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FRENZY-FREE FUNERALS: THE LEAST AMERICA OWES ITS FALLEN HEROES

ROBERT J. GRINDLE*

INTRODUCTION

Imagine, if you can, watching your husband linger in pain for over three months after suffering terrible burns from an explosion during combat operations in Iraq.¹ Imagine your five-month-old daughter being held by her father, just once before he finally slips away.² After carrying your husband to his final rest in a small town, you eulogize him from a pulpit before a packed room of not only friends and family, but also soldiers and supporters.³ You talk about the love you carry for your soul mate and the pride you feel for your husband's service to his country.⁴

Then imagine that, in the face of your pain, you hear a crowd exclaim, "Thank God for dead soldiers!" and you see a sign inscribed with that phrase.⁵

Mrs. Katie Youmans, widow of Army Sergeant Joshua Youmans, experienced exactly that.⁶ Her husband's funeral was protested by the Westboro Baptist Church,⁷ a group whose conduct U.S. Representative Silvestre Reyes described as "so reprehensible that there are hundreds of

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1. See *Mich. Soldier Met Daughter Before He Died*, BOSTON.COM, Mar. 6, 2006, http://www.boston.com/news/nation/articles/2006/03/06/mich_soldier_mets_daughter_before_he_died/; see also Fallen Heroes Memorial, Fallen Heroes of Operation Iraqi Freedom, <http://www.fallenheroesmemorial.com/oif/profiles/youmansjoshuav.html> (last visited Mar. 30, 2009).

2. See *Legislative Hearing on H.R. 23, H.R. 601, H.R. 2188, H.R. 2963, H.R. 4843, H.R. 5037, and H.R. 5038 Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 109th Cong. 5 (2006) [hereinafter *Hearing*] (statement of Rep. Mike Rogers); *Mich. Soldier Met Daughter Before He Died*, *supra* note 1. For an audio recording of the Legislative Hearing, see Audio Recording: House Veterans' Affairs Committee Audio, Committee on Veterans' Affairs (Apr. 6, 2006), available at <http://veterans.house.gov/hearings/schedule109/apr06/4-6-06/4-6-06.wma>.

3. See *Hearing*, *supra* note 2, at 5.

4. See *id.*

5. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (D. Md. 2008).

6. See *Hearing*, *supra* note 2, at 5; *Mich. Soldier Met Daughter Before He Died*, *supra* note 1.

7. See *Hearing*, *supra* note 2, at 5.

thousands of Americans that are outraged.”⁸

With stories such as Mrs. Youmans’ recounted in Committee Hearings, Congress passed the Respect for America’s Fallen Heroes Act (RAFHA), and with President George W. Bush’s signature, it became law in May 2006.⁹ The RAFHA prohibits picketing and protesting near funerals at federal cemeteries.¹⁰

This note explores the constitutionality of the RAFHA. In particular, this note provides an in-depth view of the history and purpose of funerals, both psychologically and sociologically, which courts require to properly assess the RAFHA, but which is lacking in current legal writing.¹¹

The RAFHA should be held constitutional because it meets all relevant requirements for speech regulation, as established by the Supreme Court of the United States: (1) a content-neutral and (2) narrowly tailored statute that achieves (3) a significant state interest, while (4) allowing ample alternative means of idea expression.¹²

Indeed, the RAFHA is content neutral and narrowly tailored to achieve a significant state interest, while leaving open ample alternative means of idea expression.¹³ The RAFHA is content neutral because it proscribes all demonstrations that interfere with the normal activities of funerals, instead of proscribing demonstrations containing only a specific message.¹⁴ The RAFHA is narrowly tailored because it restricts demonstra-

8. *Id.* at 11 (statement of Rep. Silvestre Reyes, Member, H. Comm. on Veterans’ Affairs).

9. *See* Respect for America’s Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (codified at 38 U.S.C. § 2413, 18 U.S.C. § 1387 (2006)). To view a photograph of the signing ceremony, see Congressman Mike Rogers, Representing Michigan’s 8th District, <http://www.mikerogers.house.gov/Gallery.aspx?G=2> (last visited June 6, 2009). Although this note focuses on the activities of the Westboro Baptist Church, the RAFHA applies generally to all protests and protest groups. *See* 38 U.S.C. §§ 2413(a)(2)(A)(ii), (b); *infra* note 223.

10. *See* 38 U.S.C. § 2413.

11. *See generally* Andrea Cornwell, Comment, *A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals*, 56 AM. U. L. REV. 1329 (2007) (discussing the absence of social context); Megan Dunn, Note, *The Right to Rest in Peace: Missouri Prohibits Protesting at Funerals*, 71 MO. L. REV. 1117 (2006) (same); *infra* Part III. *But see* Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 306–09 (2008) (providing a brief overview of the psychological and sociological purposes of funerals and discussing a “right to mourn”). Although courts have recognized cemeteries as “sacred,” *see, e.g.*, *State v. Bradbury*, 9 A.2d 657, 658–59 (Me. 1939), freedom of religion is outside the scope of this note. For a brief discussion of religious issues in this context, *see* Rutledge, *supra*, at 309–10.

12. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (stating that a state may enforce content-neutral regulations which are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”); *infra* Part I; *cf.* *Boos v. Barry*, 485 U.S. 312, 321 (1988) (noting that content-specific regulation requires “the most exacting scrutiny”).

13. *See infra* Part IV.

14. *See* 38 U.S.C. § 2413; *see also infra* Part IV.B.

tions near a federal cemetery for only a short time surrounding funeral services—one hour before until one hour after a funeral.¹⁵ Allowing grieving families a peaceful, solemn and uninterrupted funeral, protecting normal funeral operations, and maintaining societal norms, serve as a significant state interest.¹⁶ By regulating during only a small time period, rather than regulating the content of the speech, the RAFHA leaves open ample alternative means of idea expression, enabling a protest group to continue to express its ideas in other ways, such as via the Internet, or at government buildings, military bases, and even music concerts.¹⁷

Part I of this note details relevant court treatment of congressional regulation of speech.¹⁸ Aside from identifying the relevant Supreme Court test for speech regulation, Part I notes not only that the First Amendment is not an absolute, but also that courts consider context, history, and societal norms in determining the constitutionality of speech regulation.¹⁹

Part II examines court treatment of funerals and death-related issues. For example, Part II discloses that courts have recognized the significance of the emotional well-being of the bereaved and the deep roots of burial rites.²⁰ Part II also reveals that courts have noted that the funeral serves a healing function by creating a safe haven for the bereaved.

Part III explores the history and purpose of funerals, as well as the critical role that the public plays in facilitating healing of sorrow by providing expressions of support and social understanding to the mourner. Aside from facilitating healing, military funerals serve an additional role in society by improving the morale of surviving soldiers.²¹ Finally, Part IV closely examines the RAFHA itself and shows that the RAFHA should be upheld as constitutional because it meets all relevant requirements for

15. See 38 U.S.C. § 2413(a)(2); see also *infra* Part IV.B.

16. See *Grayned v. City of Rockford*, 408 U.S. 104, 112, 120 (1972) (interest in maintaining normal school activities); *Virginia v. Black*, 538 U.S. 343, 360 (2003) (plurality opinion) (interest in maintaining order and morality); *infra* Part IV.

17. See, e.g., *Westboro Baptist Church, Upcoming Picket Schedule*, <http://www.godhatesfags.com/schedule.html> (last visited Feb. 2, 2008) (on file with CHICAGO-KENT LAW REVIEW) (planning protests at the World Pride and Power Conference and a Marilyn Manson concert in February 2008); see *infra* note 226 and accompanying text.

18. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

19. See, e.g., *Black*, 538 U.S. at 352–57 (examining the social and historical contexts of a cross burning statute).

20. See, e.g., *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167–69 (2004) (examining the historical and social contexts of burial rites).

21. See MICHAEL SLEDGE, *SOLDIER DEAD: HOW WE RECOVER, IDENTIFY, BURY, AND HONOR OUR MILITARY FALLEN* 17 (2005); *infra* text accompanying note 168.

speech regulation, as established by the Supreme Court.²²

BACKGROUND

The Westboro Baptist Church (Church), founded by Reverend Fred Phelps and comprised almost entirely of his family members, protests at funerals of soldiers.²³ The full message the Church delivers can be found at its website, but essentially it propounds that a variety of tragedies befalling the United States—including the September 11, 2001, attacks; the killing of soldiers in Iraq and other military incursions; Hurricane Katrina that decimated New Orleans in 2005; and even the 2007 Minneapolis bridge collapse—are retribution from a vengeful God for the United States' tolerance of homosexuality.²⁴

During the protests, members carry signs that read, for example, “God hates fag enablers,” “God hates America,” and “God hates you.”²⁵ They shout these phrases and similar ones, such as “thank God for dead soldiers,” to the mourners during funerals.²⁶ The protesters sing “‘God Hates America’ to the tune of ‘God Bless America.’”²⁷ And, they stand or stomp on the American flag.²⁸ After witnessing the protest by the Westboro Baptist Church during Sergeant Youmans' funeral, U.S. Representative Mike Rogers, from Michigan, stated that “the vile hatred, the taunting, the jeer-

22. See *Perry*, 460 U.S. at 45 (stating that a state may enforce content-neutral regulations which are “narrowly tailored to serve a significant government interest, [leaving] open ample alternative channels of communication.”); cf. *Boos*, 485 U.S. at 321 (content-specific regulation requires “the most exacting scrutiny”); see also *supra* text accompanying notes 14–17.

23. Rebecca Bland, Note, *The Respect for America's Fallen Heroes Act: Conflicting Interests Raise Hell with the First Amendment*, 75 UMKC L. REV. 523, 525 (2006); Kathryn Westcott, *Hate Group Targeted by Lawmakers*, BBC NEWS, May 25, 2006, <http://news.bbc.co.uk/1/hi/world/americas/5015552.stm> (detailing activities of the Church).

24. Eric Black, *Fred Phelps Is Coming*, MINN. MONITOR, Aug. 7, 2007, <http://www.minnesotamonitor.com/showDiary.do?diaryId=2184>; Press Release, Westboro Baptist Church, *God Hates America, and God Is Killing Our Troops in His Wrath* (Jan. 2, 2009), available at http://www.godhatesfags.com/written/fliers/20090102_charles-gaffney-memorial.pdf; Press Release, Westboro Baptist Church, *Thank God for Katrina* (Aug. 31, 2005), available at http://www.westborobaptistchurch.com/written/fliers/archive/20050831_thank-god-for-katrina.pdf. See generally Westboro Baptist Church Home Page, www.godhatesfags.com (last visited Mar. 26, 2009).

25. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (D. Md. 2008); *Jury Awards Father Nearly \$11 Million in Funeral Protesters Case*, FOXNEWS.COM, Nov. 1, 2007, <http://www.foxnews.com/story/0,2933,307058,00.html> [hereinafter *Jury Award*]; see generally Westboro Baptist Church, Photos, <http://www.godhatesfags.com/visual/photos/index.html> (last visited Mar. 26, 2009) (photo gallery).

26. See Complaint at 4, *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008), 2006 WL 2304608, available at <http://f11.findlaw.com/news.findlaw.com/cnn/docs/pi/snyderwbc22307acmp.pdf> (last visited Mar. 26, 2009).

27. *Jury Award*, *supra* note 25.

28. *Decision in Phelps-Roper Case Not Likely til '08*, WIBW.COM, Nov. 5, 2007, <http://www.wibw.com/home/headlines/11013146.html>.

ing, of these families goes beyond the pale of any sense of decency I have ever seen.”²⁹

The group gained national attention by protesting at the funeral of Matthew Shepard, who was beaten to death because he was gay.³⁰ Since then, the group has continued protesting at various events and locations to spread its message,³¹ including military funerals³² and Walter Reed Army Medical Center.³³ Press and public reaction to the group has been highly critical.³⁴ For example, an angry mob of about one-thousand people attacked the demonstrators during a funeral in Seaford, Delaware, after overpowering police who were protecting the group.³⁵ In October 2007, a jury awarded a soldier’s father nearly eleven million dollars after he sued Phelps family members, who protested at his son’s funeral, for invasion of privacy and intentional infliction of emotional distress.³⁶

Legislatures around the country have passed laws prohibiting protests at funerals,³⁷ including the federal Respect for America’s Fallen Heroes Act, which President George W. Bush signed into law in May 2006.³⁸

29. *Hearing*, *supra* note 2, at 5.

30. Westcott, *supra* note 23.

31. *See, e.g., Phelps’ Church Plans Protest at Lane Bryant Victims’ Funerals*, NBCCHICAGO.COM, Feb. 7, 2008, <http://www.nbcchicago.com/news/local/Phelps-Church-Plans-Protest-At-Lane-Bryant-Victims-Funerals.html> (planned protests at murder victims’ funerals); Westcott, *supra* note 23; *Church Plans to Picket Outside Camp Lejeune*, WITNTV.COM, Jan. 17, 2008, <http://www.witntv.com/home/headlines/13862522.html>.

32. *See, e.g., Hearing*, *supra* note 2, at 5; *Indiana Soldier Buried In Shadow of Hate*, NBCCHICAGO.COM, Aug. 5, 2005, <http://www.nbcchicago.com/news/local/Indiana-Soldier-Buried-In-Shadow-Of-Hate.html> (reporting that Indiana soldier, Specialist Adam Harding, “the best America can offer,” was laid to rest amid protest).

33. Gilbert Donovan, *The Patriot Guard vs. Westboro Baptist Church: A Contrasting Religious Twist*, ASSOCIATED CONTENT, May 16, 2007, http://www.associatedcontent.com/article/246935/the_patriot_guard_vs_westboro_baptist.html.

34. *See, e.g.,* Carrie K. Hutchens, *Ministries of Hate: What God Do They Serve?*, DAKOTA VOICE, Nov. 5, 2007, http://69.89.18.38/~dakotavo/200711/R/20071105_CH.html; Blogs of War, Video: Crowd Chases off Westboro Baptist Church Followers, <http://www.blogsofwar.com/2006/12/01/video-crowd-chases-off-westboro-baptist-church-followers/> (last visited Mar. 26, 2009) (“They are pretty much running for their lives and trying to drive away as fast as possible. This crowd would have torn them limb from limb.”).

35. *Clash over Protesters at Military Funerals*, N.Y. TIMES, May 23, 2006, <http://www.nytimes.com/2006/05/23/us/23brfs-brief-006.html>.

36. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 569 (D. Md. 2008) (reducing jury award); *see also Jury Award*, *supra* note 25.

37. State statutes regulating speech at funerals are outside the scope of this note. For a discussion of such state statutes, see Dunn, *supra* note 11, at pts. III.B, IV (examining the Kansas statute, noting that twelve other states have passed or considered similar legislation, and analyzing the Missouri statute); Westcott, *supra* note 23 (noting that, as of May 2006, nine states had passed similar legislation and twenty states had similar legislation pending).

38. *See* Respect for America’s Fallen Heroes Act, Pub. L. No. 109-228, §§ 2(a)(1), 3(a), 120 Stat. 387–88 (codified at 38 U.S.C. § 2413, 18 U.S.C. § 1387 (2006)). To view a photograph of the signing ceremony, see Congressman Mike Rogers, Representing Michigan’s 8th District,

Westboro Baptist Church members and the American Civil Liberties Union (ACLU) have initiated several constitutional challenges to these statutes, claiming they violate the protections guaranteed by the First Amendment by limiting protected speech.³⁹ This note, however, argues that the RAFHA is indeed a valid proscription of speech under the First Amendment, given Supreme Court precedent such as *Grayned v. City of Rockford, Virginia v. Black*, and *National Archives and Records Administration v. Favish*, and given the role of funerals in society.⁴⁰

I. COURT TREATMENT OF FREE SPEECH

The First Amendment prohibits abridgement of free speech.⁴¹ However, as Part I.A reveals, First Amendment protection is not absolute, but depends instead on context. Part I.B details the test applied when Congress regulates speech, namely that Congress may regulate speech when the statute is “narrowly tailored to serve a significant government interest, [leaving] open ample alternative channels of communication,” and if the regulation is content neutral and merely restricts the time, place, or manner of delivering speech.⁴²

A. *The First Amendment Is Not Absolute*

The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press”⁴³ Yet, Congress and state legislatures⁴⁴ have, throughout the history of the United States, enacted such laws, and the Court has, under the proper circumstances, ruled approvingly.⁴⁵

<http://www.mikerogers.house.gov/Gallery.aspx?G=2> (last visited June 6, 2009).

39. See, e.g., *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007), *rev'd*, 509 F.3d 480 (8th Cir. 2007); Susan Jones, *ACLU Sues Kentucky for Restricting Funeral Protests*, THE NATION, May 2, 2006, <http://www.cnsnews.com/Nation/Archive/200605/NAT20060502b.html>; see also *infra* text accompanying note 194. Compare *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 996–97 (E.D. Ky. 2006) (holding that the Kentucky statute is not narrowly tailored because it proscribes behavior that funeral attendees cannot see or hear), with 38 U.S.C. § 2413(a)(2) (stating that the proscribed activity must “disturb[] or tend[] to disturb” funerals or “impede[] the access to or egress from” a federal cemetery).

40. See *infra* Parts III–IV; see generally *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004); *Virginia v. Black*, 538 U.S. 343 (2003); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

41. U.S. CONST. amend. I.

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

43. U.S. CONST. amend. I.

44. The Fourteenth Amendment to the Constitution restricts state legislatures from violating the First Amendment. See, e.g., *Black*, 538 U.S. at 358.

45. See, e.g., *Grayned*, 408 U.S. at 112; *infra* text accompanying note 58.

The Supreme Court of the United States has approved of legislatures' authority to make prohibiting or regulating laws because the First Amendment is not viewed as an absolute.⁴⁶ In a famous example, Justice Oliver Wendell Holmes wrote, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁴⁷ Justice Holmes recognized that the limit of the exercise of one's rights occurs at the intersection between that exercise and the harm caused to others.⁴⁸ The avoidance of limiting one's rights is so ingrained in American society, and the basis of America's laws, that one may easily forget that the purpose of the First Amendment is a restraint upon the government from abridging citizens' rights, but it is that same avoidance of harm to fellow citizens that allows the government to regulate rights—for example, speech.⁴⁹

In other words, what is at stake in a constitutional challenge of the RAFHA is not only limiting speech and privacy interests, but also whether American society tolerates the harm caused by disruptive demonstrations during a funeral—a time of profound sorrow.⁵⁰

46. See FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 3 (1981).

47. *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (stating that enforcement of the First Amendment "in disregard of the rights of others would be harsh and arbitrary in itself").

48. See *Schenck*, 249 U.S. at 52; see also *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (D. Md. 2008)

This Court has held and continues to hold that the First Amendment does not afford absolute protection to individuals committing acts directed at other private individuals. The Supreme Court of the United States has specifically held that First Amendment protection of particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury.

Id. (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–43 (1974)); HAIMAN, *supra* note 46, at 4 ("For example, unrestrained communication by one person may do serious damage to the reputation and economic well-being of another. It may constitute an unacceptable invasion of the privacy of other people.").

49. See HAIMAN, *supra* note 46, at 4.

The difficulty stems from the fact that, though we have a theoretical commitment—stemming from our history, traditions, temperament, and geography—to freedom of expression as a near absolute, reality forces us to recognize many competing rights and interests that tempt us, sometimes with good reason, in the direction of restraints on our systems of interpersonal and public communication.

Id.; see also *Black*, 538 U.S. at 358–59 ("The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.") (internal quotations omitted).

50. See HAIMAN, *supra* note 46, at 4; *supra* text accompanying note 49; see also *infra* notes 137–44 and accompanying text.

B. Requirements of Valid Speech Regulation

In evaluating governmental infringement of free speech, the Supreme Court applies a two-step test.⁵¹ The government must show a sufficient state justification for the regulation of speech, and upon finding such a valid state interest, the Supreme Court essentially balances competing interests—the justification for the speech proscription (that is, the alleged harm) against the actual manner and circumstances of the proscription.⁵² The Court bases its scrutiny level on two variables: first, whether the prohibition is based on the content of the speech, and second, the time, place, and manner of the prohibition.⁵³

When the scrutiny level is highest, the Court refers to the interest as a “compelling state interest,” and when the scrutiny level is lower the Court uses the term “significant government interest”⁵⁴ or legitimate state interest.⁵⁵ For example, bans on content-specific speech in public forums, such as parks and streets, raise the scrutiny level to its most stringent, and require the government to “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”⁵⁶

Content-neutral regulations of the time, place, and manner of expression, however, are permissible when “narrowly tailored to serve a significant government interest, [leaving] open ample alternative channels of communication.”⁵⁷ For example, in *Grayned v. City of Rockford*, the Supreme Court upheld a noise ordinance preventing the imminent or actual interference with “normal school activity.”⁵⁸ The ordinance abridged speech and even picketing near a school, if that speech or demonstration grew so loud that it interfered with normal school operation.⁵⁹ The Court

51. See cases cited *infra* notes 57 and 77 and accompanying text.

52. See JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 21–23 (4th ed. 2008); see also *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (noting that, “as cases arise, the delicate and difficult task falls upon the courts to weigh the *circumstances* and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.”) (emphasis added).

53. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). For a discussion explaining time, place, and manner restrictions, see *Grayned v. City of Rockford*, 408 U.S. 104, 119–21 (1972) (discussing how the same speech delivered at one time, place, or manner may be proscribed in some contexts, but not in others).

54. *Perry*, 460 U.S. at 45.

55. See *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 535–36 (1980).

56. *Perry*, 460 U.S. at 45.

57. *Id.*

58. *Grayned*, 408 U.S. at 112.

59. *Id.* at 120.

held the ordinance did not “unnecessarily interfere with First Amendment rights” and served an “interest in having an undisrupted school session.”⁶⁰ The ordinance was a content-neutral restriction regulating the time, place, and manner of the delivery of speech⁶¹ because it prohibited speech only during class sessions, regardless of its content.⁶²

In addition, the protestors in *Grayned* had other sufficient communicative outlets because they could protest around the school at other times, just not during classes.⁶³ Similarly, in *Kovacs v. Cooper*, the Supreme Court upheld an ordinance that banned any vehicle from the public streets that emitted loud noises when those vehicles were equipped with loud speakers.⁶⁴ The Court noted that reasonable protection from such vehicles outweighed free speech protections.⁶⁵ In reaching its decision, the Court articulated the underpinnings of the First Amendment by stating that the ordinance posed “no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, [or] by pamphlets”⁶⁶ The Court also noted, however, that the “right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.”⁶⁷

In *Perry Education Association v. Perry Local Educators’ Association*, the Court articulated the opportunity to reach listeners as “leav[ing] open ample alternative channels of communication.”⁶⁸ As part of a collective bargaining agreement, the local board of education in *Perry* allowed only one teachers’ union access to the school system’s “interschool mail system and teacher mailboxes.”⁶⁹ A rival teacher’s group challenged the constitutionality of the exclusive access agreement.⁷⁰ The Court decided ample alternatives existed because the agreement prevented only use of the mailboxes and the mail system.⁷¹ The rival group remained free to use “other school facilities to communicate with teachers,” including school bulletin boards, meeting rooms, and even the school’s public address sys-

60. *Id.* at 119.

61. *See id.* at 116.

62. *Id.* at 120–21.

63. *Id.* at 120.

64. *Kovacs v. Cooper*, 336 U.S. 77, 78, 89 (1949).

65. *Id.* at 89.

66. *Id.*

67. *Id.* at 87.

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

69. *Id.* at 38–39.

70. *Id.* at 39.

71. *Id.* at 41.

tem.⁷² Further, the group could “communicate with teachers by word of mouth, telephone, or the United States mail.”⁷³

In contrast to these content-neutral proscriptions, the Court in *Boos v. Barry* invalidated a statute prohibiting certain picketing within five hundred feet of foreign embassies in Washington, D.C., as well as other specified locations.⁷⁴ In particular, the statute allowed display of favorable signs, but prohibited other types of signs, “such as signs critical of a foreign government or its policies.”⁷⁵ In analyzing the statute, the Court reiterated the principle that “content-based restriction[s] on political speech in a public forum . . . must be subjected to the most exacting scrutiny.”⁷⁶ Such scrutiny requires the prohibition to be necessary and narrowly tailored “to serve a compelling state interest.”⁷⁷ Although the government asserted a compelling interest in protecting the dignity of foreign officials, the Court decided that this interest was insufficient to support a content-based prohibition because other, more narrowly tailored means existed to achieve the government’s interest.⁷⁸ Additionally, the Court noted that the “justification focuse[d] only on the content of the speech” and its impact on listeners.⁷⁹

Even content-based speech may be regulated, if the governmental interest is important enough and the means are narrowly tailored.⁸⁰ In *Virginia v. Black*, the Court considered the constitutionality of a statute that prohibited cross burning in public view with intent to intimidate, and also provided that the act of cross burning itself established prima facie evidence of an intent to intimidate.⁸¹ The Court began its analysis of the statute by restating the established principle that content-specific restrictions on speech are permitted under the First Amendment where the benefits of speech with low social value toward the truth are “clearly outweighed by the social interest in order and morality.”⁸²

Preventing intimidation suffices as a social interest in maintaining order and morality that justifies a proscription of speech and conduct.⁸³

72. *Id.*

73. *Id.*

74. *Boos v. Barry*, 485 U.S. 312, 316–18 (1988).

75. *Id.* at 316.

76. *Id.* at 321.

77. *Id.* (internal quotations omitted).

78. *Id.* at 321, 329.

79. *Id.* at 321.

80. See *Virginia v. Black*, 538 U.S. 343, 358–59 (2003).

81. See *id.* at 348.

82. *Id.* at 358–59 (internal quotations omitted).

83. See *id.* at 360. This note does not address another ground for holding the RAFHA a valid proscription under the First Amendment, namely that the Church’s message, delivered at a funeral,

After discussing the history of cross burning in this and other countries, the Court concluded that cross burning is often a symbol of hate and intimidation.⁸⁴ The Court noted that “burning a cross is a particularly virulent form of intimidation” that justifies the proscription.⁸⁵

In allowing Virginia to regulate cross burning, which carries the message of intimidation, the Court concluded that, because the reason for the intimidation was irrelevant under the statute, the statute was sufficiently content-neutral.⁸⁶ Specifically, the statute prohibited cross burning regardless of whether the defendant was motivated by race, gender, sexual orientation, or religion.⁸⁷ Although the Court allowed the regulation of cross burning under the First Amendment, it invalidated the portion of the statute that established *prima facie* evidence of intent to intimidate because it is possible that one could engage in cross burning for purposes other than intimidation.⁸⁸

By contrast, in *Reno v. ACLU*, the Supreme Court invalidated a statute imposing a blanket prohibition on the carrying of material characterized as “indecent,” “obscene,” or “patently offensive,” over the Internet.⁸⁹ The Court concluded that the statute’s regulation of speech was content-based and was impermissibly overbroad and vague to withstand First Amendment scrutiny.⁹⁰ The Court acknowledged a “compelling interest in protecting the physical and psychological well-being” of children from exposure to indecent materials.⁹¹ Nevertheless, the Court reasoned that a blanket regulation on “indecent” and “patently offensive” material via the Internet was overbroad because it prohibited too much constitutionally protected speech that could be stated and heard by adults, where other, less restrictive means existed to accomplish the valid state interest.⁹² Moreover, the statute could not be said to be a mere “time, place, and manner” restriction on the deliv-

constitute “fighting words.” See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (unanimous opinion) (“The test [for fighting words] is what men of common intelligence would understand would be words likely to cause an average addressee to fight.”). The test for fighting words is satisfied in RAFHA cases because fights between protestors and funeral attendees have occurred. See *supra* text accompanying note 35. If considered fighting words, protestors’ speech would not be the type of speech that the First Amendment protects. See *Chaplinsky*, 315 U.S. at 572.

84. *Black*, 538 U.S. at 357.

85. *Id.* at 363.

86. *See id.* at 362.

87. *Id.*

88. *Id.* at 367.

89. *Reno v. ACLU*, 521 U.S. 844, 859–60 (1997).

90. *Id.* at 874.

91. *Id.* at 869 (internal quotations omitted).

92. *Id.* at 874.

ery of pornography because it was content-specific.⁹³

II. COURT TREATMENT OF DEATH AND FUNERALS

Aside from cases involving the Westboro Baptist Church, including a jury finding against Fred Phelps in *Snyder v. Phelps*,⁹⁴ few courts have dealt directly with freedom from undue interference during a funeral.⁹⁵ Although not in a First Amendment context, courts have recognized not only a public sentiment favoring proper burials, but also a right to privacy that in some circumstances prevents undue intrusion into survivors' grief in order to protect their emotional well-being.⁹⁶ This Part details relevant cases concerning death and funerary customs.

As recently as 2004, in *National Archives and Records Administration v. Favish*, the Supreme Court acknowledged the deep roots of burial rites in humankind's history.⁹⁷ In *National Archives*, an investigator sought release of photographs from the scene of a suicide under the Freedom of Information Act because he believed the government's investigation into the death was flawed.⁹⁸ In reaching the decision not to compel the pictures' release, the Court recognized that the decedent's family had a personal privacy interest in the photographs "for their own peace of mind and tranquility."⁹⁹ This privacy interest outweighed the public's interest in reviewing the photographs to assess the validity of the government's investigation.¹⁰⁰

The Court noted that funerals "are a sign of the respect a society shows for the deceased and for the surviving family members."¹⁰¹ The Court added that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."¹⁰² Finally, the Court acknowledged that the common law has long recognized the "well-established cultural tradition acknowledging a family's control

93. *See id.* at 879–80.

94. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 569 (D. Md. 2008) (reducing jury award); *see also Phelps-Roper v. Nixon*, 509 F.3d 480, 483 (8th Cir. 2007).

95. *See Bland*, *supra* note 23, at 533.

96. *See, e.g., Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2004).

97. *Id.* at 167–68.

98. *Id.* at 161–62.

99. *Id.* at 166.

100. *Id.* at 171–75.

101. *Id.* at 167–68.

102. *Id.* at 168.

over the body and death images of the deceased.”¹⁰³

In reaching its decision in *National Archives*, the Court cited *Schuyler v. Curtis* favorably.¹⁰⁴ In *Schuyler*, the Court of Appeals of New York recognized a right of privacy that prevents another from “improperly interfering with the character or memory of a deceased relative.”¹⁰⁵ *Schuyler* involved the use of a decedent’s likeness to construct a statue honoring the decedent.¹⁰⁶ The consent of the decedent’s family was not obtained first, however.¹⁰⁷ The Court held that no impermissible interference with the character or memory of the deceased arose in the particular facts presented because the statue was to be used as a tribute; thus, no mental distress existed.¹⁰⁸ Nevertheless, the Court noted that the living retain a right of privacy to protect their reasonable feelings.¹⁰⁹

Other states have recognized similar rights of privacy.¹¹⁰ For example, in another case cited approvingly by the *National Archives* Court,¹¹¹ the Supreme Court of Washington in *Reid v. Pierce County* consolidated cases involving the display of autopsy photographs at various places, including cocktail parties, by members of a medical examiner’s office.¹¹² In deciding that the plaintiffs could proceed to trial under an invasion of privacy theory, the Court held that the “immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent.”¹¹³ The Court further noted that the “protectable privacy interest is grounded in maintaining the dignity of the deceased.”¹¹⁴

Similarly, in 1939, the Supreme Judicial Court of Maine determined in *State v. Bradbury*, that the defendant may have committed an offense when he indecently disposed of his sister’s dead body by burning it in his basement furnace.¹¹⁵ The Court acknowledged not only that an improper burial would emotionally torture the living, but also that it would outrage “the feelings and natural sentiments of the public.”¹¹⁶ The Court also recited the

103. *Id.*

104. *Id.* at 168–69 (citing *Schuyler v. Curtis*, 42 N.E. 22, 25 (N.Y. 1895)).

105. *Schuyler*, 42 N.E. at 25.

106. *Id.* at 24.

107. *Id.*

108. *See id.* at 26.

109. *Id.*

110. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) (collecting cases).

111. *Id.* at 168–69.

112. *Reid v. Pierce County*, 961 P.2d 333, 335 (Wash. 1998).

113. *Id.* at 342.

114. *Id.*

115. *State v. Bradbury*, 9 A.2d 657, 657–59 (Me. 1939).

116. *Id.* at 659.

commonplace societal belief that burial places are sacred sites to which reverential respect is owed.¹¹⁷ Additionally, the Court recognized that the survivors' interests and feelings create a duty to provide a proper and decent burial.¹¹⁸

III. THE HISTORY AND PURPOSE OF FUNERALS

Private and public funerals have a long history of facilitating healing, and they require positive public involvement to achieve their healing function.¹¹⁹ Some commentators analyze the right to grieve without interference from noisy demonstrations by analogizing funerals to abortion protests or to a right to be let alone.¹²⁰ These analogies further strengthen the notion that the Supreme Court is willing not only to recognize significant state interests in preventing interference with normal event operations, but also to take account of societal norms and history.¹²¹

This Part examines the history and societal norms surrounding funerals, from both a psychological and sociological perspective. Part III.A details funeral development, emotions coincident to death and funerals, and society's role in funerals. Part III.B describes the role that state and military funerals play in society.

A. Only Disruption-Free Funerals Assist the Mourner

After the death of a friend or loved one, the first step along the road of healing is the funeral.¹²² A funeral service provides a social support system that creates a caring and supportive environment—a “safe haven”—for the bereaved to express feelings.¹²³ This “safe haven” enables healing and integration of “the bereaved back into the community.”¹²⁴ In this way, the

117. *Id.* at 658 (internal quotations omitted).

118. *See id.*

119. *See infra* notes 145–64 and 172 and accompanying text.

120. *See, e.g.,* Anna Zwierz Messar, Student Piece, *Balancing Freedom of Speech with the Right to Privacy: How to Legally Cope with the Funeral Protest Problem*, 28 PACE L. REV. 101, 121 (2007) (“Experts say that if laws banning funeral protests are further challenged, courts will likely look to rulings on laws governing abortion protests.”); Lauren M. Miller, Comment, *A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 Hous. L. Rev. 1097, 1126–27 (2007) (discussing the right to be let alone).

121. *See, e.g., supra* notes 47–49, 58, 82–83, 102 and accompanying text.

122. *See generally* National Funeral Directors Association, *Why a Funeral?*, <http://www2.nfda.org/page.php?pld=159&PHPSESSID=be450031395436441951629d8eff3698> (last visited Mar. 31, 2009); *see infra* note 147 and accompanying text.

123. *See* National Funeral Directors Association, *supra* note 122; *infra* note 145 and accompanying text.

124. *See* National Funeral Directors Association, *supra* note 122; *infra* note 159 and accompanying

public plays a critical role in a mourner's healing.¹²⁵ Although American funerals have changed over time,¹²⁶ they remain important not only to the bereaved, but also to our culture—both symbolically and emotionally.¹²⁷ They represent society's culture and values.¹²⁸

Burial of humans began between 100,000 and 40,000 years ago, perhaps to protect the body.¹²⁹ More importantly, however, cemeteries—even those not located on church grounds—have long been considered sacred.¹³⁰ In her book, *The Corpse: A History*, Christine Quigley notes that even “hunter-gatherers returned to the [burial] site to honor” their dead.¹³¹ Anthropological theories suggest that rituals surrounding death “developed almost compulsively from random behavior because of the necessity to control the fearful forces surrounding death.”¹³² Today, control is recognized as a healing aspect of the funeral.¹³³ Control takes many forms, including embalming and making the deceased seem asleep.¹³⁴ The funeral ritual “itself is a form of controlling death.”¹³⁵ In the 1980s, roughly “75 percent of funerals in the United States included . . . [a] graveside service,”¹³⁶ revealing cemetery interment's critical role in healing and control.

Fear surrounding death, though, is but one emotion a mourner may feel in “the uncontrollable potency of deep emotion” accompanying a death, according to Paul E. Irion in his comprehensive funeral study, *The Funeral: Vestige or Value?*¹³⁷ Others include abandonment, resentment, helplessness, disillusionment, and even “hostility toward the deceased, recalling the strained circumstances of relationship in the past.”¹³⁸ A bereaved feels “profound emotions”¹³⁹ in an “intensely personal” way.¹⁴⁰ Hence, Irion notes that a mourner may feel “terribly alone in his sor-

text.

125. See *infra* notes 145–64 and accompanying text.

126. See PAUL E. IRION, *THE FUNERAL: VESTIGE OR VALUE?* 98–99 (1966).

127. CHRISTINE QUIGLEY, *THE CORPSE: A HISTORY* 73 (1996); see *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167–68 (2004).

128. IRION, *supra* note 126, at 20; see *Nat'l Archives*, 541 U.S. at 167–68.

129. QUIGLEY, *supra* note 127, at 84; see *Nat'l Archives*, 541 U.S. at 167–68.

130. QUIGLEY, *supra* note 127, at 88; see *State v. Bradbury*, 9 A.2d 657, 658 (Me. 1939).

131. QUIGLEY, *supra* note 127, at 88.

132. IRION, *supra* note 126, at 91.

133. See *id.* at 51; see also *Nat'l Archives*, 541 U.S. at 168.

134. IRION, *supra* note 126, at 51–52.

135. *Id.* at 54.

136. QUIGLEY, *supra* note 127, at 72.

137. IRION, *supra* note 126, at 46.

138. *Id.* at 101–02.

139. *Id.* at 45.

140. *Id.* at 98.

row.”¹⁴¹

To deal with these emotions, the funeral serves a coping function¹⁴² and may form a lasting memory surrounding the death of a loved one.¹⁴³ “The funeral,” according to Irion, “is helpful psychologically insofar as it enables mourners to confront realistically the crisis in which they exist.”¹⁴⁴ It provides an environment in which the mourner may freely express his feelings.¹⁴⁵ Further, it allows an opportunity for the survivor to “restructure[] his relationship with the deceased.”¹⁴⁶

Funeral services, however, represent only the beginning of the therapeutic healing process because mourners must fully deal with their painful feelings to resolve the loss.¹⁴⁷ Over time, our society has shortened the mourning period from as long as a year to a matter of days.¹⁴⁸ People resume work and normal routines almost immediately after a funeral.¹⁴⁹ Because the funeral plays such an integral role in the healing process, “the brief period allotted [must] be utilized with maximum effectiveness.”¹⁵⁰

Irion identifies various social and psychological norms critical to a funeral successfully serving its healing function.¹⁵¹ Funerary customs provide an outlet for needed public expression of feelings.¹⁵² The public nature of a funeral renders it an extremely important part of the healing process.¹⁵³ The funeral provides a stable pattern of behavior from which the bereaved receives guidance and support.¹⁵⁴

Moreover, the public and community play an integral role in assisting the mourner’s healing. Irion notes that they represent society’s attempt to provide “symbols which can express the feelings of the mourners.”¹⁵⁵ The funeral is the mechanism by which the community conveys its support to the mourner by expressing a shared loss or “social understanding of the

141. *Id.*

142. *Id.* at 101.

143. *See, e.g.,* QUIGLEY, *supra* note 127, at 82 (“Children were once selected as pall-bearers so that the event would leave them with an everlasting impression of human mortality.”).

144. IRION, *supra* note 126, at 101.

145. *Id.* at 104.

146. *Id.* at 97.

147. *See id.* at 99–102.

148. *Id.* at 98–99.

149. *Id.* at 98.

150. *Id.* at 98–99.

151. *Id.* at 115–18.

152. *Id.* at 95; *see also* Hearing, *supra* note 2, at 8 (statement of Rep. Steve Chabot).

153. IRION, *supra* note 126, at 104.

154. *Id.* at 91; *see also* Hearing, *supra* note 2, at 8 (statement of Rep. Steve Chabot).

155. IRION, *supra* note 126, at 95.

relationship of the living to those who have died.”¹⁵⁶ A funeral is “the response of the community . . . to the emotional experiences of the mourner,”¹⁵⁷ and, according to Irion, it represents “public acceptance of the right of the mourner to express his authentic conscious feelings.”¹⁵⁸

Further, funerals strengthen relationships between the bereaved and the living.¹⁵⁹ A survivor draws strength and support from group participation, which indicates group solidarity.¹⁶⁰ Importantly, Irion cautions that the environment surrounding the relational rebirth should not violate “the integrity of [the] previous relationship with the deceased.”¹⁶¹

Hence, the long history of burials and funeral rites reveal that funerals serve as a “safe haven” that promotes healing during a highly personal and intensely painful time. Effective healing requires not only the bereaved to maintain as much control over the funeral as possible, but also positive public involvement. Society’s sympathetic expressions to the bereaved enable mourners to vent feelings, which is critical to the healing process by allowing a mourner to move forward with life and beyond the loss.

B. State and Military Funerals Demonstrate Honor, Respect, and Duty

When a political leader or soldier dies, allowing mourners to move beyond the loss requires expression of important symbols. This Part explores those symbols and their purpose.

Firing cannons and guns, flying flags at half staff, and gathering large crowds of mourners are important symbols and critical portions of carefully planned state funerals. In its quest to move survivors beyond a loss, such a funeral provides a nation—or even the world—an opportunity to honor a military or political leader.¹⁶² For example, via television or in person, millions of people watched President John F. Kennedy’s funeral, which included a twenty-one gun salute and a fifty jet airplane fly-over.¹⁶³

President Kennedy is not alone in receiving grand honors upon his death.¹⁶⁴ A profoundly silent, yet enormous crowd watched the procession

156. *Id.* at 117; *see also* *Hearing, supra* note 2, at 8 (statement of Rep. Steve Chabot).

157. IRION, *supra* note 126, at 104; *see also* *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167–68 (2004); *Hearing, supra* note 2, at 8 (statement of Rep. Steve Chabot).

158. IRION, *supra* note 126, at 104.

159. *Id.* at 117.

160. *Id.* at 99.

161. *Id.* at 118; *see also* *Nat’l Archives*, 541 U.S. at 168.

162. QUIGLEY, *supra* note 127, at 73.

163. *Id.* at 76.

164. *Id.* at 73–77 (collecting examples).

carrying the slain President Abraham Lincoln to the Capitol building.¹⁶⁵ A long train journey through the country then followed, comprising the country's "first great state funeral."¹⁶⁶ The President's casket was opened at station stops, enabling an estimated one million people to view the President's body amid draped buildings.¹⁶⁷

Soldiers, no less than civil and military leaders, have long held a special status in American funerals,¹⁶⁸ dating back at least to the Civil War and the massive collection of soldiers' bodies from battlefields to provide for placement in permanent military cemeteries.¹⁶⁹ Proper soldier burial coincides with our national belief system and gives meaning to the soldier's sacrifice.¹⁷⁰ Michael Sledge, in his book *Soldier Dead: How We Recover, Identify, Bury, and Honor Our Military Fallen*, instructs that their sacrifice imposes a general duty to "give them a secure resting place . . . [to] preserve their place in history and assure our future."¹⁷¹ Moreover, a proper burial with customary rites improves the morale of surviving soldiers and prevents haunting images from mentally tormenting surviving soldiers and family.¹⁷²

IV. THE RESPECT FOR AMERICA'S FALLEN HEROES ACT IS CONSTITUTIONAL

As described above in Part I, the government must show a justification, or significant interest, for a speech proscription.¹⁷³ Once it demonstrates a valid interest, the scrutiny level depends upon whether the statute prohibits speech in a content-specific or content-neutral manner.¹⁷⁴ The level of scrutiny, in turn, determines the required narrowness of the statute along with whether other available communication avenues must exist.¹⁷⁵

165. *Id.* at 75.

166. MUSEUM OF FUNERAL CUSTOMS, THE EMBALMING OF PRESIDENT LINCOLN (n.d.), available at <http://www.funeralmuseum.org/pdf/embalmlincoln.pdf> (last visited Nov. 3, 2007) (on file with Chicago-Kent Law Review).

167. *See id.*

168. *See generally* SLEDGE, *supra* note 21.

169. *See id.* at 298.

170. *Id.* at 297; *see also* *Hearing, supra* note 2, at 8 (statement of Rep. Steve Chabot).

171. SLEDGE, *supra* note 21, at 297.

172. *See id.* at 17; *see also, e.g.,* *Hearing, supra* note 2, at 6 (email to Rep. Mike Rogers from Sergeant Ashley A. Voss, Baghdad, Iraq ("The thought of their families having to face protesters after their memorials insights a rage I have never known before. These 'protesters' mock all that we have accomplished here.")).

173. *See* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see supra* Part I.B.

174. *See supra* notes 68–76 and accompanying text.

175. *See supra* notes 68–76 and accompanying text.

The RAFHA proscribes disruptive demonstrations near federal cemeteries during a limited time period of one hour before through one hour after a funeral.¹⁷⁶ The RAFHA does not discriminate among demonstration types; it bans all disruptive demonstrations, regardless of their content.¹⁷⁷ The RAFHA protects citizens from additional emotional harm and allows a funeral to serve its healing function.¹⁷⁸ Further, because the content of the demonstrations is not regulated, the RAFHA leaves open ample alternative outlets for expression of ideas.¹⁷⁹

A. *The RAFHA*

U.S. Representative Steve Chabot, from Ohio, expressed the motivation of the bill's supporters during committee hearings when he said, "the families and friends of our nation's fallen heroes [should] be given a few hours of peace within which to honor their loved ones' ultimate sacrifice."¹⁸⁰ He continued, "[t]hat is the least we can do for those who have fought and given their life to uphold the Constitution."¹⁸¹

U.S. Representative Mike Rogers, of Michigan, embraced the notion that funerals represent society's sympathetic expressions to mourners' intense pain, when he characterized the RAFHA as "America's chance to put our arms around these families and tell them we love them, we appreciate it, we certainly appreciate their sacrifice. And we will allow you the dignity and peace to lay to rest your loved one"¹⁸²

Furthering these motivations, Congress passed the RAFHA,¹⁸³ which

176. See 38 U.S.C. § 2413 (2006).

177. See 38 U.S.C. § 2413(b).

178. See *infra* notes 180–88 and accompanying text.

179. See *infra* Part IV.D.

180. *Hearing, supra* note 2, at 8 (statement of Rep. Steve Chabot).

181. *Id.* The full text of this portion of Representative Chabot's testimony states:

In conclusion, let me say that all supporters of H.R. 5037 are asking is that the families and friends of our nation's fallen heroes be given a few hours of peace within which to honor their loved ones' ultimate sacrifice. A few hours to pay respect to a selfless life devoted to protecting others. That is not unconstitutional. That is not even an imposition. That is the least we can do for those who have fought and given their life to uphold the Constitution.

I urge all my colleagues to join me in supporting this bill, which will give the families of those who have died the comfort of knowing that they will be able to pray in peace and thank the fallen on and near the sacred ground where they will rest forever so that we can live free today.

Id.

182. *Id.* at 4–5 (statement of Rep. Mike Rogers).

183. The prohibition sections of the RAFHA state:

(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

proscribes demonstrations “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’s director or superintendent.¹⁸⁴ The RAFHA prohibits demonstrations near a cemetery from one hour before until one hour after a funeral or memorial service.¹⁸⁵ Specifically, a demonstration may not occur within 300 feet of a cemetery if it “impedes the access to or egress from such cemetery.”¹⁸⁶ Further, a demonstration may not “take[] place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery property.”¹⁸⁷

A demonstration is defined as including the willful “making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral,” such as picketing, an oration “that is not part of a funeral,” displaying signs and placards “unless such a display is part of a funeral,” or distributing any “written or printed matter other than a program distributed as part of a funeral.”¹⁸⁸

demonstration has been approved by the cemetery superintendent or the director 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.

(b) Demonstration.—For purposes of this section, the term “demonstration” includes the following:

(1) Any picketing or similar conduct.

(2) Any oration, speech, use of sound amplification equipment or device, or similar conduct that is not part of a funeral, memorial service, or ceremony.

(3) The display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony.

(4) The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.

38 U.S.C. § 2413.

184. *Id.* § 2413(a)(1). Prior restraint issues are outside the scope of this note because it is unlikely that the RAFHA presents any such issues. *See* 16B C.J.S. *Constitutional Law* § 543 (1985) (“Prior restraints which control protected speech must ordinarily be neutral with respect to its content, but may limit speech with respect to its time, place, or manner.”) (footnotes omitted). *But see* Cornwell, *supra* note 11, at 1371–74 (arguing that in passing the RAFHA, Congress relied on *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), but that *Griffin* was erroneously decided, rendering the RAFHA an unconstitutional prior restraint).

185. 38 U.S.C. § 2413(a)(2).

186. *Id.* § 2413(a)(2)(B).

187. *Id.* § 2413(a)(2)(A)(i).

188. *Id.* §§ 2413(a)(2)(A)(ii), (b).

B. *The RAFHA Is Narrowly Tailored*

Some argue that the RAFHA is a content-based prohibition on speech.¹⁸⁹ Such arguments contend that the statute draws a distinction between two categories of speech: speech that is part of a funeral service and speech that is not part of a funeral service.¹⁹⁰ Attempting to categorize the statute as content-specific based on that distinction overlooks not only the purpose of the statute, but also the Supreme Court's willingness to take into account the circumstances of the regulation.¹⁹¹ In *Grayned*, the statute did not prohibit all speech near a school during school hours; it prohibited only the speech that interfered with normal school activities.¹⁹² The RAFHA repeatedly and specifically differentiates between acts and materials that are part of a funeral, and acts and materials that are not part of a funeral.¹⁹³ The distinction here is similar to the statute in *Grayned* because the proscribed speech is only the speech that interferes with normal funeral activities, such as speech that is not part of a funeral ceremony. Indeed, the statute specifically states that the proscribed behavior is only that which “disturbs or tends to disturb the peace or good order of the funeral.”¹⁹⁴

Like *Grayned*, the statute here is merely a “time, place, and manner” restriction.¹⁹⁵ In *Grayned*, picketers were free to demonstrate loudly at any time except during the critical period of school hours.¹⁹⁶ The restriction here likewise regulates a critical and narrow timeframe of only one hour before through one hour after a funeral.¹⁹⁷ Any group wishing to protest or demonstrate near a cemetery may indeed do so, just not during the statutorily-defined narrow timeframe.¹⁹⁸ Moreover, the statute here is simply not as restrictive as the statute tested in *Reno*.¹⁹⁹ Unlike the statute in *Reno*, which completely regulated internet material at all times, the statute here only regulates speech during a specific, narrow period of time.²⁰⁰

189. See, e.g., Cornwell, *supra* note 11, at 1351–55.

190. See, e.g., *id.* at 1352.

191. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (analyzing federal regulations requiring the denial of a protest permit to protect parks from harm); see also discussion *supra* Part III and text accompanying notes 47–50, 58, 180–88.

192. See *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972); see also discussion *supra* notes 58–63.

193. See 38 U.S.C. § 2413(b)(2)–(4).

194. *Id.* § 2413(a)(2)(A)(ii) (emphasis added).

195. See *infra* text accompanying notes 196–201.

196. *Grayned*, 408 U.S. at 120.

197. See 38 U.S.C. § 2413(a)(2).

198. See *id.*; see also discussion *infra* Part IV.D.

199. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

200. Compare discussion *supra* notes 89–93 (prohibition at all times) with 38 U.S.C. § 2413(a)(2)

Further, an argument suggesting that the RAFHA is content-specific overlooks the distinction made in *Boos*.²⁰¹ The concern in *Boos* stemmed from the fact that the statute allowed some specific content, but prohibited other specific content, namely a message critical of foreign officials or countries.²⁰² Here, the statutory provisions do not proscribe speech based on the content of the message, but instead seek to cure the disruptive effect of all demonstrations that interfere with funeral services.²⁰³

C. *The RAFHA Serves a Significant Governmental Interest*

Not only would loud demonstrations interfere with a funeral's "safe haven," relationship restructuring, and free expression of "profound emotions," but they would also decrease the effectiveness of the funeral—the brief period that Irion notes as essential to healing.²⁰⁴ As Irion pointed out, positive public involvement facilitates healing.²⁰⁵ It provides symbols expressing the mourner's feelings and serves as a source of strength and support for the mourner.²⁰⁶ In sharp contrast to the profoundly silent crowd observing President Lincoln's funeral, the Westboro Baptist Church shouts phrases such as "Thank God for dead soldiers!" at military funerals.²⁰⁷ Such demonstrations would undermine the purposes that Irion noted.

In *National Archives*, the Court acknowledged the importance of control surrounding death.²⁰⁸ A frenzy-free funeral simply extends the area of control to the funeral, which itself is a form of control.²⁰⁹ The Court also recognized the significance of family members' "peace of mind and tranquility" when recognizing a personal privacy interest in death-scene photographs.²¹⁰ The Court acknowledged the dual role of funerals as "a sign of the respect a society shows for the deceased and for the surviving family members."²¹¹ The RAFHA allows society to show its respect by eliminating disruptions that interfere with mourners' peace of mind and healing, and by preventing undue intrusion into mourners' grief to protect their

(prohibition only one hour before through one hour after a funeral).

201. See discussion *supra* notes 74–79.

202. *Boos v. Barry*, 485 U.S. 312, 318–19 (1988).

203. See 38 U.S.C. § 2413(a)(2); see also discussion *supra* notes 180–82.

204. See IRION, *supra* note 126, at 99–102; see also discussion *supra* Part III.A.

205. See discussion *supra* notes 151–61.

206. See discussion *supra* notes 154–61.

207. See discussion *supra* notes 25–29, 165–69.

208. See *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004).

209. See discussion *supra* notes 132–139.

210. *Nat'l Archives*, 541 U.S. at 166.

211. *Id.* at 168.

emotional well-being.²¹² Additionally, it preserves the reverential respect of burial places that the *Bradbury* court noted has long existed.²¹³

Moreover, as author Michael Sledge reveals, a proper burial improves morale of surviving soldiers.²¹⁴ The legislative history of the RAFHA demonstrates that soldiers' morale was within Congress' contemplation.²¹⁵

Because the RAFHA is a content-neutral time, place, and manner restriction, the most exacting strict scrutiny will not apply to the RAFHA.²¹⁶ Even if the Court imposed strict scrutiny, though, the RAFHA would survive such scrutiny. The government has a compelling interest in protecting the mental health of grieving families and protecting not only the sanctity of funerals, but also the morale of soldiers serving in the military.²¹⁷

In addition, the Court in *Black* allowed a content-based proscription of cross burning because it prevented intimidation.²¹⁸ Maintaining order and morality were sufficient government interests in *Black*.²¹⁹ Here, the RAFHA serves a similar purpose. The RAFHA specifically proscribes demonstrations that "disturb the peace or good order of [a] funeral,"²²⁰ and reinforces society's morality surrounding proper funerals.²²¹

D. *The RAFHA Allows Alternative Avenues of Expression*

The *Perry* Court required "ample alternative channels of communication" for time, place, and manner restrictions.²²² Besides obvious outlets, such as simply protesting at different places, many other outlets exist for protest groups, such as the Westboro Baptist Church, to deliver its mes-

212. See discussion *supra* notes 99–105 and Part IV.A.

213. See *State v. Bradbury*, 9 A.2d 657, 658 (Me. 1939); see also discussion *supra* note 117.

214. See SLEDGE, *supra* note 168, at 17; see also *supra* notes 170–75 and accompanying text. Improving morale of soldiers by providing proper burial rites to fallen military personnel only bolsters an already significant government interest in protecting normal funeral activities that allow mourners to heal and maintain control, while also allowing society to preserve important symbols.

215. See *Hearing*, *supra* note 2, at 5–6 (statement of Rep. Mike Rogers, reading an email from Sergeant Ashley A. Voss, Baghdad, Iraq); see also *supra* note 172.

216. See *supra* notes 53–57 and Part IV.B.

217. See *Hearing*, *supra* note 2, at 11 (statement of Rep. Mike Rogers) (noting a compelling government interest in allowing families peace and dignity during funeral); *id.* (statement of Rep. Silvestre Reyes) (discussing a "compelling government interest" in protecting military families); see also *supra* text accompanying notes 170–75.

218. See *Virginia v. Black*, 538 U.S. 343, 360 (2003) (plurality opinion); *supra* text accompanying note 83.

219. See *Black*, 538 U.S. at 360; *supra* text accompanying notes 82–83.

220. 38 U.S.C. § 2413(a)(2)(A)(ii) (2006).

221. See discussion *supra* notes 101–08 and Part III.

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

sage, including websites.²²³ Further, because the RAFHA is merely a time, place, and manner restriction of speech, anyone is free, as U.S. Representative Mike Rogers explained, “to circle the cemetery an hour before at a [300] foot distance and spew [their] hate and discontent.”²²⁴

Some argue, though, that the RAFHA does not allow for adequate alternative avenues of communication for the Westboro Baptist Church, in particular, because the Church seeks to reach funeral attendees, who are unlikely to “arrive an hour ahead of the service or stay an hour afterward.”²²⁵ This argument overlooks the fact that the Church protests at places other than funerals, such as Walter Reed Army Medical Center, and plans protests at various conferences, concerts, and military bases.²²⁶

CONCLUSION

Death is perhaps the most natural part of life. For centuries, humans

223. See, e.g., Westboro Baptist Church Home Page, *supra* note 24 (indicating that the Church is already spreading its message via the Internet). The rationale in this Part applies equally to any group protesting at funerals. For example, if anti-war protestors, who often protest on city streets, see, e.g., *Anti-War Protesters March Down Michigan Ave.*, NBCCHICAGO.COM, Mar. 19, 2008, <http://www.nbcchicago.com/news/local/Anti-War-Protesters-March-Down-Michigan-Ave.html>, began disruptively protesting at federal cemeteries, the RAFHA would apply and such groups would similarly have ample alternative outlets for idea expression, see, e.g., *infra* notes 224–29 and accompanying text.

224. *Hearing*, *supra* note 2, at 11 (statement of Rep. Mike Rogers).

225. Katherine A. Ritts, Note, *The Constitutionality of “Let Them Rest in Peace” Bills: Can Governments Say “Not Today, Fred” to Demonstrations at Funeral Ceremonies?*, 58 SYRACUSE L. REV. 137, 167–68 (2007). Ritts’ argument ultimately relies on *Weinberg v. City of Chicago*, 310 F.3d 1029, 1040–42 (7th Cir. 2002). *Id.* at 167 n.231. In *Weinberg*, the Court of Appeals for the Seventh Circuit relied on *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000). *Weinberg*, 310 F.3d at 1041–42. The *Gresham* court stated:

[A]n adequate alternative cannot totally foreclose a speaker’s ability to reach one audience even if it allows the speaker to reach other groups. See *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996) (holding that total ban on sidewalk art does not leave open alternative means of communication because alternative display in galleries or museums would not reach the same audience.).

Gresham, 225 F.3d at 906–07; see also *Weinberg*, 310 F.3d at 1041. *Gresham* reveals that “[a]n adequate alternative does not have to be the speaker’s first or best choice . . . or one that provides the same audience or impact for the speech.” *Gresham*, 225 F.3d at 906 (citations omitted); see also *Weinberg*, 310 F.3d at 1042. The court continued, “an alternative must be more than merely theoretically available. It must be realistic as well.” *Gresham*, 225 F.3d at 906. The RAFHA provides realistically available outlets for communication, including audiences that the Westboro Baptist Church already reaches. See *infra* note 226 and accompanying text. Additionally, a critical issue in *Bery v. City of New York* was that street artists could not reach a public audience. 97 F.3d at 698. The *Bery* court explained that “appellants are entitled to a public forum for their expressive activities.” *Id.* The RAFHA allows for public demonstrations at other times or places. See, e.g., *infra* note 226 and accompanying text.

226. Donovan, *supra* note 33 (discussing a protest at the Walter Reed Army Medical Center); see also Westboro Baptist Church Upcoming Picket Schedule, <http://www.godhatesfags.com/schedule.html> (last visited Feb. 2, 2008) (noting a planned protest at the World Pride and Power Conference and a Marilyn Manson concert) (on file with CHICAGO-KENT LAW REVIEW); see also *supra* note 31 and accompanying text.

have been honoring and respecting their fallen family members and friends.²²⁷ Protecting the psychological well-being of mourners while they cope with profound personal grief is a significant state interest justifying speech regulation at funerals.²²⁸ The content-neutral RAFHA is narrowly tailored to achieve its goal by proscribing speech with a mere “time, place, and manner” limitation.²²⁹ The RAFHA leaves open adequate alternative avenues for expression of any message would-be protesters wish to deliver, such as concerts, conferences, and other places.²³⁰

The RAFHA serves as an expression of appreciation of soldiers’ ultimate sacrifice, and it protects mourners’ peace and dignity.²³¹ It symbolically allows society to put its arms around widows like Mrs. Katie Youmans and every other grieving family attending military funerals at federal cemeteries.²³²

227. *See supra* notes 129–35 and accompanying text.

228. *See discussion supra* Parts I–IV.

229. *See supra* Part IV.B.

230. *See supra* Part IV.D.

231. *See supra* notes 180–82 and accompanying text.

232. *See supra* notes 1–6, 182 and accompanying text.

