD, Feb. 9, 2006, http://badgerherald.com/oped/2006/02/09/funerals_not_place_f.php (supporting bans on funeral protesting).

24. Alvarez, *supra* note 7. Corporal Bass was one of seven soldiers who died in Iraq when their truck overturned in a flash flood. *Id.* A friend of Bass who attended the funeral "frowned as he watched the protestors from a distance. . . . 'It's hurtful and it's taking a lot of willpower not to go down there and stomp their heads in.'" *Id.*

25. Anti-Defamation League, *Fred Phelps and the Westboro Baptist Church: In Their Own Words*, June 21, 2006, http://www.adl.org/special_reports/wbc/default.asp (reporting that the Westboro protests have "inspir[ed] a wave of grassroots anger" and that over forty states have either enacted or were considering legislative responses).

26. God Hates America, Westboro Baptist Church Responds, <http://www.godhatesamerica.com/html/lawsuit.html> (last visited Nov. 8, 2006).

27. God Hates America, About Westboro Baptist Church, <http://www.godhatesamerica.com/index.html> (detailing the mission of Westboro Baptist Church).

28. Keen, *supra* note 1 (reporting that Phelps stated, "[t]his nation has ticked off the Almighty, and it's too late to repent").

29. Joe Tashler & Steve Fry, *The Transformation of Fred Phelps*, TOPEKA-CAPITAL JOURNAL, <http://www.rickcross.com/reference/westboro/westboro4.html> (last visited Nov. 15, 2007).

the church seems no longer affiliated with any known Baptist organization.³⁰ The church preaches against all forms of sin and engages in demonstrations that oppose homosexuality and sinful lifestyles.³¹ On his website, Phelps states the purpose behind Westboro Baptist Church:

[O]ur goal is to preach the Word of God to this crooked and perverse generation. By our words, some will repent. By our words, some will be condemned. Whether they hear, or whether they forbear, they will know a prophet has been among them. . . . [O]ur goal is to glorify God by declaring His whole counsel to everyone. . . . [W]e hope that by our preaching some will be saved.³²

Phelps and his wife moved to Topeka, Kansas, in 1955 and founded the church.³³ In 1962, Phelps earned a law degree from Washburn University in Kansas, but the state of Kansas disbarred him in 1979 for allegedly being abusive to a witness.³⁴ Phelps has picketed for various causes for over a decade, initially arriving at businesses, disaster zones, and the funerals of homosexuals.³⁵ More recently, Phelps has concentrated his efforts on protesting at funerals of soldiers killed in Iraq and Afghanistan.³⁶ Phelps and the members of Westboro Baptist Church have picketed the funerals of numerous soldiers who were killed abroad.³⁷ They have traveled to over twenty-two different states and often hold signs reading, “Thank God for Dead Soldiers” and “Thank God for IEDs [improvised explosive devices].”³⁸

30. See Lauerman, *supra* note 3 (questioning whether Westboro Baptist is a church or a family get together).

31. God Hates America, *supra* note 27.

32. Challenging Pastor Phelps’s Twisted Ideologies, http://www.therefinersfire.org/challenging_pastor_phelps.htm (last visited Nov. 15, 2007) (reproducing Phelps’s answer to a question posted to the Westboro Baptist Church website, which is currently under construction).

33. Lauerman, *supra* note 3. Prior to moving to Topeka, Phelps, while a student at John Muir College in Pasadena, California, preached against “promiscuous petting” and “pandering to lusts of the flesh.” *Id.*

34. *Id.* (reporting that even after his disbarment, Phelps remained active in state and local politics by campaigning for Al Gore’s presidential race, by running for Governor of Kansas in 1990, 1994, and 1998, and by running for the U.S. Senate in 1992).

35. Alvarez, *supra* note 7.

36. *Id.* (stating that the members of Westboro Baptist Church believe that “God is killing soldiers . . . because of America’s unwillingness to condemn gay people and their lifestyles”).

37. Anti-Defamation League, *supra* note 25.

38. *Id.* “Phelps believes that the soldiers represent a nation tolerant of homosexuality, and their deaths are God’s direct punishment for their sins.” *Id.* Prior to picketing the funerals of military soldiers, Phelps and his church members gained national publicity for protesting the funeral of Matthew Shepard, a homosexual and

In 2005, fifteen members of Westboro Baptist Church stood in protest across the street from the funeral of Army Specialist Edward Myers, a soldier who died in Iraq.³⁹ When the protestors finally left the scene, both the family of the deceased and veterans in attendance applauded.⁴⁰ Before the protestors left, Phelps's daughter, Shirley Phelps-Roper, stated, "The first sin was being a part of this military. If this young man had a clue and any fear of God, he would have run, and not walked, from this military."⁴¹

According to its website, the group holds daily protests and travels across the nation to picket at the funerals of gays, lesbians, and fallen soldiers.⁴² In response to these activities, a group known as Patriot Guard Riders formed to shield funeral mourners from the signs and words of the protestors.⁴³ Families and friends of the deceased continue to express their outrage over the protestors' message and have pressured lawmakers to punish them—insisting on respect for military funerals.⁴⁴

B. Lawmakers Strike Back

"I fully support our First Amendment rights . . . [b]ut I would love to put restrictions in it that (protestors) can't be within 10 miles of a military funeral, not just 300 feet."⁴⁵

murder victim of a vicious hate crime. *Id.*

39. *Phelps' Group Protests At Soldier's Funeral*, KMBC.COM, Aug. 5, 2005, <http://www.kmbc.com/news/4816699/detail.html> (reporting that one protestor wore an American flag tied to his belt that draped to the ground while holding a sign that read: "Thank God for IEDs").

40. *Id.* (noting that, after an exchange of words between a group of veterans and the protestors, the latter left—twenty minutes after the funeral began).

41. *Id.* (reporting that Phelps's daughter also stated, "[t]hat's the first piece of solid evidence that you have that the young man is currently in hell").

42. *God Hates America*, *supra* note 27 (asserting that the group has participated in over 32,000 demonstrations since June of 1991).

43. *Alvarez*, *supra* note 7 (describing the formation of the Patriot Guard Riders by a "small group of motorcycle riders, some of them Vietnam War veterans" and detailing the group's efforts to protect mourners from the Westboro Baptist Church picketing). The group now consists of over 22,000 members. *Id.* They seek to provide respect for the families of deceased soldiers and have followed the protestors all over the country. *Id.*

44. *Id.* (reporting that, in support of funeral picketing laws, Indiana Republican Steve Buyer stated, "[r]epugnant, outrageous, [and] despicable, do not adequately describe what I feel they do to these families").

45. Scott Sexton, *Bill Banning Protests at Funerals May Raise Ruckus*, WINSTON-SALEM JOURNAL, May 28, 2006, http://www.journalnow.com/servlet/Satellite?pagename=WSJ%2FMSGArticle%2FWSJ_ColumnistArticle&c=MGArticle&cid=1137836391380&path=!localnews&s=1037645509099 (quoting Rep. Mitch Gillespie).

In response to the recent actions of the Westboro Baptist Church, Congress and numerous states have enacted legislation in an effort to protect the families of fallen soldiers.

1. *The Respect for America's Fallen Heroes Act.* On May 29, 2006, President George W. Bush sent a message to the members of Westboro Baptist Church by signing the Respect for America's Fallen Heroes Act.⁴⁶ The Act prohibits demonstrations at cemeteries under the control of the National Cemetery Administration and at Arlington National Cemetery.⁴⁷ The Act specifically targets the Kansas church group⁴⁸ by prohibiting all funeral protests within 300 feet of the entrance of a national cemetery or within 150 feet of a road into the cemetery for a period lasting from 60 minutes before a funeral until 60 minutes after the funeral ends.⁴⁹ Violators of the Act are subject to a fine and a maximum prison sentence of one year.⁵⁰ According to Senate Majority Leader Bill Frist of

46. See Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (2006) (prohibiting protests within 300 feet of the entrance of a cemetery from sixty minutes before to sixty minutes after a funeral). "President Bush signed a law on Memorial Day banning protests within 300 feet of national cemeteries. Last month, he said it 'ensures that families of fallen servicemembers will not have to endure protests during military funerals.'" Keen, *supra* note 1.

47. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, sec. 2, § 2413(a)(1), 120 Stat. 387, 387 (2006) (to be codified at 38 U.S.C. § 2413).

48. Jim Abrams, House Bill Reins Military Funeral Protests (May 9, 2006), <http://www.abate-local58.org/assets/Misc/H.R.%205037.pdf> (reporting that Phelps believes Congress is violating the First Amendment).

49. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, sec. 2, § 2413(a)(2), 120 Stat. 387, 387 (2006) (to be codified at 38 U.S.C. § 2413). The Act specifically states:

(a) PROHIBITION.—No person may carry out—

(1) a demonstration on the property of a cemetery under the control of the National Cemetery Administration or on the property of Arlington National Cemetery unless the demonstration has been approved by the cemetery superintendent or the directory of the property on which the cemetery is located; or

(2) with respect to such a cemetery, a demonstration during the period beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony is held, any part of which demonstration—

(A)(i) takes place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery property; and

(ii) includes, as part of such demonstration, any individual willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony; or

(B) is within 300 feet of such cemetery and impedes the access to or egress from such cemetery.

50. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, sec 3, § 1387, 120 Stat. 387, 388 (2006) (to be codified at 18 U.S.C. § 1387).

Tennessee, the Act “protect[s] the sanctity of . . . national cemeteries as shrines to their gallant dead.”⁵¹ American leaders believe the Act is a necessary measure to provide peace to military families when burying their loved ones.⁵²

The cemeteries protected under the Act are maintained and controlled by the U.S. government, and public access to them has always faced significant constitutional restrictions.⁵³ Because the Respect for America’s Fallen Heroes Act only restricts speech activities on primarily cemetery property, which is not a public forum, Phelps will have a difficult time showing that the Act is unconstitutional.⁵⁴

2. *The Military Funeral Demonstrations Act.* On December 22, 2006, President Bush signed the Military Funeral Demonstrations Act, the legislative counterpart to the Respect for America’s Fallen Heroes Act.⁵⁵ The Act prohibits protesting at military funerals that take place at nonfederal cemeteries.⁵⁶ In a statement regarding the Act, Senator Durbin declared: “[O]ur soldiers, our veterans and those fallen heroes who have sacrificed their lives for the good of our country deserve to be laid to rest with dignity. . . . [The legislation] will help put an end to the reprehensible actions of those who have insisted on disrupting military funerals across the nation.”⁵⁷ Despite these good intentions, the Senate’s means in achieving its goal of silencing the protestors may be too restrictive.

Traditionally, government restrictions on public sidewalks and streets are subject to a higher level of scrutiny than

51. Abrams, *supra* note 48 (reporting that Senator First also stated, “[i]t’s a sad but necessary measure to protect what should be recognized by all reasonable people as a solemn, private and deeply sacred occasion”).

52. *See id.* (detailing the views of several congressmen who support the Act).

53. Mara Lee, *Bills Would Bar Protests at Military Funerals*, SCRIPPS HOWARD NEWS SERVICE, Mar. 15, 2006, available at <http://www.rickross.com/reference/westboro/westboro38.html> (relaying ACLU representative’s opinion that cemeteries are not a public forum).

54. *See id.* (arguing there is no First Amendment conflict); *see also supra* Part IV (analyzing the constitutionality of the national funeral picketing acts).

55. Act of Dec. 22, 2006, Pub. L. No. 109-464, 120 Stat. 3480 (2006) (to be codified at 18 U.S.C. § 1388). The Senate originally introduced the bill as the “Military Funeral Demonstrations Bill.” S. 4042, 109th Cong. (2006).

56. Act of Dec. 22, 2006, Pub. L. No. 109-464, sec. 1, § 1388(a), 120 Stat. 3480, 3480 (2006) (to be codified at 18 U.S.C. § 1388).

57. Nathan Burchfiel, *Bush Signs Law to Bar Military Funeral Protests*, CNSNEWS.COM, Dec. 27, 2006, available at <http://www.cnsnews.com/ViewNation.asp?Page=/Nation/archive/200612/NAT20061227a.html> (quoting Senator Dick Durbin, sponsor of the Senate bill).

privately owned property.⁵⁸ Therefore, the constitutionality of this Act is questionable because it seeks to restrict access “within 300 feet of the boundary of the location of [a] funeral,”⁵⁹ prohibiting citizens from accessing public sidewalks and streets surrounding cemeteries. Phelps’s challenge to the constitutionality of the Military Funeral Demonstrations Act deserves judicial attention.

3. *State Legislation.* In addition to national legislation, many states have enacted laws criminalizing protests at funerals.⁶⁰ The majority of these laws mirror the requirements of the federal legislation by prohibiting protestors from being within 100 to 500 feet of the cemetery entrance for at least one hour before and one hour after the funeral.⁶¹ Wisconsin, in particular, seeks to bar protestors from displaying “any visual image that conveys fighting words” within several hundred feet of the funeral.⁶²

In the wake of these new laws, the members of Westboro Baptist Church wait for the courts to decide their fate.⁶³ Phelps’s group believes the recent legislation helps spread their message by drawing attention to the church’s activities.⁶⁴ While Phelps’s activities may be offensive to many American citizens—especially the families of soldiers—some believe the newly enacted laws against funeral picketing ignore

58. See also *Carey v. Brown*, 447 U.S. 455, 461–62 (1980) (providing that the government may not enforce restrictions on public forum areas unless they prove to serve a substantial government interest and the means are carefully scrutinized).

59. Act of Dec. 22, 2006, Pub. L. No. 109-464, sec. 1, § 1388(a)(2)(A), 120 Stat. 3480, 3480 (2006) (to be codified at 18 U.S.C. § 1388).

60. David L. Hudson, *Funeral Protests*, FIRST AMENDMENT CTR., http://www.firstamendmentcenter.org/Assembly/topic.aspx?topic=funeral_protests (reporting that at least twenty-seven states have enacted funeral protesting laws).

61. See Alvarez, *supra* note 7 (stating more of the laws have been worded to avoid potential First Amendment problems).

62. *Id.* (adding these laws “do not try to prevent protestors from speaking out” while protesting).

63. *Anti-Gay Church Says It Won’t Violate New Funeral-Protest Laws*, FIRST AMENDMENT CENTER, Mar. 9, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16614> [hereinafter *Anti-Gay Church*] (reporting protestors refuse to violate the law, but rather seek legal action). On October 31, 2007, a district court awarded a \$10.9 million judgment to Albert Snyder, father of Lance Corporal Matthew Snyder. *Church Ordered to Pay \$10.9 Million for Funeral Protest*, CNN.COM, Oct. 31, 2007, <http://www.cnn.com/2007/US/law/10/31/funeral.protests.ap> (last visited Nov. 14, 2007). Phelps and Westboro Church members “were found liable for invasion of privacy and intent to inflict emotional distress.” *Id.*

64. *Anti-Gay Church*, *supra* note 63 (expressing a church member’s gratitude in drawing a “huge amount of attention to our message”).

significant freedoms granted by the First Amendment.⁶⁵ In response to the newly enacted legislation, Westboro Baptist Church is mounting legal challenges in numerous states.⁶⁶

C. Current Litigation

“It is difficult to imagine an advocacy group that has less in common with Westboro than the American Civil Liberties Union, . . . [b]ut the ACLU is also in favor of protecting the First Amendment, which sometimes means that it must protect the rights of groups whose values run contrary to its own.”⁶⁷

Army Specialist Edward Myers of St. Joseph, Missouri was killed when a makeshift bomb exploded near his Humvee while he was on patrol in Iraq.⁶⁸ Phelps and his church members made arrangements to protest at his funeral.⁶⁹ The recent enactment of a funeral picketing act in Missouri, however, interrupted Phelps’s typical picketing routine.⁷⁰ As a result, lawsuits challenging the constitutionality of the picketing laws are pending in three states—Kentucky, Missouri, and Ohio.⁷¹

As of January 2007, the courts have ruled on only one of the lawsuits.⁷² On September 26, 2006, a U.S. district court in Kentucky issued a preliminary injunction that prevents the enforcement of Kentucky’s Funeral Picketing Act.⁷³ The complaint asserts that the legislation, signed into law on March 27, 2006,

65. Alvarez, *supra* note 7 (noting that others believe that funerals could represent a legitimate place where citizens can be protected from unwanted messages).

66. *Anti-Gay Church*, *supra* note 63 (reporting that Westboro Baptist Church hopes to challenge the new legislation).

67. Tom Head, *ACLU: Kentucky Funeral-Protest Law Is Unconstitutional*, ABOUT.COM, May 3, 2006, <http://civilliberty.about.com/b/a/257496.htm> (stating the ACLU found itself fighting the law on behalf of lesbian and gay rights, but also defends the law on behalf of Westboro Baptist Church).

68. Faces of the Fallen, <http://projects.washingtonpost.com/fallen/dates/2005/jul/27/edward-l-myers> (last visited Nov. 8, 2007).

69. Garance Burke, *ACLU Sues for Anti-Gay Group That Pickets at Troops’ Burials*, WASH. POST, July 23, 2006, at A2.

70. *Anti-Gay Church*, *supra* note 63 (reporting that Phelps and his church members will continue to protest but will follow the current restrictions).

71. Hudson, *supra* note 60 (noting supporters of the Oklahoma and Missouri bills believe that, because the legislation allows the protestors to express their views at other times and at other places, the statutes are not a complete ban on expression).

72. See *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 976–77 (E.D. Ky. 2006); see also *supra* note 63 (noting a recent district court judgment award to the father of a soldier whose funeral Phelps and his church members protested).

73. *Id.* at 998 (enjoining Attorney General Gregory Stumbo from enforcing sections 5(1)(b) and (c) of House Bill 333 and Senate Bill 93).

infringes upon the right to protest at funerals, which, it claims, is guaranteed under the First and Fourteenth Amendments.⁷⁴ Specifically, the plaintiffs in *McQueary v. Stumbo* challenged sections 5(1)(b) and (c) of the Kentucky Act, asserting they are “not narrowly tailored to serve a significant government interest and do not leave open alternative channels for communication.”⁷⁵ Federal Judge Karen Caldwell determined:

Because McQueary has established a strong likelihood of success on the merits on his First Amendment challenge to Sections 5(1)(b) and (c) of the Act, the Court finds that he would suffer irreparable injury if the injunction requested in this case is not issued; . . . the public interest will be served by issuance of the injunction.⁷⁶

III. HISTORICAL OVERVIEW OF THE PUBLIC FORUM DOCTRINE

Beyond the right to freedom of speech, the First Amendment also guarantees freedom of assembly and freedom of religion.⁷⁷ Because the First and Fourteenth Amendments protect these rights, direct congressional or state action that interferes with these constitutional protections is prohibited.⁷⁸ Any action taken by Congress or a state to abridge these rights is subject to judicial review.⁷⁹ While it is understood that past courts have protected

74. *Id.* at 976–77.

75. *Id.* at 978. Sections 5(1)(b) and (c) state:

(1) A person is guilty of interference with a funeral when he or she at any time on any day:

. . . .

(b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of an event specified in paragraph (a) of this subsection; or

(c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:

1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or
2. Distributes literature or any other item.

Id.

76. *Id.* at 997–98.

77. U.S. CONST. amend. I.

78. *See* *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (noting that freedom of speech and freedom of the press are fundamental personal rights and liberties that are shielded by the Fourteenth Amendment from state interference); *see also* *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (noting that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise of religion).

79. *See* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (explaining that courts must decide whether restrictions on oral or written expressions are justified). This principle is supported by a commitment to the idea that “debate on

speech within the public forum,⁸⁰ the degree and manner of current regulation restricting speech at funerals has not been clearly established.⁸¹

A. *Formulation of the Public Forum Doctrine*

The public forum doctrine affords American citizens the right to use public places to circulate ideas and information.⁸² This doctrine was traditionally used to balance the tensions between the public's right to use public property for the exercise of free speech with the government's need to restrict speech in order to use the property for other legitimate nonspeech purposes.⁸³

In *Davis v. Massachusetts*, the Court snuffed any sign of tension between the public's use and the government's restrictions on public property by reducing the problem to a question of mere property rights.⁸⁴ The Court affirmed Davis's conviction for speaking in the Boston Common without a permit, holding that "[t]he right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."⁸⁵ This holding was typical of judicial opinions at the time—municipalities had the same power to forbid and censor speech on

public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Additionally, "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461–62 (1980).

80. Massey, *supra* note 17, at 309 (reciting the Court's standard of review for speech restrictions in a public forum—to pass judicial scrutiny, "[r]estrictions of speech in the public forum must be reasonable time, place, and manner regulations, that are content-neutral, narrowly tailored to advance 'a significant government interest, and leave open ample alternative channels for communication'" (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983))).

81. *Cf. id.* (describing the public forum doctrine—under which the constitutionality of funeral protest restrictions should be analyzed—as a "labyrinth" of conflicting rules).

82. See Raskin & LeBlanc, *supra* note 13, at 180–81 (stating that public property has traditionally served as a place for citizens to communicate and express ideas regardless of viewpoint or social status).

83. Massey, *supra* note 17, at 12. Professor Massey describes the Court's development of the public forum doctrine as an "inefficacious body of law." *Id.* at 311.

84. *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897); Massey, *supra* note 17, at 314 (noting Justice Holmes began "the practice of viewing speech rights on public property through a property prism").

85. *Davis*, 167 U.S. at 48 (determining the Boston Common was under control of the legislature, which could limit its use and delegate authority to the municipality, and any limitation of use was no more an infringement of the rights of a member the public than for the owner of private property to forbid the same conduct).

their property as private homeowners.⁸⁶ This idea survived for nearly forty years until the decision of *Hague v. Committee for Industrial Organization*.⁸⁷ In *Hague*, the Court rejected *Davis* to more emphatically pronounce that freedom of speech must be protected as one of the core principles of democracy.⁸⁸

Justice Owen Roberts articulated the classical principles behind freedom of speech in what has become the public forum doctrine.⁸⁹ He stated,

[The] use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . is not absolute . . . but it must not, in the guise of regulation, be abridged or denied.⁹⁰

According to Justice Roberts, the emerging public forum doctrine was based on the ancient principles of democracy and the idea that, without the freedom of political expression, a true democracy does not exist.⁹¹ He believed the very idea of a republican government requires citizens to have a right to discuss public affairs and demand change.⁹² Justice Roberts rejected applicability of the broad rule created by *Davis*—that speech rights were directly correlated to property rights—and instead created a more affirmative view, obliging the government to open up property in order to promote public discourse.⁹³

In the same year the Court decided *Hague*, it reaffirmed the public forum doctrine in *Schneider v. New Jersey*.⁹⁴ The *Schneider* Court considered the constitutionality of city ordinances that restricted the distribution of leaflets in streets, sidewalks, and

86. See, e.g., *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895).

87. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

88. *Id.* at 516, 518 (holding that labor organizers could not be prevented from distributing leaflets and assembling in public places). The case involved the Jersey City Mayor who used a city ordinance to prevent labor meetings in public places and stopped the distribution of literature pertaining to C.I.O.'s cause. *Id.* at 500–03.

89. See *id.* at 512–14 (creating a more affirmative government obligation to allow for public discourse on public property).

90. *Id.* at 515–16.

91. See *id.* at 513 (“Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss [public policy] and the benefits, advantages, and opportunities to accrue to citizens therefrom.”).

92. *Id.*

93. See *id.* at 513, 514–16 (declining to decide whether *Davis* was correct, but holding it did not control the ordinance at issue because the very nature of a republican government implies citizens must be able to use public places for public discourse).

94. *Schneider v. New Jersey*, 308 U.S. 147, 160–61 (1939).

other public places.⁹⁵ The Court declared that the right of a citizen to disperse information using oral speech or reading materials is constitutional in nature.⁹⁶ The Court determined the government's interest in keeping the streets clean did not sufficiently outweigh a citizen's right to share literature with other citizens who were willing to receive it.⁹⁷ More importantly, the Court reaffirmed its belief that these freedoms are of fundamental importance, reflective of the framers' intentions, and must not be abridged without careful scrutiny.⁹⁸

B. *The Continuance of the Public Forum Doctrine*

Over several decades, the Court developed the public forum doctrine in an effort to determine the manner and extent to which government may regulate speech on public property.⁹⁹ Because the government's ability to restrict speech is not unlimited, the extent to which the government is permitted to regulate or prohibit speech under the First Amendment depends upon the character of the forum in which the speech takes place.¹⁰⁰ The Court has continued to define the public forum as a place for freedom of expression, symbolizing the importance of democratic rights.¹⁰¹ The valuation of democratic rights over government regulation has influenced the formation of modern strict scrutiny review by requiring the government to demonstrate a compelling interest in order to regulate First Amendment rights.¹⁰²

95. *Id.* at 153–54.

96. *Id.* at 160–61 (explaining that although any regulation of speech must be subject to judicial scrutiny, the public forum doctrine does not permit, for example, an individual to break traffic laws by blocking traffic).

97. *Id.* at 162 (noting the right to share literature is not absolute and that lawful restrictions may be appropriate within constitutional limits).

98. *Id.* at 161 (“Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.”).

99. Massey, *supra* note 17, at 309 (arguing that the Court has never satisfactorily determined to what degree and in what manner governments may regulate speech on public property).

100. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813–14 (1984); *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 280 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981).

101. Raskin & LeBlanc, *supra* note 13, at 188 (explaining that the Court has reaffirmed its recognition of the public forum as a place for expression that provides a source for democratic debate and change).

102. *Id.* (noting that “[f]reedom of press [and] freedom of speech . . . are in a preferred position” in relation to government regulation (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (alterations in original))).

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Supreme Court established a three-tier categorization of public forums with coinciding levels of scrutiny.¹⁰³ To determine the constitutionality of a statute, the government must first determine whether the plaintiff seeks access to a traditional public forum, a designated public forum, or a nonpublic forum.¹⁰⁴ Each type of forum triggers a different level of judicial scrutiny.¹⁰⁵

At one end of the spectrum, the Court describes the traditional public forum, enunciated by Justice Roberts in *Hague*: “[S]treets and parks . . . have immemorially been held in trust for the use of public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁰⁶ In these locations, the government may not enforce content-based restrictions unless the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.¹⁰⁷ In a public forum, the state may enforce reasonable time, place, and manner regulations of expression that are “narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.”¹⁰⁸

The designated public forum is defined as property the state has voluntarily opened as a place for the public to conduct expressive activities.¹⁰⁹ As long as the property is open to the

103. *Perry*, 460 U.S. at 45–46. The first category includes streets and parks; the second category consists of public property that is open as a place for expressive activity; and the third category is public property not open for public communication and regulated under separate standards. *Id.*

104. *Cornelius*, 473 U.S. at 802–04 (explaining the different forms of expression associated with each type of forum).

105. Massey, *supra* note 17, at 309–10.

Restrictions of speech in the public forum must be reasonable time, place, and manner regulations that are content-neutral, narrowly tailored to advance a significant government interest, and leave open ample alternative channels for communication. Absolute bans on speech in a public forum must be narrowly drawn to accomplish a compelling governmental interest. By contrast, the non-public forum can be closed to speech on the basis of the subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.

Id. (internal quotations omitted).

106. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

107. *Carey v. Brown*, 447 U.S. 455, 461–62 (1980) (“[T]he justifications offered for any [content-based] distinctions [the regulation] draws must be carefully scrutinized.”); *id.* at 464–65 (opining that “certain state interests may be so compelling” that a narrowly-drawn, content-based restriction might be justifiable).

108. *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry*, 460 U.S. at 45).

109. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 n.7 (1983) (noting the state “is not required to indefinitely retain the open character” of this type of forum, but “as long as it does so it is bound by the same standards as apply in a

public, any regulation is subject to the same limitations of a traditional public forum.¹¹⁰ Therefore, any content-based restriction is subject to strict scrutiny.¹¹¹ However, the state may limit a designated public forum to certain speakers or subject areas as long as it does not discriminate based on viewpoint.¹¹²

Lastly, all remaining government property is considered nonpublic fora.¹¹³ In these areas, the government has the right to act as a private owner and restrict use in order to preserve the property.¹¹⁴ Therefore, rational basis review applies, and the state may enact reasonable regulations of speech in these areas.¹¹⁵ Once property becomes a nonpublic forum, government regulations are constitutional as long as the restrictions are reasonable and viewpoint neutral.¹¹⁶

In short, the characterization of property is determined by three elements: (1) whether the public traditionally has had a right of access for speech purposes; (2) whether speech is compatible or incompatible with the property's function; and (3) whether the place was intended to be open for speech.¹¹⁷ These inquiries determine the court's categorization of a property and thus the standard of review given to the statute at issue.

C. *The Downfall of the Public Forum Doctrine*

“[G]overnment agencies by their very nature are driven to overregulate public forums to the detriment of First Amendment rights.”¹¹⁸

traditional public forum”).

110. *Id.* at 46.

111. *Carey*, 447 U.S. at 461–62; *see supra* notes 107–08 and accompanying text.

112. *Perry*, 460 U.S. at 46 n.7 (“A public forum may be created for a limited purpose such as use by certain groups, . . . or for the discussion of certain subjects.” (internal citations omitted)).

113. *Id.* at 46.

114. *Id.*

115. *Id.*; *see also* *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (“Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.”).

116. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678–79 (noting that limitations on nonpublic property must only survive a more limited review).

117. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 1102 (2d ed. 2002).

118. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 315–16 (1984) (Marshall, J., dissenting) (arguing that a prohibition on camping in certain parks does not violate the First Amendment).

In the decades following the enunciation of the public forum doctrine, the Court continued to recognize the importance of free speech and conservatively applied the doctrine to First Amendment cases.¹¹⁹ The Court expressed its adoption of the public forum analysis in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.* and confirmed that the analysis provides a method of determining whether the government's interest outweighs the interest of the citizens seeking to use the property for other purposes.¹²⁰ Additionally, the Court determined that it would not look at government intent when deciding whether or not a designated public forum exists; rather, the court would scrutinize the "policy and practice" of the government.¹²¹

The Court also reaffirmed the public forum doctrine in *United States v. Kokinda*.¹²² In *Kokinda*, the Court held that a sidewalk providing access from a parking lot to a post office was not a traditional public forum because "[t]he Postal Service ha[d] not expressly dedicated its sidewalks to any expressive activity."¹²³ Therefore, the federal workplace was a nonpublic forum.¹²⁴ This decision "suggests that governments may veto the traditional public forum by creating new places" not deliberately dedicated to speech.¹²⁵

The decisions in *Cornelius* and *Kokinda* indicate a transformation in the understanding of the public forum doctrine.¹²⁶ In these cases, the doctrine is no longer concrete; rather, the Court's analysis turns on the government's intentions.¹²⁷ This resulted in an increase in judicial deference to

119. See Raskin & LeBlanc, *supra* note 13, at 188 (stating that the Court reaffirmed the public forum doctrine "as a safe haven for free expression and a germinator of democratic change").

120. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (noting the extent to which government can control a particular forum is dependent upon its categorization).

121. *Id.* at 802 (stating that the government opens a nontraditional public forum for public discourse intentionally, not through mere accident).

122. See *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990) (recognizing the three-part framework created by the Court in previous decisions).

123. *Id.* at 739–30 (pointing out the regulation is subject to the standard of "reasonableness" associated with nonpublic fora, and the government may not restrict expression based solely on the disagreement over the message).

124. *Id.* at 736–37 (concluding that the regulation in question passed the constitutional test for reasonableness).

125. Massey, *supra* note 17, at 321 (suggesting a present shift to a negative theory of free speech).

126. *Kokinda*, 497 U.S. at 730; *Cornelius*, 473 U.S. at 800.

127. See Massey, *supra* note 17, at 321 (questioning whether *Kokinda* and *Krishna Consciousness* led to the demise of the traditional public forum but asserting that they lessened its significance).

forum administrators as opposed to a system of property taxonomy.¹²⁸ These extensions of the public forum doctrine reflect a pattern of growing regulation of speech.¹²⁹

IV. FUNERAL PICKETING UNDER A TRADITIONAL PUBLIC FORUM ANALYSIS

The extent of First Amendment protections traditionally afforded to a speaker depend upon how a court categorizes the particular property where speech occurs.¹³⁰ The First Amendment rights of funeral protestors are subject to an evaluation of the forum¹³¹ based upon the nature of the location where the protest occurs.¹³² Typically, the Court then looks at the policy and practice of the government with respect to the protest area and determines whether it is intended to be a traditional or nontraditional public forum.¹³³ This Part uses the public forum doctrine to analyze the constitutionality of the recently enacted funeral picketing acts.

A. *Selection of the Appropriate Public Forum*

*“The devil’s in the details.”*¹³⁴

When analyzing the constitutionality of the funeral picketing acts, the Court must determine to which of the three forum areas Phelps seeks access.¹³⁵ Statutes that limit expression inside public

128. *Id.*

129. James J. Knically & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455, 467–68 (2005) (noting that greater expansion of restrictions on free speech comes with the need for legal refinement and the risk of ambiguity).

130. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (describing the different categories of public fora and the types of expression associated with each).

131. *See id.* (providing a three-part framework to evaluate different types of government owned property); *supra* notes 113–22 and accompanying text (describing the evaluation method for a traditional public forum).

132. *Perry*, 460 U.S. at 45 (stating that in a traditional public forum, the government may not prohibit all communication, and content-based regulation will survive judicial scrutiny if the regulation is necessary to serve a compelling state interest and it is narrowly tailored to achieve that end).

133. Massey, *supra* note 17, at 319 (“The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government’s intent.” (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802–03 (1985))).

134. Lee, *supra* note 53 (quoting Marv Johnson of the ACLU, who suggests that constitutionality will hinge upon what type of property the government seeks to regulate).

135. *Cornelius*, 473 U.S. at 797 (noting that, to determine the constitutionality of a state statute, the court must first determine whether the plaintiff seeks access to a traditional public forum, a designated public forum, or a nonpublic forum).

cemeteries create a more difficult constitutional challenge for Phelps because cemeteries are not public fora—they are government property.¹³⁶ Thus, to achieve a higher level of scrutiny, the cemetery would need to be characterized as a designated public forum. Statutes restricting public property outside of cemeteries, however, are held to a higher standard of judicial scrutiny, requiring the government to prove the restrictions serve a compelling state interest.¹³⁷ In this instance, Phelps and other church members seek access to public right-of-way areas that are within 300 feet of a funeral ground.¹³⁸

Regarding picketing on public sidewalks, the Court in *Carey v. Brown* determined that even narrow, residential streets are still regarded as a traditional public forum.¹³⁹ Protestors in *Carey* demonstrated against the Chicago Mayor's failure to support racial integration by picketing on a public sidewalk in front of the Mayor's home.¹⁴⁰ The Court recognized sidewalks as traditionally associated with the right to free speech; the absolute denial of access to them cannot be permitted.¹⁴¹ Under this reasoning, even when a sidewalk is located in a residential area, it does not lose its status as a traditional public forum.¹⁴²

Phelps uses funeral picketing as a platform to spread his message concerning God's promises to people who obey Him.¹⁴³ The Court should consider the platform behind Phelps's picketing and that the location in which he seeks to spread his message is a public sidewalk. Such a conclusion would lead the court down the

136. Lee, *supra* note 53 (noting that, although cemeteries are not public fora, statutes limiting expression on public sidewalks may create problematic First Amendment issues).

137. See *Carey v. Brown*, 447 U.S. 455, 460 (1980) (recognizing that sidewalks are traditional public fora).

138. See *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 978 (E.D. Ky. 2006) (stating *McQueary*, a fellow protestor of Phelps, seeks to protest on a public sidewalk where he feels his message is most adequately conveyed); Lee, *supra* note 53 (reporting that the ACLU feels statutes restricting expression in cemeteries have no First Amendment conflict).

139. *Carey*, 447 U.S. at 460 (surmising that streets "are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely" (citation and internal quotation marks omitted)).

140. *Id.* at 457 (revealing that these protestors were arrested and charged with unlawful residential picketing).

141. *Id.* at 460 (explaining that a statute that seeks to regulate free speech in neighborhoods clearly falls within the realm of First Amendment rights).

142. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (rejecting the argument that sidewalks in residential neighborhoods are not considered a traditional public forum).

143. See *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437, at *1 (W.D. Mo. Jan. 26, 2007) (expressing the view of the church that public platforms, and particularly funerals, are the optimal place to deliver the church's message).

path of a traditional public forum analysis. In addition, the Court should find that because Phelps seeks access to public sidewalks outside of cemeteries, the government may not prohibit expressive activity without adequately justifying a compelling state interest in the restriction.

Determining the constitutionality of government's free-speech regulation turns on whether the regulation is content-based (typically resulting in prohibition) or content-neutral.¹⁴⁴ This determination triggers the applicable level of scrutiny. Content-based regulations must be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."¹⁴⁵ Content-neutral regulations must be reasonable in time, place, and manner.¹⁴⁶

Therefore, if the sidewalk where Phelps's protests take place is classified as a traditional public forum, the government's restriction on his speech must survive one of two tests.¹⁴⁷ If the regulation is content-neutral, it must survive intermediate scrutiny review; but if the regulation is content-based, the restriction is subject to strict scrutiny.¹⁴⁸

B. Content-Based Regulations versus Content-Neutral Regulations

*"Content is a spacious concept that embraces whole subjects of discourse regardless of the 'viewpoint' expressed."*¹⁴⁹

The applicable standard of review for the funeral picketing act hinges on whether the acts are content-based or content-neutral. A regulation is neutral if it serves a purpose outside the content of expression—or in other words, the law seeks to regulate the speech rather than prohibit the message.¹⁵⁰ In contrast, the regulation is content-based if it

144. See Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 804 (2004) (explaining regulations based on the content of speech are subject to a higher level of judicial scrutiny).

145. *Carey*, 447 U.S. at 461–62.

146. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (requiring the satisfaction of a "significant governmental interest" and the maintenance of other means of communicating the information).

147. See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (providing a framework for analyzing the constitutionality of free speech regulations).

148. *Ward*, 491 U.S. at 791; see *infra* Section IV.B (providing context for the applicable standard of review).

149. Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 101 (1996).

150. See *Ward*, 491 U.S. at 791 (citing *Clark v. Cmty for Creative Non-Violence*, 468

was “enacted for the purpose of restraining speech on the basis of content.”¹⁵¹ While content-based restrictions are permitted, the state must satisfy the higher burden of strict scrutiny by showing that the regulation serves a *compelling* government interest and the regulation is narrowly tailored to achieve that end.¹⁵² Content-neutral regulations are not as heavily scrutinized. Content-based restrictions typically target entire categories of speech, prohibiting them altogether; content-neutral regulations seek only to limit the time, place, and manner of public discourse. Therefore, the content-neutral regulations are subject to intermediate scrutiny, in which the Supreme Court has prescribed a three-part inquiry.¹⁵³ First, the government must prove the regulation serves a *significant* public interest.¹⁵⁴ Second, the restriction must be “narrowly tailored” to achieve the stated public interest.¹⁵⁵ Lastly, the restriction must not “burden substantially more speech than is necessary” to serve the government’s interest, leaving open “ample alternative avenues of communication.”¹⁵⁶ This test operates on a case-by-case basis, giving courts more flexibility to determine whether the government has engaged in overregulation of speech that is not sufficiently justified by the government interest.¹⁵⁷

A classic example of content-neutral regulation is articulated by the Court in *United States v. O’Brien*.¹⁵⁸ The Court upheld a conviction of a Vietnam War protestor for burning his draft card.¹⁵⁹ Burning the card was a violation of the 1965 Amendment to the Universal Military Training and Service Act, which banned the intentional destruction of the cards.¹⁶⁰ Justice Warren found that the government’s interest in preventing harm to the functioning of

U.S. 288, 295 (1984)) (noting that, in determining content neutrality, the court must look at whether the government’s adoption of the legislation is because of its disagreement with the message of the protestors).

151. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

152. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citing *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

153. *Ward*, 491 U.S. at 791.

154. *Id.*

155. *Id.*

156. *Id.* at 791, 799.

157. *Id.* at 791.

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

159. *Id.* at 376.

160. *Id.* at 382 (“When O’Brien deliberately rendered unavailable his registration certificate, he willfully frustrated [the] governmental interest.”).

the Selective Service System¹⁶¹ was unrelated to the suppression of free expression; therefore, the Act was constitutional.¹⁶²

The Court explained that government regulation is justified if it is within the powers of the constitution, furthers an “important or substantial” government interest, is unrelated to the restriction (content-neutral), and is no greater than that required to further the government interest.¹⁶³ The Court subsequently used this test to analyze whether content-neutral laws suppressing speech rights violate the First Amendment.¹⁶⁴

In *Ward v. Rock Against Racism*, the Court expanded the considerations of *O’Brien* and determined that the principle inquiry for a content-based statute is whether the government adopted the regulation without any reference to the content of the regulated speech.¹⁶⁵ The Court decided that the government’s purpose behind the enactment of the legislation was the key consideration.¹⁶⁶ If the government adopted a regulation based on its disagreement with the message conveyed, the regulation is content-based.¹⁶⁷ Therefore, under a *Ward* analysis, the Court must first ask whether the regulation is content-neutral.¹⁶⁸ If so, the government need only provide a *significant* government interest; if not, the government must present a *compelling* interest as required under the content-based strict scrutiny test.¹⁶⁹

In *City of Renton v. Playtime Theatres, Inc.*, the city of Renton, Washington, passed a zoning ordinance that prohibited adult motion picture theatres within 1,000 feet of a residential zone, family home, church, park, or school.¹⁷⁰ In its analysis, the Court compared this case to *Young v. American Mini Theaters, Inc.*, which held that a similar zoning ordinance prohibiting adult

161. *Id.* (“The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System.”).

162. *Id.* (finding the law prohibiting the burning of draft cards constitutional).

163. *See id.* at 376–77 (ruling a criminal prohibition against burning a draft card did not violate the First Amendment).

164. *Id.* (finding the Universal Military Training and Service Act constitutional).

165. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that government regulation may have an incidental effect on speech and still remain content-neutral).

166. *Id.*

167. *Id.* (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others”).

168. *Id.*

169. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

170. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986) (holding the ordinance valid as a governmental response to a serious problem created by adult movie theatres).

theatres did not violate the First Amendment.¹⁷¹ The *Renton* Court also noted the district court's observation that, although the ordinance appeared to be neither content-based nor content-neutral, the ordinance was not aimed at the "content" of the films shown at the theaters, but rather at the "secondary" effects of the theater on its surroundings.¹⁷² The Court explained that if the government's "predominate intent" is content-neutral, it is adequate to deem the statute content-neutral.¹⁷³ The Court reasoned that if the city was truly concerned with prohibiting the message conveyed by adult theaters, it would have tried to close the theaters rather than merely restrict their location.¹⁷⁴ Therefore, this regulation was constitutional because it did not conflict with the fundamental principle underlying content-based speech regulations—"government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."¹⁷⁵

In *Boos v. Barry*, the Court found that a statute prohibiting picketing in front of foreign embassies was content-based because the regulation focused on the direct impact of the speech on its audience.¹⁷⁶ The state justified the statute by focusing on the need to protect the dignity of foreign diplomats by shielding them from the speech displayed during pickets.¹⁷⁷ The Court found this regulation to be content-based and concluded that a regulation that prohibits speech based on its primary impact on its audience must be considered content-based.¹⁷⁸

In *Hill v. Colorado*, the Court's content analysis stated the principal inquiry of a ban restricting abortion protestors was whether the government adopted the regulation because of its

171. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 72–73 (1976).

172. *Renton*, 475 U.S. at 47 (accepting the District Court's assertion that the *Renton* ordinance was not aimed at the content of the films, but the theaters' *secondary effects* on the community).

173. *Id.* at 48.

174. *Id.* The Court noted:

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. (quoting *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968)).

175. *Id.* at 48–49 (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

176. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

177. *Id.*

178. *Id.*

disagreement with the protestors' message.¹⁷⁹ The Court determined the ban was not adopted based on any disagreement with the anti-abortion view because the protesting restrictions applied to all demonstrators equally, regardless of their message.¹⁸⁰

In his dissent, Justice Kennedy stated, "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."¹⁸¹ However, the majority disagreed, stating:

[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 the debate is without support. . . . [T]he relevant First Amendment point is that the statute would prevent both speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion.¹⁸²

The *Hill* Court noted the distinction between the facts of its case with those of *Carey v. Brown*.¹⁸³ In *Carey*, the statute banned all picketing except for labor picketing at places of employment; therefore, the statute's restriction was deemed content-based.¹⁸⁴ In *Hill*, however, the statute applied to any type of protest, education, or counseling, whether it was in favor of or against abortion, and the state was therefore justified in enacting minimal restrictions to prevent harassment and to protect the safety of facility patients.¹⁸⁵

To determine whether funeral picketing legislation was enacted to suppress a particular message, the Court must look at whether the regulation was adopted based on a disagreement with Phelps's message.¹⁸⁶ This requires the Court to examine the government's justification of the enactment.¹⁸⁷ The Respect for

179. *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

180. *Id.* (finding that the statute applied to everyone equally, regardless of viewpoint). The Court found the state's interest of protecting access and privacy was unrelated to the content of the demonstrator's speech, but rather the state only restricted the place where some speech could occur. *Id.* at 719–20.

181. *Id.* at 768 (Kennedy, J., dissenting) (arguing that the Colorado statute's application to all demonstrators is merely a "disguise" for a First Amendment violation).

182. *Id.* at 724–25 (majority opinion).

183. *Id.* at 722–23.

184. *Id.*

185. *Id.* at 723–24.

186. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

187. *See supra* notes 149–82 and accompanying text (explaining the case law examining the government's legislative intent).

America's Fallen Heroes Act purports to restrict particular demonstrations at the Arlington National Cemetery and at other cemeteries under the control of the U.S. government.¹⁸⁸ Similarly, the Military Funeral Demonstrations Act seeks to prohibit protesting at funerals of the military.

Clearly, the Respect for America's Fallen Heroes Act and the Military Funeral Demonstrations Act are partially aimed at silencing Phelps and other members of Westboro Baptist Church.¹⁸⁹ The enactment of this legislation is motivated by the desire to prevent these protesters from demonstrating at military funerals because of the message they convey.¹⁹⁰ The government asserts that as part of its duty to promote this interest, there is a coinciding interest in preventing any interference with military funerals.¹⁹¹ In support of funeral picketing legislation, Senator Pat Roberts stated, "We must allow them the right to mourn without being thrust into a political circus."¹⁹²

To the extent these regulations are aimed at prohibiting the message of members of Westboro Baptist Church, the legislation *appears* to be content-based.¹⁹³ However, the government's intentions are ostensibly motivated by the desire to regulate interferences regardless of the message or speaker.¹⁹⁴ Because the funeral picketing acts, like the statute at issue in *Hill*, create a regulation by prohibiting *all* protesting within 300 feet of a military funeral and within specified time periods, they may likely be seen as content-neutral.¹⁹⁵ Thus, as content-neutral restrictions,

188. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (2006).

189. Without the controversy surrounding Phelps's protesting, it is unlikely Congress would have taken any action to place regulations on protesting near funerals. Sexton, *supra* note 45 (presenting the political fire that has motivated many legislators to support the enactment of funeral picketing laws).

190. *Id.* "We will not allow the repugnant acts of a few to define who we are as Americans." Abrams, *supra* note 48 (quoting Veterans' Affairs Committee Chairman Steve Buyer).

191. *Cf.* Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, § 4, 120 Stat. 387, 389 (2006) ("It is the sense of Congress that each State should enact legislation to restrict demonstrations near any military funeral.").

192. Press Release, Senator Pat Roberts Applauds Senate Action on Respect for America's Fallen Heroes Act (May 24, 2006), <http://roberts.senate.gov/05-24a-2006.htm>; *see also* Lee, *supra* note 53 (reporting Congress's intentions behind the enactment of funeral protesting and its desire to bar all protestors from disrupting the burial of soldiers with dignity and peace).

193. While Phelps may choose to argue this angle, I believe arguments under the content-neutral analysis are stronger. This is primarily because, beyond statements by legislators who support these acts, there is no facial evidence in the acts that support the argument that they are content-based.

194. *See* Lee, *supra* note 53.

195. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, sec. 2, § 2413, 120

the remainder of this Part analyzes the statutes under intermediate scrutiny.¹⁹⁶

C. Justification Through A Significant State Interest

*Speech cannot “be prohibited because of a ‘mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.’”*¹⁹⁷

Assuming the acts are found to be content-neutral, the Court must determine whether the government has a significant interest in regulating speech during military funerals.¹⁹⁸ The Court must weigh the right to protest on public property with the government’s right to regulate this speech based on its interest in protecting the dignity of fallen soldiers and the sensibilities of their families through the prohibition of interference with military funerals.

In *Frisby v. Schultz*, the Court determined that the government had a significant interest in protecting residential privacy.¹⁹⁹ However, in *Cohen v. California*, the Court found that, while there is an interest in protecting the right to privacy in the home, citizens are subject to potentially offensive speech when outside the home.²⁰⁰ So, while a state may protect citizens from unwanted communications, it may not protect a citizen from

Stat. 387, 387–88 (2006); Act of Dec. 22, 2006, Pub. L. No. 109-464, sec. 1, § 1388(a), 120 Stat. 3480, 3480 (2006) (to be codified at 18 U.S.C. § 1388) (“[I]t shall be unlawful for any person to engage in an activity during the period beginning 60 minutes before and ending 60 minutes after such funeral, any party of which activity . . . is within 300 feet of the boundary of the location of such funeral.”).

196. See *Carey v. Brown*, 447 U.S. 455, 461–62 (1980); *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

197. *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972) (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969)).

198. See *Carey*, 447 U.S. at 461–62.

199. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). The Court noted its prior decisions recognizing “the unique nature of the home” and that “preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.” *Id.* (quoting *Carey*, 447 U.S. at 471).

200. *Cohen v. California*, 403 U.S. 15, 21 (1971).

While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas . . . we have at the same time consistently stressed that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Id. (citing *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970)).

communications merely because the citizen may find the message offensive.²⁰¹

In *Madsen v. Women's Health Center*, the Court, in determining whether an injunction prohibiting anti-abortion protestors from demonstrating in certain places outside of a facility, noted that performing abortions was constitutional, and a state "has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy."²⁰² The Court also believed the state had a strong interest in protecting the public safety and ensuring order through the promotion of free-flowing traffic on public streets and sidewalks and the protection of property rights of all citizens.²⁰³ The Court concluded that the difference between picketing at homes and medical facilities is that at hospitals, the picketing threatens both the psychological and physical wellbeing of the patient.²⁰⁴ Through its later explanation in *Schenck v. Pro-Choice Network of Western New York*, the Court noted the *Madsen* injunction only recognizes a state's interest in protecting individuals held captive by medical circumstances from communications that affect their wellbeing and does not create a "generalized 'right to be left alone' on a public street or sidewalk."²⁰⁵ The *Schenck* clarification is important because case law remains unclear on whether protecting citizens from unwanted communications outside the home is a significant state interest.²⁰⁶

In *Hill v. Colorado*, the Supreme Court controversially upheld a ban on approaching another person within eight feet to hand out pamphlets, display a sign, protest, educate, or counsel within a one hundred foot radius of an entrance to a health care facility.²⁰⁷ The Court determined that the rights of an unwilling listener

201. *Id.* Similarly, the Court in *Street v. New York* found that under the constitution, expression of ideas may not be banned simply because they are offensive. *Street v. New York*, 394 U.S. 576, 592 (1969).

202. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994).

203. *See id.* at 768 (agreeing with the lower court that the state's interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, in combination with the interest in promoting the free flow of traffic on public streets and sidewalks "is quite sufficient to justify an appropriately tailored injunction to protect them").

204. *Id.*

205. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997).

206. *See Hill v. Colorado*, 530 U.S. 703, 707 (2000) (addressing the potentially legitimate interest of protecting a citizen from unwanted communication outside the home); Raskin & LeBlanc, *supra* note 13, at 202 (noting it is unclear how the right to unwanted speech connects to a traditional free speech analysis).

207. *Hill*, 530 U.S. at 707; *see also* COLO. REV. STAT. § 18-9-122(3) (2000).

outside of a medical facility outweighed the rights of abortion protestors.²⁰⁸ More importantly, it appears the Court recognized the right of the unwilling listener as a valid government interest justifying a restriction on the rights granted by the First Amendment.²⁰⁹ Unfortunately, in recognizing this new government interest, the Court did not provide adequate guidelines or standards for future courts to follow.²¹⁰

The *Hill* Court, however, did discuss at length the right of the unwilling listener to avoid unwanted communication: “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.’”²¹¹ While the *Hill* Court discusses the unwilling listener’s interest in avoiding unwanted communication, it is unclear whether the Court found the statute was justified by this particular interest.²¹² In other words, was the Colorado statute justified by the interest of protecting its citizens from unwanted communications or through the *Madsen* Court’s interest of protecting citizens from the potential psychological and physical affects of the targeted speech? The Court stated that the purpose of the Colorado statute was not to protect a potential listener from hearing a particular message, but rather “to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range.”²¹³

The result of *Hill* makes it unclear whether the “unwilling listener” is an extension of the *Ward* test or merely an

208. *Hill*, 530 U.S. at 714–18 (comparing the competing interests of speakers and unwilling listeners); see also Jennifer L. Maffett, Note, *Balancing Freedom of Speech Against the Rights of Unwilling Listeners: The Attack on the First Amendment in Hill v. Colorado*, 26 U. DAYTON L. REV. 327, 330 (2001) (arguing that the Colorado statute contradicted established First Amendment jurisprudence and that the Court “erred in holding that the right of unwilling listeners outside medical facilities outweighed the protestors’ free speech rights”).

209. Maffett, *supra* note 208, at 330 (“For the first time, the Supreme Court gave greater weight to the rights of unwilling listeners than to the protection of free speech.”).

210. *Id.*

211. *Hill*, 530 U.S. at 716–17 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

212. See Raskin & LeBlanc, *supra* note 13, at 213 (questioning the true intent of the Court’s analysis). The Court noted that it was not recognizing a “right to avoid unpopular speech in a public forum.” *Hill*, 530 U.S. at 718.

213. *Hill*, 530 U.S. at 718 n.25 (noting that this interest is constitutionally distinct from the freedom from unpopular speech).

independent test that will be used by future courts.²¹⁴ If courts choose to accept the interest in being left alone as content-neutral motivation for government speech restrictions, then it symbolizes a significant defeat for the First Amendment.²¹⁵ This development makes it “hard to see how the right to speak freely in public places can coexist with an equally weighty interest in being left alone in public places.”²¹⁶ If this is true, then how can unpopular views survive the idea that the First Amendment was created to protect those viewpoints?

Given that a funeral is a very private event for families to gather and mourn the loss of a loved one, intrusive communications may qualify as psychologically damaging, similar to the medical patients in *Hill*.²¹⁷ It is possible the Court may find that, like medical patients who enter a facility to obtain an abortion, family members who are attending a funeral are similarly held captive. However, the Court should seek to minimize the expansion of First Amendment restrictions by reforming their analysis to one that looks beyond the facial character of the acts and instead looks to the purpose and intent of the legislation.²¹⁸ Following this analysis, the Court would find the rationale behind the enactment of the funeral picketing acts indicate a clear bias of content and viewpoint.

The purpose and function of the funeral picketing legislation is to silence the unpopular viewpoints of a small sect of religious outsiders. The Court should recognize that, although Phelps’s unpopular viewpoints are being propagated at this moment in time, his ideas may eventually subside, and the free speech rights of future generations will be diminished by the Court’s precedent on restraining unpopular ideas.²¹⁹

214. Raskin & LeBlanc, *supra* note 13, at 202 (noting that the Court’s use of the unwilling listener interest is a troubling development in First Amendment law).

215. *Id.* (noting more particularly that “this interest is a little dagger aimed at the very heart of the First Amendment”).

216. *Id.* at 202–03 (asserting that adoption of “an interest in being left alone against unwanted speech in public places is a statement by the Court that if certain political or moral views are unpopular and *the majority of people do not want to hear them*, speech may then be censored or regulated by the government in affected areas”).

217. *See supra* notes 202–06 and accompanying text (explaining the distinction between the right to be left alone and a more defined right to be free from psychological or physical harm).

218. Raskin & LeBlanc, *supra* note 13, at 217 (asserting there is “no existing doctrinal formula” for further analysis).

219. Perhaps Justice Scalia puts it best: “There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents.” *Hill v. Colorado*, 530 U.S. 703, 753 (2000) (Scalia, J., dissenting). Justice Kennedy adds, “It should be a profound

The Court must return to the public forum doctrine.²²⁰ This doctrine demands every viewpoint be treated the same under the First Amendment. If an idea surfaces that is offensive or is politically charged, the government would be required to show a compelling government interest to override the right to free expression.

Regardless of whether the Court chooses to adopt the interest in one's right to be left alone, the content-neutral analysis for whether the funeral picketing acts are unconstitutional does not end with the justification of a significant state interest.²²¹ The government must also show that the restrictions outlined by the legislation are narrowly tailored, leaving "open ample alternative channels for communication of the information."²²²

D. Regulations Must Be Narrowly Tailored and Provide an Effective Alternative Means of Communication

*"The rationale behind these laws is to stop offensive type of expression . . . but that's the very type of expression the First Amendment continues to protect."*²²³

When the government regulates speech in a public forum, it must ensure the restriction is narrowly tailored.²²⁴ In order for the acts to be narrowly tailored, they must not restrict more speech than necessary to further the government's legitimate interests.²²⁵ In addition, the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden of speech does not serve to advance its goals."²²⁶

In *Frisby v. Schultz*, the Supreme Court reviewed the constitutionality of an ordinance prohibiting picketing in front of

disappointment to defenders of the First Amendment that the Court today refuses to apply the same structural analysis when the speech involved is less palatable to it." *Id.* at 767 (Kennedy, J., dissenting).

220. See *supra* Parts III & IV (explaining the history and current status of the public forum doctrine).

221. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (providing a three-step analysis to determine the constitutionality of a government regulation of free speech).

222. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

223. *Hudson*, *supra* note 60 (quoting Robert D. Richards, Director of the Pennsylvania Center for the First Amendment).

224. *Ward*, 491 U.S. at 791.

225. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989).

226. *Ward*, 491 U.S. at 799. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

residences, stating the target of the picketing was held captive in his residence without any means to avoid the unwanted speech.²²⁷ Therefore, the Court concluded the ordinance, which banned all residential picketing, was narrowly tailored.²²⁸ In *Hill v. Colorado*, the Court determined that a floating buffer zone of eight feet was narrowly tailored to serve a significant state interest.²²⁹ The purpose behind the ordinance was to prohibit any person from knowingly approaching another person “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.”²³⁰ The Court determined that the Colorado statute did not foreclose any channel of communication or prohibit any message, but rather “allow[ed] every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow place requirement imbedded within the ‘approach’ restriction.”²³¹

The Respect for America’s Fallen Heroes Act and the Military Funeral Demonstrations Act both provide for a 300-foot buffer zone,²³² which is substantially larger than the eight foot floating buffer zone upheld in *Hill* and the single residence zone upheld in *Frisby*.²³³ This football field-sized buffer zone is also large enough to interfere with other activities unassociated with the funeral protests. In addition, any protests at nearby locations would subsequently be silenced as a secondary effect of these acts.

Finally, although a free-speech zone is available to Phelps and his followers, it does not qualify as an adequate alternative for communication. The Acts restrict all protests an hour before

227. *Frisby*, 487 U.S. at 487 (noting that the protection of the interest of the unwilling listener in other hypothetical situations is still open to question).

228. *Id.* at 488.

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Thus, largely because of its narrow scope, the facial challenge to the ordinance must fail.

Id.

229. *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (noting that both those who oppose and support abortion are banned from protesting, in compliance with the level of neutrality that the Constitution demands).

230. *Id.* at 707.

231. *Id.* at 734.

232. Respect for America’s Fallen Heroes Act, Pub. L. No. 109-228, sec. 2, § 2413(a)(2)(B), 120 Stat. 387, 387 (2006); Act of Dec. 22, 2006, Pub. L. No. 109-464, sec. 1, § 1388(a)(2)(A), 120 Stat. 3480, 3480 (2006) (to be codified at 18 U.S.C. § 1388).

233. *Hill*, 530 U.S. at 715; *Frisby*, 487 U.S. at 487–88.

and an hour after and within 300 feet the funeral,²³⁴ therefore silencing all messages during that period. In *Hill*, the Court noted the eight-foot buffer was constitutional because, while it made the demonstrator's message harder to hear, it did not substantially affect the reader's ability to view signs held by the demonstrators.²³⁵ However, in this instance Phelps's purpose is to communicate with funeral attendees, whether it is through signs, voices, or pamphlets. This opportunity is no longer available. Not even the *Hill* Court would support this restriction.²³⁶

VI. CONCLUSION

Traditionally, picketing has provided citizens with a means to exercise freedom of speech and expression.²³⁷ The *Hill* decision, however, makes it substantially easier for the government to regulate speech based on viewpoint.²³⁸ In its review of the constitutionality of funeral picketing acts, the Court should not adopt the lenient approach used in *Hill*, which possibly accepts the right of the unwilling listener to be left alone, but should return to a more traditional analysis of free speech liberties.

The message of Reverend Phelps and the members of Westboro Baptist Church is certainly not the last offensive message the government will seek to silence. If left unchecked, the reasoning of *Hill* will allow courts to destroy the sanctity behind the marketplace of ideas,²³⁹ eventually silencing all opposition. The Court must use this opportunity to reinstate the founding principles behind free speech and elevate these rights above those of the unwilling listener.

Lauren M. Miller

234. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, sec. 2, § 2413(a)(2), 120 Stat. 387, 387 (2006); Act of Dec. 22, 2006, Pub. L. No. 109-464, sec. 1, § 1388(a)(2)(A), 120 Stat. 3480, 3480 (2006) (to be codified at 18 U.S.C. § 1388).

235. *Hill*, 530 U.S. at 726 (noting the three types of communications regulated by the Colorado statute do not entirely silence demonstrators' messages).

236. *Id.* at 728 (emphasizing that "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention'" (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949))).

237. Amber M. Pang, Comment, *Speech, Conduct, and Regulation of Abortion Protest by Court Injunction: From Masden v. Women's Health Center to Schneck v. Pro-Choice Network*, 34 GONZ. L. REV. 201, 205 (1998-99) (asserting that recent abortion cases have strayed from traditional First Amendment jurisprudence, fueling a continuing debate).

238. Raskin & LeBlanc, *supra* note 13, at 182 (noting that *Hill* becomes a "template for developing passable government speech regulations targeted at the expression of unpopular views in public places").

239. *See supra* note 9 and accompanying text (emphasizing the importance of a circulation of ideas in a democratic society).