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# Constitutional Law - Freedom of Speech - Ban on Picketing in Front of Individual Residence Does Not Violate First Amendment

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# NOTES

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—BAN ON PICKETING IN FRONT OF INDIVIDUAL RESIDENCE DOES NOT VIOLATE FIRST AMENDMENT. *Frisby v. Schultz*, 108 S. Ct. 2495 (1988).

Between April 20 and May 20, 1985, Sandra Schultz and Robert Braun, along with other pro-life demonstrators, picketed the home<sup>1</sup> of Dr. Benjamin Victoria, in the town of Brookfield, Wisconsin.<sup>2</sup> The demonstrators were protesting because Dr. Victoria performed abortions at two clinics in neighboring towns.<sup>3</sup> The picketers alleged that the picketing was orderly and peaceful, but it generated substantial controversy and several complaints.<sup>4</sup>

The Town Board adopted an ordinance stating, “[i]t is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.”<sup>5</sup> The specified

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1. The residence was picketed on at least six occasions for periods ranging from one to one and a half hours. The number of picketers varied from 11 to more than 40. *Frisby v. Schultz*, 108 S. Ct. 2495, 2498 (1988).

2. Dr. Victoria was not a party to the action. The defendants-appellants were the Supervisors of the Town Board, the Chairman of the Town Board, the Chief of Police, the Town Attorney, and the Town of Brookfield. *Schultz v. Frisby*, 807 F.2d 1339, 1342 (7th Cir. 1986).

3. The appellees stated that picketing on the street in front of Dr. Victoria’s residence would be more effective than picketing at the clinics where he performed abortions. It would inform Dr. Victoria’s neighbors about the issue. The picketing would generate greater media coverage if it occurred in a residential area, enabling the group to reach more people with their message. The picketers also did not want to interfere with the efforts of pro-life sidewalk counselors at the abortion clinics. *Id.* at 1341-42.

4. 108 S. Ct. at 2498. The parties disagreed as to the conduct of the picketers. The town presented sworn affidavits indicating that the picketers tied red ribbons on the bushes and door of the house, shouted slogans that included references to Dr. Victoria as a “baby killer,” and on occasion temporarily blocked family members from entering or exiting the home. 807 F.2d at 1340-41.

Other affidavits stated that the picketers were observed telling at least two small children in the neighborhood that Dr. Victoria was killing babies. However, the picketers submitted sworn affidavits that their picketing was peaceful, polite, and restrained. *Id.* at 1341.

The district court found that “[t]he picketing seems to have been conducted for the most part in a peaceable and orderly fashion.” *Schultz v. Frisby*, 619 F. Supp. 792, 795 (E.D. Wis. 1985).

5. 619 F. Supp. at 794 (quoting TOWN OF BROOKFIELD, WIS., GEN. CODE § 9.17(2) (1985)). The town initially passed an ordinance prohibiting all residential picketing except for picketing during a labor dispute. The Town Attorney, however, advised the Town Supervisors that the labor picketing exception probably rendered the ordinance unconstitutional in view of

purpose of the ordinance was to protect the privacy of the Town's residents and to promote public safety.<sup>6</sup> Faced with the threat of prosecution under the new ordinance, the group ceased picketing at the Victoria residence.

The picketers filed suit in the District Court for the Eastern District of Wisconsin.<sup>7</sup> The complaint alleged that the ordinance violated the picketers' rights under the first amendment of the United States Constitution.<sup>8</sup> The district court ruled that the picketers were likely to succeed on the merits and issued a preliminary injunction against enforcing the ordinance. The court concluded that the ordinance was unconstitutional because its absolute ban on speech in a public forum was not narrowly tailored to advance the Town's stated interests.<sup>9</sup>

A divided panel of the Court of Appeals for the Seventh Circuit affirmed.<sup>10</sup> The court found that residential streets are public forums naturally suitable for disseminating ideas.<sup>11</sup> The court held that the ordinance failed to provide adequate alternative channels of expression for the picketers,<sup>12</sup> and the Town had less restrictive means available to address its legitimate interests in protecting the privacy of its residents.<sup>13</sup>

The United States Supreme Court granted certiorari and re-

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Carey v. Brown, 447 U.S. 455 (1980) (similar ordinance violated the equal protection clause). The first ordinance was repealed and replaced with a flat ban on all residential picketing. 108 S. Ct. at 2498.

6. 108 S. Ct. at 2498. The Court noted that the primary stated purpose of the ordinance was "the protection and preservation of the home" and that "members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." *Id.* The Town Board determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants." *Id.* The ordinance also states a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel." *Id.*

7. *Schultz v. Frisby*, 619 F. Supp. 792 (E.D. Wis. 1985). The group sought declaratory and injunctive relief from enforcement of the ordinance. *Id.* at 793.

8. "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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

9. 619 F. Supp. at 796-97.

10. *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986). See Note, *Balancing First Amendment Rights to Freedom of Expression Against the Rights of an Individual to Privacy in the Home*, 71 MARQ. L. REV. 201 (1987).

11. 807 F.2d at 1345-47.

12. *Id.* at 1347-48.

13. *Id.* at 1350-54.

versed.<sup>14</sup> The Court construed the Brookfield ordinance to prohibit only focused picketing in front of a single residence, but not all picketing in residential neighborhoods.<sup>15</sup> The ordinance thus left open ample alternative channels of communication<sup>16</sup> and served a significant government interest in protecting residential privacy.<sup>17</sup> The Court concluded that single residence picketing inherently intrudes on residential privacy. Therefore, a complete ban was the most narrowly tailored means of protecting such privacy interests.<sup>18</sup> The ordinance so construed did not violate the first amendment. *Frisby v. Schultz*, 108 S. Ct. 2495 (1988).

The first amendment prohibits the government from enacting laws “abridging the freedom of speech” or “the right of the people peaceably to assemble.”<sup>19</sup> The values embraced in the first amendment reflect a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>20</sup> The Supreme Court has characterized freedom of speech as a fundamental personal right<sup>21</sup> and “the essence of self-government.”<sup>22</sup>

The right of free speech is not absolute.<sup>23</sup> For instance, the Constitution does not protect someone who falsely shouts “Fire!” in a crowded theater.<sup>24</sup> The government may completely forbid certain precise categories of speech without violating the first amendment.<sup>25</sup> It may also place reasonable time, place, or manner restrictions on

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14. *Frisby v. Schultz*, 108 S. Ct. 2495 (1988).

15. *Id.* at 2501.

16. *Id.* at 2501-02.

17. *Id.* at 2502.

18. *Id.* at 2502-04.

19. U.S. CONST. amend. I. The first amendment was extended to the states through the fourteenth amendment’s due process clause in *Gitlow v. New York*, 268 U.S. 652 (1925). The first amendment also applies to city ordinances. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

20. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). For a summary of the values that justify free speech, J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 835-37 (3d ed. 1986) [hereinafter NOWAK].

21. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

22. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

23. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). See also *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985) (“protected speech is not equally permissible in all places and at all times”); *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (“the 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”).

24. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

25. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980) (misleading commercial speech); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech that incites imminent lawless action); *New York Times v. Sulli-*

constitutionally protected speech.<sup>26</sup>

"Speech" can involve more than just the spoken word. Certain expressive activities have historically been associated with speech and assembly.<sup>27</sup> The Supreme Court has recognized these expressive activities and has extended first amendment protection to a wider range of expression<sup>28</sup> than mere verbal communication.<sup>29</sup> Picketing<sup>30</sup> is one such activity.<sup>31</sup> Since 1940 the Court has generally considered peace-

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van, 376 U.S. 254 (1964) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

26. See NOWAK, *supra* note 20, at 970-84. See also Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757 (1986).

27. Certain forms of conduct are naturally expressive. Regulation of these activities implicates the first amendment.

The framers of the First Amendment clearly intended to extend its protection beyond sheer verbal communication. They included in the guarantee not only freedom of speech and the press but in addition the right of assembly and petition. Plainly they meant to embrace more than the individual speaker or the written word, and to establish the kind of spirited and even turbulent system that included meetings, marches, demonstrations, and similar aspects of assembly.

T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 293 (1970).

28. Professor Emerson contends that an effective right of assembly and petition demands that expressive conduct extending beyond mere speech be protected. He distinguishes between "expression" and "action," arguing for full first amendment protection for the former. However, he notes that the Supreme Court, in its more recent decisions, has adopted a two-level theory that distinguishes between "pure speech" and "speech plus" with the latter receiving a lesser degree of protection under the first amendment. *Id.* at 293-94.

While this two-level theory had its origin in early labor picketing cases, see *infra* note 31, it was forcefully restated by Justice Goldberg in *Cox v. Louisiana*, 379 U.S. 536 (1965):

We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

*Id.* at 555. For criticism of this distinction between pure speech and speech plus, see T. EMERSON, *supra* note 27, at 297-98 and L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-7, at 825-32 (2d ed. 1988).

29. See, e.g., *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (consumer boycott); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (solicitation); *Spence v. Washington*, 418 U.S. 405 (1974) (peace symbol affixed to flag); *Cohen v. California*, 403 U.S. 15 (1971) (wearing sign on back of jacket); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (wearing black armbands); *Brown v. Louisiana*, 383 U.S. 131 (1966) (peaceful sit-in on premises of public library); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (civil rights demonstration); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (door-to-door distribution of religious handbills); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (distribution of leaflets); *Stromberg v. California*, 283 U.S. 359 (1931) (displaying red flag).

30. "Picketing" can encompass a wide range of activities, but is generally characterized by one or more persons walking or standing in a given place while displaying a sign. See *Thornhill v. Alabama*, 310 U.S. 88, 101 n.18 (1940).

31. Picketing was characterized as "speech plus" in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 326 (1968) (Douglas J., concurring). The concept

ful picketing as constitutionally protected speech.<sup>32</sup> This is especially true of “public-issue” picketing,<sup>33</sup> which is “an exercise of . . . basic constitutional rights in their most pristine and classic form,”<sup>34</sup> and

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may be traced to Justice Douglas’ concurring opinion in *Bakery and Pastry Drivers’ Local 802 v. Wohl*, 315 U.S. 769 (1942):

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

*Id.* at 776-77 (Douglas, J., concurring).

32. It is well settled that the first amendment does not protect picketing that is accompanied by violence, *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); picketing that seeks to coerce an illegal objective, *International Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957); or picketers who trespass on private property, *Hudgens v. NLRB*, 424 U.S. 507 (1976).

Nevertheless, “[t]here is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving ‘speech’ protected by the First Amendment.” *United States v. Grace*, 461 U.S. 171, 176 (1983).

Since picketing is a combination of speech and conduct, it does not rise to the level of first amendment protection afforded to “pure speech.” The precise degree of protection will depend on the circumstances surrounding the picketing activity. See J. WHITEHEAD, *THE RIGHT TO PICKET AND THE FREEDOM OF PUBLIC DISCOURSE* 73-75 (1984).

33. The Fifth Circuit distinguished “public issue” pickets from private pickets in *Davis v. Franco*, 395 F.2d 730 (1968): “[p]rivate pickets are usually concerned with labor disputes . . . . The decisions suggest that private pickets are exercises of economic power and create many issues not caused by the ‘public issue’ demonstration.” *Id.* at 735 n.6. See also *DeGregory v. Giesing*, 427 F. Supp. 910 (D. Conn. 1977) (labor picketing less protected than public issue picketing).

The distinction between “public issue” picketing and labor picketing was first articulated by the Supreme Court in *Carey v. Brown*, 447 U.S. 455 (1980). The Court in *Frisby* stated that “we have traditionally subjected restrictions on public issue picketing to careful scrutiny.” 108 S. Ct. at 2499. See also *Boos v. Barry*, 108 S. Ct. 1157, 1162 (1988) (the “central importance of protecting speech on public issues” has led the Court to “scrutinize carefully any restrictions on public issue picketing”).

Professor Emerson argues that there is a fundamental difference between labor picketing and non-labor picketing. Labor picketing normally involves the use of economic pressure by “closely knit, powerful organizations.” “A labor picket line is thus not so much a rational appeal to persuasion as a signal for the application of immediate and enormous economic leverage . . . . As such it must, under ordinary circumstances, be classified as action, rather than expression.” T. EMERSON, *supra* note 27, at 445. On the other hand, racial, consumer, and other non-labor picketing should receive full first amendment protection. *Id.* at 448.

The Supreme Court has long been concerned with the “coercive” economic effect of labor picketing. The Court’s current analysis permits labor picketing to be regulated more freely. See *NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607 (1980) (union violated NLRA by peacefully picketing on public sidewalk in front of consumer entrances to “neutral” businesses that sold insurance policies of employer engaged in labor dispute). For an argument that certain labor picketing should likewise be subject to strict first amendment scrutiny, see Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982).

34. *Carey v. Brown*, 447 U.S. at 466-67 (1980) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

has "always rested on the highest rung of the hierarchy of First Amendment values."<sup>35</sup>

Picketing has not always been lawful.<sup>36</sup> Prior to 1900<sup>37</sup> courts were generally hostile to it, outlawing even peaceful picketing.<sup>38</sup> The Supreme Court first suggested that picketing was an exercise of free speech in 1937.<sup>39</sup> Three years later the Court specifically extended first amendment protection to peaceful labor picketing in *Thornhill v. Alabama*.<sup>40</sup> But subsequent cases curtailed the pronouncements made in *Thornhill*.<sup>41</sup>

35. *Id.* at 466-67. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). The Court in *Carey* explained why speech on issues of public concern is so vitally important:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

447 U.S. at 467 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

36. For a historical perspective on picketing, see J. WHITEHEAD, *supra* note 32, at 69-119.

37. Picketing was generally considered a tort in the nineteenth century. See Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 14 U. PITT. L. REV. 170 (1953). Largely due to the influence of then Judge Oliver Wendell Holmes, Jr. in his article, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894), and in his dissent in *Vegeahn v. Gunter*, 167 Mass. 92, 104-09, 44 N.E. 1077, 1079-82 (1896) (Holmes, J., dissenting) (patrolling does not necessarily carry with it a threat of bodily harm), some courts began to accept the economic interests of labor unions as justification for peaceful picketing. See J. WHITEHEAD, *supra* note 32, at 70-71 and F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 24-31 (1930).

38. This hostility has not completely disappeared. In 1905 a federal court found "[t]here is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." *Atchinson T. & S.F. Ry. Co. v. Gee*, 139 F. 582, 584 (C.C.S.D. Iowa E.D. 1905).

As recently as 1962, a New York court criticized the actions of demonstrators who picketed the home of the board chairman of a private hospital (who was also a judge) during a labor dispute:

Truly it is shocking, reprehensible and outrageous, deserving the unhesitating and scathing rebuke of the court. Conducted at a considerable distance from the hospital, in an exclusively residential area, it was apparently aimed to cause unspeakable embarrassment, humiliation, and mortification to the named jurist and his family. It represents a form of direct and unmitigated coercion and terrorism that should be roundly denounced and sternly condemned. Not within any conceivable limit of the right to free speech and the right to inform, it represents a mean, foul, and sinister blow, one to which decent unionism would not stoop.

*Hebrew Home v. Davis*, 38 Misc. 2d 173, 178, 235 N.Y.S.2d 318, 324 (Sup. Ct. 1962).

39. *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937). *Senn* upheld a Wisconsin statute which authorized peaceful labor picketing. Union members could picket the business of a brick layer so long as the protest was peaceful and without intimidation or coercion. In this case, the brick layer's office was also his home.

40. 310 U.S. 88 (1940).

41. See, e.g., *Int'l Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957) (Wisconsin's state policy against union coercion was superior to the union's right to picket). The Court observed that subsequent decisions limited the "broad pronouncements, but not the

The civil rights demonstrations of the 1960s and 70s gave rise to a further expansion of picketing freedoms. Protestors involved in peaceful marching and picketing received first amendment protection in *Edwards v. South Carolina*<sup>42</sup> and *Cox v. Louisiana*.<sup>43</sup> The Court in *Police Dept. of Chicago v. Mosley*<sup>44</sup> struck down a city ordinance that prohibited all picketing near a school, except peaceful picketing during a labor dispute. The ordinance was unconstitutional because it made an impermissible distinction between labor picketing and other peaceful forms of picketing.<sup>45</sup>

Recent decisions of the Supreme Court have continued this trend

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specific holding, of *Thornhill*," since picketing involved more than just communication and thus could not be immune from state regulation. *Id.* at 289. The state could constitutionally enjoin peaceful picketing, even during a labor dispute, when such picketing conflicted with a "valid state policy in a domain open to state regulation." *Id.* at 291.

*Thornhill* had little effect upon state courts, where most picketing cases were heard. Injunctions against picketing continued to be issued by many state courts which either distinguished or ignored *Thornhill*. One commentator noted:

We have travelled a long way. For a time it seemed as though peaceful picketing were [sic] going to receive real constitutional protection. Now it looks as though state courts, by the simple device of declaring union objectives contrary to public policy, can ban peaceful picketing in almost all situations where there is room for difference of opinion as to these objectives. We seem to be on the road back to government by injunction.

Fraenkel, *Peaceful Picketing—Constitutionally Protected?*, 99 U. PA. L. REV. 1, 12 (1950).

42. 372 U.S. 229 (1963). Nearly 200 demonstrators carrying picket signs were convicted for breach of the peace after they marched without incident through the grounds of the state capitol to protest state segregation policies. The Supreme Court overturned the conviction on first amendment grounds, asserting that "[t]he circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form." *Id.* at 235.

43. 379 U.S. 536 (1965) (Cox I) and 379 U.S. 559 (1965) (Cox II). During a peaceful civil rights demonstration, Cox was arrested for breach of the peace, obstructing a public passageway, and picketing near a courthouse. The Court recognized picketing and parading as permissible first amendment activities, but also recognized a legitimate state interest in regulating picketing to maintain public order. 379 U.S. at 554-55. Justice Goldberg, writing for the Court, upheld the Louisiana statute that prohibited picketing "in or near" a courthouse to prevent disruption of judicial proceedings. He argued that picketing does not rise to the level of protection afforded "pure speech." *Id.* See *supra* note 28.

Justice Black went even further. He took the position that marching or picketing was conduct, unprotected by the first amendment, which could be regulated or prohibited. However, the exception in the anti-picketing statute for labor picketing was

... [T]o deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects . . . amounts . . . to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.

379 U.S. at 581 (Black, J., concurring).

44. 408 U.S. 92 (1972). Mosley would walk the public sidewalk adjoining the school, carrying a sign protesting "black discrimination." *Id.* at 93.

45. "[A]bove all else, the First Amendment means that government has no power to re-



of granting broad first amendment protection to "public-issue" picketing. An absolute ban on picketing on the public sidewalks surrounding the Supreme Court building was held unconstitutional in *United States v. Grace*.<sup>46</sup> In *Boos v. Barry*<sup>47</sup> the Court struck down a law forbidding the display of picket signs critical of foreign governments on public sidewalks near their embassies.

Residential picketing<sup>48</sup> poses a greater difficulty for the courts because of the convergence of three fundamental interests—free speech, public order, and privacy.<sup>49</sup> State courts have frequently found peaceful picketing of a private home to be an invasion of the homeowner's privacy<sup>50</sup> or a danger to public order.<sup>51</sup>

The Wisconsin Supreme Court in *Wauwatosa v. King*<sup>52</sup> upheld a state statute that made it unlawful for anyone to engage in picketing before or about a private residence.<sup>53</sup> The court found that safeguarding the home was a vital public interest and the statutory presumption that residential picketing disturbs family privacy was reasonable.<sup>54</sup>

strict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95 (citations omitted).

To the extent that the difference between public-issue picketing and labor picketing is content-related, the distinction cannot be relied upon to determine who can and cannot picket. However, to the extent the difference is based on the action component inherent in certain types of labor picketing (i.e., its economic "coercion"), the distinction is valid. *See supra* note 33.

46. 461 U.S. 171 (1983). One person was threatened with arrest for displaying on the sidewalk a picket sign containing the text of the first amendment.

47. 108 S. Ct. 1157 (1988) (the Court held the ordinance to be a content-based restriction on political speech in a public forum).

48. *See generally* Arnolds & Seng, *Picketing and Privacy: Can I Patrol on the Street Where You Live?*, 2 S. ILL. U.L.J. 463 (1982); Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177 (1967); Annotation, *Peaceful Picketing of Private Residence*, 42 A.L.R.3d 1353 (1972); Comment, *Picketers at the Doorstep*, 9 HARV. C.R.-C.L. L. REV. 95 (1974).

49. For a discussion of the balancing of these interests, see Arnolds & Seng, *supra* note 48, at 470-84; Comment, *supra* note 48, at 105-22.

50. *E.g.*, *State v. Perry*, 196 Minn. 481, 265 N.W. 302 (1936) (strikers' display of banners in front of foreman's home was attempt to inject industrial controversy into domestic life); *State v. Zanker*, 179 Minn. 355, 229 N.W. 311 (1930) (banner displayed by labor pickets in front of nonstriking employee's home disregarded her right to be undisturbed).

51. *E.g.*, *State v. Cooper*, 205 Minn. 333, 285 N.W. 903 (1939) (employee not allowed to picket employer's residence where his conduct was likely to arouse anger, disturbance, or violence); *Walinsky v. Kennedy*, 94 Misc. 2d 121, 404 N.Y.S.2d 491 (Sup. Ct. 1977) (chanting crowd of 40 gay rights advocates carried baseball bats, whistles, and bullhorns); *People v. Levner*, 30 N.Y.S.2d 487 (Magis. Ct. 1941) (sheer number of picketers constituted threat to public peace).

52. 49 Wis. 2d 398, 182 N.W.2d 530 (1971).

53. The ordinance was virtually identical to the one struck down in *Carey v. Brown*, 447 U.S. 455 (1980). *See infra* notes 68-72 and accompanying text.

54. The court noted the alleged psychological harm caused by residential picketing:

Since the state can place a constitutionally valid limitation on where speech occurs, picketing can be legitimately prohibited in residential areas.

While judicial opposition to residential picketing persists, many state courts in recent years have shown increasing sympathy for the free speech rights of the picketers. In certain circumstances, the courts have permitted picketing the homes of landlords by tenants<sup>55</sup> or concerned citizens.<sup>56</sup> Similarly, courts have upheld the right to picket the private residence of a public official.<sup>57</sup> In *State v. Schuller*<sup>58</sup> the Maryland Court of Appeals held that a statutory ban on all residential picketing violated the right to free speech because less restrictive alternatives were available to protect residential privacy.<sup>59</sup>

Federal courts have generally balanced the competing interests in favor of the picketers' first amendment rights. The Fifth Circuit struck down a municipal ordinance making it unlawful for more than two people to picket in front of a residence, a place of business, or a

To those inside and to the neighbors, the home becomes something less than a home when and while the picketing, demonstrating and parading continue. . . . The newsworthiness of the situation stems in part from the tensions created and pressures focused on the home. Such tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.

49 Wis. 2d at 411-12, 182 N.W.2d at 537.

55. *Hibbs v. Neighborhood Org. to Rejuvenate Tenant Hous.*, 433 Pa. 578, 252 A.2d 622 (1969). Since the landlord was otherwise inaccessible, the court found no reasonable alternative forum. The court noted that this was not a "true case" of residential picketing, and therefore refused to issue "a blanket rule permitting residential picketing." *Id.* at 580-81, 252 A.2d at 624.

56. *People Acting Through Community Effort v. Doorley*, 468 F.2d 1143 (1st Cir. 1972). The First Circuit relied on *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), to strike down as violative of the equal protection clause a municipal ordinance that prohibited residential picketing except where the residence was the site of a labor dispute. The court did not reach the first amendment questions.

57. *Flores v. City & County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950) (state governor); *State v. Anonymous*, 6 Conn. Cir. Ct. 372, 274 A.2d 897 (1970) (state agency head).

58. 280 Md. 305, 372 A.2d 1076 (1977) (peaceful picketing on public sidewalk in front of home of Secretary of Defense).

59. The court said that

Rather than prohibiting certain specific conduct associated with picketing and within the purview of the state's power to control, the Maryland Act provides for a blanket ban on residential picketing itself. The statute proscribes picketing even if it is peaceful and orderly, is quiet and non-threatening, is on public property, and does not obstruct persons or traffic. The ban applies regardless of the time of day the picketing takes place. While picketing and parading and the use of the streets for such purpose is subject to reasonable time, manner and place regulation, such activity may not be wholly denied . . . .

*Id.* at 315-16, 372 A.2d at 1081 (citation omitted).

public building.<sup>60</sup> The ordinance's absolute ban did not "aim specifically at a serious encroachment on a state interest or evince any attempt to balance the individual's right to effective communication and the state's interest in peace and harmony."<sup>61</sup> Other circuits have similarly found absolute bans on residential picketing as overly broad restrictions on protected speech and therefore unconstitutional.<sup>62</sup> The single exception is the Tenth Circuit,<sup>63</sup> which upheld a municipal ordinance<sup>64</sup> forbidding residential picketing as a "valid exercise of governmental power" to insure community privacy and order.<sup>65</sup>

The residential picketing issue first reached the Supreme Court in *Gregory v. City of Chicago*.<sup>66</sup> The Court overturned disorderly conduct convictions of civil rights protestors who picketed the home of the mayor. While recognizing that the first amendment protected the actions of the picketers, the Court concluded that the picketers' convictions under the disorderly conduct statute violated due process. Thus the holding in *Gregory* did not actually resolve the question of residential picketing.<sup>67</sup>

60. *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968).

61. *Id.* at 735.

62. *Pursley v. City of Fayetteville*, 820 F.2d 951 (8th Cir. 1987); *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986), *rev'd*, 108 S. Ct. 2495 (1988).

63. *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974). The dispute arose over alleged racial discrimination in employment practices. The protestors picketed the residences of city officials. The mayor testified that on one occasion some 300 picketers appeared outside his home with signs and noisy chants, upsetting himself, his wife and his neighbors. *Id.* at 541-42. The Seventh Circuit in *Schultz* stated, "[w]e think *Francois* more accurately represents the direction of first amendment law than does the decision of the Tenth Circuit in *Garcia*." 807 F.2d at 1354.

64. This ordinance was very similar to the one in *Frisby*. It did not provide for a labor-picketing exception.

65. 507 F.2d at 545. The court distinguished picketing in a "public place" from picketing "before or about residences," and applied the nuisance doctrine to justify the prohibition. *Id.* at 544. See also *DeGregory v. Giesing*, 427 F. Supp. 910 (D. Conn. 1977) (state has substantial interest in preserving residential privacy and limiting scope of labor picketing to site of dispute).

66. 394 U.S. 111 (1969).

67. "This is a simple case," wrote Chief Justice Warren for the Court. 394 U.S. at 111. Justice Black concurred in the judgment of the Court, but could not agree that the case was simple. He noted that picketing, like other conduct, could be regulated by the government in the interest of protecting the privacy of the home:

Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.

*Id.* at 125 (Black, J., concurring).

The Supreme Court was again presented with the question of whether an absolute ban on residential picketing was constitutional in *Carey v. Brown*.<sup>68</sup> Civil rights demonstrators challenged an Illinois statute that prohibited residential picketing except where the residence was also a “place of employment involved in a labor dispute.”<sup>69</sup> The Court sidestepped the residential picketing question and considered only the equal protection issue, holding that the statute discriminated against non-labor picketing.<sup>70</sup> The statute’s exception for labor picketing largely undermined the preservation of residential privacy justification advanced for the statute since labor picketing was equally likely to intrude on the tranquility of the home.<sup>71</sup> The Court did not decide whether a ban on all residential picketing, regardless of its content, would violate the first amendment.<sup>72</sup>

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68. 447 U.S. 455 (1980).

69. The Illinois statute provided:

It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

ILL. REV. STAT. ch. 38, para. 21.1-2 (1979). Subsequent to *Carey*, the statute was amended to delete the labor exception.

70. The Court found that the anti-picketing statute in this case was constitutionally indistinguishable from the ordinance invalidated in *Mosley*. 447 U.S. at 460. Justice Rehnquist, in his dissent, argued that the Court had mischaracterized the statute. The language of the statute, he said, exempted four categories of residences from the ban on picketing. If the residence is used as a place of business or is a place where discussions of general public issues are held, then *all* peaceful picketing is allowed. If a residence is also used as a place of employment which is involved in a labor dispute, labor-related picketing is allowed. Finally, a resident is allowed to picket his own home. Thus, Justice Rehnquist argued, “the principal determinant of a person’s right to picket a residence in Illinois is not content, as the Court suggests, but rather the character of the residence sought to be picketed.” *Id.* at 473-74 (Rehnquist, J., dissenting). Justice Rehnquist rejected the Court’s argument that the prohibition was based on content *alone*.

71. The Court acknowledged the purpose of the statute in preserving privacy in the home, but noted:

For even the most legitimate goal may not be advanced in a constitutionally impermissible manner. And though we might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives, this is not such a case.

*Id.* at 464-65 (citation omitted).

72. The Court observed:

Because the Court of Appeals concluded that the labor dispute exception was not severable from the remainder of the statute, it invalidated the enactment in its entirety. The court therefore found it unnecessary to consider the constitutionality under the First Amendment of a statute that prohibited all residential picketing. Because we find the present statute defective on equal protection principles, *we likewise*

Residential anti-picketing laws restrict speech and are thus subject to first amendment scrutiny. The extent to which the government may limit expressive activity on public property depends upon the particular location, or "forum," in which the activity takes place. The Supreme Court identified three types of forums in *Perry Educational Association v. Perry Local Educators' Association*:<sup>73</sup> the traditional public forum, the designated public forum, and the nonpublic forum.

The first amendment affords the greatest protection to expression in public forums. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."<sup>74</sup> The *traditional public forum* consists of public property historically used for public speech and assembly. A *designated public forum*, such as an auditorium, is public property which the state has opened for use by the public as a place for expressive activity.<sup>75</sup> Once the government opens such a place for public expression, it is bound by the same standards for regulating speech that apply in a traditional public forum.<sup>76</sup>

In contrast, the government may impose greater restrictions on speech in a *nonpublic forum*. Nonpublic forums, such as mailboxes, consist of public properties which are neither by tradition nor designation forums for public communication.<sup>77</sup>

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*do not consider whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments.*

*Id.* at 459 n.2 (citations omitted) (emphasis added).

However, Justice Rehnquist in his dissent suggested that the majority had indeed decided the question. "The Court today suggests that some picketing activities would have but a 'negligible impact on privacy interests,' intimating that Illinois could satisfy its interests through more limited restrictions on picketing, such as regulating the hours and numbers of pickets." *Id.* at 478 (Rehnquist, J., dissenting). Justice Rehnquist argued that the state could permissibly conclude that "even one individual camped in front of the home is unacceptable." *Id.* See also Arnolds & Seng, *supra* note 48, at 465-66.

73. 460 U.S. 37 (1983). For criticism of the public forum analysis, see Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Lee, *supra* note 26, at 771-73.

74. 460 U.S. at 45.

75. *Id.* E.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university facilities opened to student groups); *City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meetings opened to citizens); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater opened for public activities).

76. *Perry*, 460 U.S. at 46.

77. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (charity drive for federal employees); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (city street light posts); *Perry*, 460 U.S. 37 (1983) (school mail facilities).

Streets have historically been considered traditional public forums. This includes streets that run through residential areas. Courts have relied upon Justice Owen Roberts' influential concurring opinion in *Hague v. CIO*,<sup>78</sup> which stated:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>79</sup>

The government may not forbid all communicative activity in public forums.<sup>80</sup> Content-based exclusions on speech in a public forum are permitted when there is a compelling state interest.<sup>81</sup> The state may also impose regulations of time, place, and manner<sup>82</sup> that are content-neutral,<sup>83</sup> are narrowly tailored<sup>84</sup> to serve a significant

78. 307 U.S. 496 (1939) (Roberts, J., concurring).

79. *Id.* at 515 (Roberts, J., concurring). See also *Boos v. Barry*, 108 S. Ct. 1157, 1162 (1988); *United States v. Grace*, 461 U.S. 171, 177-80 (1983); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976); *Schneider v. State*, 308 U.S. 147, 163 (1939).

80. *Perry*, 460 U.S. at 45. *Ii. Grace* the Court noted that the ordinance prohibiting the display of signs on the grounds of the Supreme Court building did not ban *all* expressive conduct. 461 U.S. at 181 n.10. Similarly, the Town of Brookfield's ordinance does not prohibit all communication on residential streets. 108 S. Ct. at 2501-02.

81. *Perry*, 460 U.S. at 45. A constitutional restriction of speech based on content must either fall within one of the narrow exceptions to protected speech, see *supra* notes 24-25 and accompanying text, or the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)); see also *United States v. Grace*, 461 U.S. 171, 177 (1983).

82. *Perry*, 460 U.S. at 45. See *supra* note 26 and accompanying text. The test for analyzing time, place, and manner restrictions was first expressed by the Court in *United States v. O'Brien*:

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest.

391 U.S. 367, 376-77 (1968) (footnotes omitted).

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

84. *Id.* Justice Brennan, in *NAACP v. Button*, said that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 371 U.S. 415, 438 (1963).

Federal courts have disagreed on what exactly qualifies as being narrowly tailored. The Second, Seventh, and Eighth Circuits hold that the proponent of the regulation must show that the government's interests are advanced by the least restrictive means available. See *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1551-54 (7th Cir. 1986), *aff'd*, 107 S.

governmental interest,<sup>85</sup> and leave open ample alternative channels of communication.<sup>86</sup>

Frequently, the most significant question is whether the government has precisely drafted the residential anti-picketing statute so as

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Ct. 919 (1987); *ACORN v. City of Frontenac*, 714 F.2d 813, 818 (8th Cir. 1983); *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 237 (2d Cir. 1982). The Third Circuit adopted a less stringent standard, requiring the proponent to show only that ample alternative channels for communication exist. See *Pennsylvania Alliance for Jobs and Energy v. Council of Munhall*, 743 F.2d 182, 186 (3d Cir. 1984) (ordinance banning door-to-door solicitation "precisely drawn" but "least restrictive means" test rejected under rationale that activity occurred in non-public forum).

Professor Lee contends that the less restrictive means analysis involves a highly subjective form of balancing "that the Court can manipulate to achieve any result it prefers" and repeats Justice Blackmun's observation that a judge would be "unimaginative" if he could not come up with some regulation a little less drastic. Lee, *supra* note 26, at 793 (citing *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun J., concurring)).

85. *Perry*, 460 U.S. at 45. The interest most frequently served in residential anti-picketing statutes is the protection of the privacy and tranquility of the home. Simply stated, residential picketing restrictions protect one's right "to be let alone" in his home. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-38 (1970); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

The Supreme Court has recognized a constitutional right to privacy that limits governmental interference in certain areas of a citizen's life. The first amendment safeguards privacy in belief and expression. The third and fourth amendments protect privacy of person and home from peacetime quartering of soldiers and unreasonable searches and seizures. The fifth amendment's privilege against self-incrimination also reflects a concern for privacy. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court found an independent right to privacy emanating from these amendments plus the ninth and fourteenth. See, e.g., NOWAK, *supra* note 20, at 684-85; T. EMERSON, *supra* note 27, at 544-48. See also *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion based on right to privacy); *Whalen v. Roe*, 429 U.S. 589 (1977) (right to privacy protects non-disclosure of personal matters and independent decision making).

This constitutional right to privacy, which may be more accurately described as a right to personal autonomy, is distinct from the government interest in protecting residential privacy. The constitutional right to privacy protects the individual from governmental interference in personal choices. Since residential picketing is the result of action by private individuals rather than the government, the constitutional right to privacy is not implicated. Still, the preservation of peace and quiet in the home is an important interest, and the state may guard against its infringement. See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (prohibition of sound trucks in residential neighborhoods).

For a discussion of privacy and residential picketing, see T. EMERSON, *supra* note 27, at 544-48; Arnolds & Seng, *supra* note 48, at 474-79; Comment, *supra* note 48, at 107-22.

86. *Perry*, 460 U.S. at 45. See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate"); *United States v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring) (restriction is impermissible if it entirely prevents a speaker from reaching a significant audience with whom he could not otherwise lawfully communicate); *Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

not to restrict more speech than necessary.<sup>87</sup> The Supreme Court has applied various tests to determine if a restriction is narrowly tailored. In *Clark v. Community for Creative Non-Violence*<sup>88</sup> the Court held that regulations related to the end they are designed to serve are not invalid simply because there is some imaginable alternative that might be less burdensome on speech.<sup>89</sup> Recent decisions, however, may indicate the Court's willingness to adopt the least restrictive means test.<sup>90</sup>

The public forum analysis affected the outcome of a recent Arkansas case, *Pursley v. City of Fayetteville*.<sup>91</sup> Although decided prior to *Frisby*,<sup>92</sup> *Pursley* presented the Eighth Circuit with facts almost identical to those in *Frisby*. In *Pursley* the Eighth Circuit struck down as unconstitutionally overbroad a municipal ordinance prohibiting the picketing of private residences.<sup>93</sup> Utilizing a three-part test,<sup>94</sup> the court first decided that picketing involves expressive activity protected by the first amendment.<sup>95</sup> It then determined, contrary to the finding of the trial court, that the sidewalk in front of the doc-

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87. Under the *Perry* test, residential anti-picketing statutes are typically struck down because they are not narrowly tailored. *Pursley v. City of Fayetteville*, 820 F.2d 951 (8th Cir. 1987); *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986), *rev'd*, 108 S. Ct. 2495 (1988); *Schultz v. Frisby*, 619 F. Supp. 792 (E.D. Wisc. 1985), *aff'd*, 807 F.2d 1339 (7th Cir. 1986), *rev'd*, 108 S. Ct. 2495 (1988).

88. 468 U.S. 288 (1984).

89. *Id.* at 297-99. See also, *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (White, J., concurring) ("[t]he less-restrictive alternative analysis . . . has never been a part of the inquiry into the validity of a time, place and manner regulation").

90. See *supra* note 84. Over a vigorous dissent by Justice White, the Court affirmed without opinion a decision which applied the requirement that the ordinance be the least restrictive means available. *City of Watseka v. Illinois Public Action Council*, 107 S. Ct. 919 (1987). See also *Boos v. Barry*, 108 S. Ct. 1157, 1168 (1988) (invalidating ordinance because "a less restrictive alternative is readily available") (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion)).

91. 820 F.2d 951 (8th Cir. 1987). Pro-life demonstrators picketed the home of a local physician who performed abortions. In response the city council passed an ordinance prohibiting residential picketing. See Note, *Pursley v. City of Fayetteville: Flat Bans on Residential Picketing Held Unconstitutional*, 41 ARK. L. REV. 861 (1988).

92. 108 S. Ct. 2495 (1988).

93. The ordinance stated: "It shall be unlawful for any person or persons to engage in demonstrations of any type or to picket before or about the residence or dwelling place of any individual." 820 F.2d at 952 n.3 (quoting *Fayetteville, Ark.*, Ordinance No. 3125).

94. *Id.* at 954. The Eighth Circuit adopted the test used by the Supreme Court in *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985). The Court first determined whether the activity was speech protected by the first amendment, then identified the nature of the forum, and finally decided whether the justifications for restricting the expressive activity satisfied the relevant constitutional standard. *Id.* at 797.

95. 820 F.2d at 954. The court noted that "picketing is not pure speech." *Id.*



tor's residence was a "public forum."<sup>96</sup> Finally, applying the standard set forth in *Perry*,<sup>97</sup> the court found that the ordinance was not narrowly tailored<sup>98</sup> despite the fact that it was content-neutral<sup>99</sup> and protected peace and privacy in the home.<sup>100</sup>

*Frisby v. Schultz*<sup>101</sup> again presented the United States Supreme Court with the issue of whether a complete ban on picketing "before or about" any residence is consistent with the first amendment's free speech guarantee. The Court first observed that restrictions on "public issue" picketing<sup>102</sup> are traditionally subject to "careful scrutiny."<sup>103</sup> The nature of the "place," or forum, the speaker seeks to utilize determines what limits may be placed on protected speech.<sup>104</sup>

The appellants argued that the streets of Brookfield are a non-public forum<sup>105</sup> for first amendment purposes.<sup>106</sup> The Court rejected this argument, stating "[o]ur prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood."<sup>107</sup> Hence, the or-

96. *Id.* at 954-55. The *Pursley* court relied on the Seventh Circuit's finding in *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986), *rev'd*, 108 S. Ct. 2495 (1988), that residential streets were public forums. The district court's finding to the contrary was considered a "drastic shift in 'public forum' doctrine." 820 F.2d at 955 n.5.

97. 820 F.2d at 955. *Accord* *United States v. Grace*, 461 U.S. 171, 177 (1983).

98. 820 F.2d at 956. The court of appeals stated:

The way the ordinance carries out this goal [citizens' peace at home], however is to completely ban picketing anywhere a home is located, be it a house surrounded by other houses, a townhouse surrounded by shops, or an apartment sharing space in a building with offices. A "residence or dwelling place" is often located close to the hubbub of daily commerce. A person living in such a home cannot expect the same level of external tranquility as can a person living in a purely residential neighborhood. Thus, to prohibit picketing in such a busy commercial area is, in effect, to discriminate against speech . . . . If the ordinance in this case were applied to a dwelling located in a mixed commercial and residential area, the ban would have a negligible effect on the serenity of the neighborhood while impinging significantly on the First Amendment. Legitimate picketing of an office or store could be quashed because of the presence of an adjacent apartment.

*Id.* at 956-57.

99. *Id.* at 955.

100. *Id.*

101. 108 S. Ct. 2495 (1988). Justice O'Connor wrote for the Court.

102. 108 S. Ct. at 2499. *See supra* note 33.

103. 108 S. Ct. at 2499.

104. *Id.*

105. *Id.* at 2499-2500. The appellants contended that the Brookfield streets were narrow and residential, thus not by tradition or designation held open for public communication. *Id.* The streets of Brookfield were about thirty feet wide, with no sidewalks or streetlights, and ran through exclusively residential areas. 619 F. Supp. at 793-94. Justice Brennan, in his dissent, called this a "rogue argument." 108 S. Ct. at 2506 n.1 (Brennan, J., dissenting).

106. *See supra* text accompanying notes 73-79.

107. 108 S. Ct. at 2500. The Court referred to public streets as the "archetype" of a tradi-

dinance must satisfy the stringent standards established for regulating speech in the traditional public forum.<sup>108</sup> Those standards, the Court observed, specify that such regulations must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.<sup>109</sup>

The appellees contended that although the Brookfield ordinance was content-neutral on its face,<sup>110</sup> a similar Wisconsin law that contained an express exception for peaceful labor picketing<sup>111</sup> was controlling. The Court deferred to the lower courts' finding that the ordinance contained no implied exception for labor picketing and was content-neutral.<sup>112</sup>

The Court narrowly construed the ordinance to prohibit only picketing in front of a single residence, but not general marching through residential neighborhoods or even walking a route in front of an entire block of houses.<sup>113</sup> The Court concluded that "the use of the singular form of the words 'residence' and 'dwelling' suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence."<sup>114</sup> Rejecting the broad interpretation given the ordinance by the lower courts,<sup>115</sup> the

tional public forum. *Id.* at 2499. The Court relied on *Carey* to foreclose the appellants' argument, interpreting it to expressly recognize residential streets and sidewalks as public forums. *Id.* at 2500.

This affirmed the Seventh Circuit's finding that the streets of Brookfield were public forums. That court stated that "[a] holding that streets located in residential areas are not public forums would represent a radical departure from the general direction of first amendment jurisprudence. Such a holding would effectively place vast areas of this country out of the reach of the protection of the first amendment." 807 F.2d 1339, 1347 (7th Cir. 1986).

108. 108 S. Ct. at 2500.

109. *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)).

110. The Brookfield ordinance did not contain an exception for labor or other types of picketing. *See supra* text accompanying note 5.

111. 108 S. Ct. at 2500. *See* WIS. STAT. § 103.53(1) (1985-1986). Other states have similar statutes, *see, e.g.*, ARK. CODE ANN. § 5-71-225 (1987). Such statutes are generally unconstitutional since they make an impermissible distinction between labor picketing and non-labor picketing. *Carey*, 447 U.S. 455. *See supra* text accompanying notes 68-72.

112. 108 S. Ct. at 2500 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) ("we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States")). However, Justice Brennan was not so quick to apply this rule here. He could not find that even *one* of the lower courts had actually decided this issue. 108 S. Ct. at 2506 n.2 (Brennan, J., dissenting).

113. 108 S. Ct. at 2501.

114. *Id.* This does not mean that picketing may *never* take place in front of a residence. The *Frisby* decision apparently allows picketers to march past a residence, but prohibits them from stopping and focusing on that residence.

115. *Id.* The Court's deference to the lower courts in interpreting state statutes, *see supra* note 112 and accompanying text, quickly disappeared. Both the district court and the Seventh

Court accepted the appellant's assurance that protestors could still march into residential neighborhoods, alone or in groups, and could go door-to-door distributing literature or proselytizing their views.<sup>116</sup> The ordinance so construed provided ample alternative channels of communication.<sup>117</sup>

The Court then turned to the question of significant governmental interest and found the ordinance served to guard residential privacy.<sup>118</sup> Recalling previous decisions protecting the sanctity of the home,<sup>119</sup> the Court reaffirmed the government's right to shield the unwilling listener from intrusive speech.<sup>120</sup>

Finally, the Court considered whether the Brookfield ordinance was narrowly tailored to eliminate no more than the exact source of "evil" it was designed to remedy.<sup>121</sup> The Court distinguished focused

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Circuit characterized the ordinance as banning all picketing in residential areas. See 108 S. Ct. at 2505 (White, J., concurring). However, Justice O'Connor said those courts had "fallen into plain error" because they had not construed the ordinance to avoid constitutional difficulties. *Id.* at 2501.

116. 108 S. Ct. at 2501-02. Counsel for the Town of Brookfield told the Court at oral argument that the town interpreted the ordinance in accord with the narrow reading of the Court and would enforce that limited view. *Id.* at 2501.

117. *Id.* at 2502. The Seventh Circuit concluded that the ordinance did not provide ample alternative channels. Writing for the majority, Senior Circuit Judge Swygert said:

There is no question that picketing *per se* is a valuable form of communication. The more difficult question is whether picketing *in a residential neighborhood* is an essential, "uniquely valuable," element of the message Schultz and Braun seek to communicate. The question we must answer is whether the plaintiffs may effectively deliver their message elsewhere without, at the same time, changing the character of that message . . . . Residential picketing . . . does not permit the citizens of Brookfield to ignore or trivialize the message the picketers wish to communicate. Residential picketing, quite literally, brings the message home . . . . [T]he fact that the message may reach and disturb families and children is clearly part of the point of the picketing, for, to a certain extent, the picketers seek to communicate their concerns about a perceived assault on the family and on childhood itself.

807 F.2d at 1348. See also, *Lee*, *supra* note 26, at 799-810.

118. 108 S. Ct. at 2502 (citing *Carey*, 447 U.S. at 471 (protecting the privacy of the home is "of the highest order in a free and civilized society") and *Gregory*, 394 U.S. at 125 (Black, J., concurring) (the home is "the last citadel of the tired, the weary, and the sick")).

119. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (offensive radio broadcasts); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks).

120. The state may legislate to protect citizens from intrusions into the home. "[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." 108 S. Ct. at 2502. "There simply is no right to force speech into the home of the unwilling listener." *Id.*

121. *Id.* (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)). The *Frisby* opinion provides the clearest indication yet of what qualifies as "narrowly tailored": "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Id.* See *supra* text accompanying notes 87-90.

picketing—the kind prohibited by the ordinance—from other more general forms of communication in residential areas.<sup>122</sup> Picketing directed against a single residence must inherently and offensively intrude on residential privacy.<sup>123</sup> Hence, a complete ban on single-residence picketing is the most narrowly tailored means of protecting residential privacy.<sup>124</sup> The Court upheld the Brookfield ordinance, but limited its holding to uninvited picketing of a single residence. The holding did not reach the constitutionality of applying the ordinance in other circumstances.<sup>125</sup>

Justice White, concurring in the judgment, believed that the crucial question was whether the ordinance at issue forbids only single-residence picketing.<sup>126</sup> He was reluctant to accept the Court's construction of the ordinance.<sup>127</sup> Nevertheless, the assurances of the town's counsel contained sufficient force to avoid applying the "strong medicine" of the overbreadth doctrine.<sup>128</sup> He acknowledged, however, that if Brookfield construed the ordinance to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional.<sup>129</sup>

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122. 108 S. Ct. at 2503. *See, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (marching); *Martin v. Struthers*, 319 U.S. 141 (1943) (door-to-door solicitation); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (solicitation); *Schneider v. State*, 308 U.S. 147 (1939) (handbilling).

123. 108 S. Ct. at 2503-04 (contra *Schultz*, 807 F.2d at 1350 ("[p]icketing is not by its very nature an activity inherently disruptive of the coherency of an American neighborhood")). The Court said that picketing focused on a single residence was "fundamentally different" than other forms of communication in residential areas such as handbilling, solicitation, and marching. *Id.* at 2503. The Court justified this distinction by saying that the message such picketing conveys is directed primarily at a particular household, rather than the general public. *Id.* Furthermore, the Court found that this type of picketing has a devastating effect on the quiet enjoyment of the home because of the psychological tensions and pressures it may create. *Id.* It is also offensive because the resident is held "captive" in his home with no other way to avoid the objectionable speech. *Id.* The number of picketers is irrelevant in determining its inherent effect, for the Court found that "even a solitary picket can invade residential privacy." *Id.*

124. "A complete ban can be narrowly tailored, but only if each activity within the prescription's scope is an appropriately targeted evil." *Id.* at 2502-03.

125. *Id.* at 2504.

126. *Id.* (White, J., concurring).

127. He questioned the finding on four grounds. First, the more natural reading of the ordinance would seem to reach more than just single-residence picketing. *Id.* at 2504-05. Second, no authoritative construction of the ordinance by Wisconsin state courts had so limited it. *Id.* at 2505. Third, the lower federal courts interpreted the ordinance to broadly apply to all residential neighborhoods, not just single residences. *Id.* Finally, even the appellants' brief did not argue the narrow construction. *Id.*

128. The overbreadth doctrine "has been employed by the Court sparingly and only as a last resort." *Id.* at 2505 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

129. *Id.* at 2505.

Justice Brennan, in a dissent joined by Justice Marshall, agreed that the government may prohibit the intrusion of speech into the home<sup>130</sup> or unduly coercive conduct around the home,<sup>131</sup> “[b]ut so long as the speech remains outside the home and does not unduly coerce the occupant, the government’s heightened interest in protecting residential privacy is not implicated.”<sup>132</sup> This distinction, he asserted, is crucial for it determines whether the ordinance is narrowly tailored to achieve the government interest.<sup>133</sup> The ordinance suppressed too much speech.<sup>134</sup> He rejected the majority’s characterization of picketing as inherently and offensively intrusive on privacy, finding it unsubstantiated.<sup>135</sup>

Justice Stevens, also dissenting,<sup>136</sup> noted that picketing is a form of speech that can become disruptive if too repetitive or hostile in its presentation.<sup>137</sup> The picketing in this case, he argued, was intended solely to cause substantial psychological distress and therefore did not deserve constitutional protection.<sup>138</sup> However, the ordinance would prohibit some speech protected by the first amendment and was therefore “overbroad.”<sup>139</sup> The ordinance also gave the town officials too much discretion in enforcement. The Town could simply amend the

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130. *Id.* at 2506 (Brennan, J., dissenting) (citing *FCC v. Pacifica Foundation*, 473 U.S. 726 (1978) (radio waves); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (unwanted mail); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (excessive noise); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (unwelcome solicitor)).

131. *Id.*

132. *Id.* at 2506-07 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971)).

133. *Id.* at 2507.

134. Justice Brennan argued that it is well within the government’s power to enact regulations that neutralize the intrusive or unduly coercive aspects of picketing around the home. The government could constitutionally regulate the number of picketers, the hours during which the picketing may take place, or the noise level of such picketing. “But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety.” *Id.*

135. The Court’s reasoning was doubly flawed according to Justice Brennan. First, other kinds of picketers may not desire to communicate with just the “targeted resident.” Even the appellees stated that they wanted to communicate with both Dr. Victoria and the community. Second, the assumption that residential picketing is *inherently* intrusive is unwarranted. The solitary picket hardly fits the description of the “lurking” stranger, secreting himself outside a residence, threatening physical harm. Justice Brennan argued that the picketer who truly desires to harass those inside the home will find that goal thwarted by a narrowly tailored ordinance substantially limiting the size, time, and volume of the protest. *Id.* at 2507-08.

136. *Id.* at 2508 (Stevens, J., dissenting). Justice Stevens said that this ordinance would make it unlawful for a fifth grader to carry a get well sign in front of the residence of a friend who was ill.

137. *Id.* at 2509.

138. *Id.*

139. *Id.*

ordinance to ban conduct that unreasonably interferes with privacy.<sup>140</sup>

The *Frisby* ruling did not sidestep the question of the constitutionality of a flat ban on all residential picketing.<sup>141</sup> If such a ban was permissible, the Court would not have needed to narrowly construe the ordinance to prohibit only picketing in front of a single residence.<sup>142</sup> State and local governments with anti-picketing laws similar to Brookfield's<sup>143</sup> should enforce such laws only within the narrow limits set forth in the *Frisby* decision.

The narrow interpretation of the ordinance was a sincere attempt to balance the competing interests<sup>144</sup> in a way that would be acceptable to both sides. However, the Court based its ruling on certain assumptions that could influence future decisions involving speech in residential neighborhoods. Central to the Court's analysis was the characterization of picketing directed at a single household as "inherently" and "offensively" intrusive on residential privacy.<sup>145</sup> The Court held that this kind of picketing was "fundamentally different" from other more generally directed forms of communication in residential areas.<sup>146</sup> The Court embraced the portrait of the neighborhood picket drawn by Justice Rehnquist in his *Carey* dissent.<sup>147</sup>

140. *Id.* at 2510.

141. *See supra* text accompanying notes 68-72.

142. So narrowed, the ordinance insures that ample alternative channels of communication are available to the picketers. *See supra* note 86. Justice White, concurring, argued that "if the ordinance were construed to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional on its face . . ." 108 S. Ct. at 2505.

143. *See supra* text accompanying note 5.

144. *See Arnolds & Seng, supra* note 48, at 468-69.

145. 108 S. Ct. at 2503. *See supra* discussion at note 123. The Court said that this kind of "targeted" or "focused" picketing made the homeowner a "captive audience" with no ready means of avoiding the unwanted speech. 108 S. Ct. at 2503-04.

146. *Id.* at 2503. *See, e.g.,* Gregory v. City of Chicago, 394 U.S. 111 (1969) (marching); Martin v. City of Struthers, 319 U.S. 141 (1943) (solicitation); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (solicitation); Schneider v. State, 308 U.S. 147 (1939) (handbilling).

The Court said that these means of communication "may not be completely banned in residential areas." 108 S. Ct. at 2503. In such cases the "flow of information" was to the public rather than into households. *Id.* (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971)). In contrast, the Court argued, single-residence picketing is directed at the household, not the public. It is usually designed to intrude upon the targeted resident in an especially offensive way. *Id.*

Picketing can be an effective form of disseminating information because it often attracts media coverage that leafletting and solicitation will not. In this case, the district court, based on an uncontradicted affidavit, found that the pro-life picketers wanted to communicate with both Dr. Victoria and the public. 619 F. Supp. at 795.

147. Justice Rehnquist stated:

Unlike sound trucks, it is not just the distraction of the noise which is in issue—it is the very presence of an unwelcome visitor at the home . . . Whether noisy or silent,

It is difficult to imagine how a solitary picket<sup>148</sup> walking quietly back and forth in front of a house is more disruptive than a large group of protesters marching through the neighborhood.<sup>149</sup> There is no doubt that picketing a residence can become disorderly and offensive, but it strains credulity to presume that *all* such picketing falls into that category.<sup>150</sup>

The Court's logic is clear but troublesome: since single-residence picketing is different from other forms of residential communication because it is inherently offensive and intrusive, an absolute ban on this kind of expression is therefore warranted.<sup>151</sup> Focused picketing in a residential neighborhood may thus be completely suppressed without violating the first amendment, even if it relates to a public issue<sup>152</sup> and takes place in a public forum.<sup>153</sup>

What justifies this remedy? The right to privacy in the home. Privacy is certainly a significant interest worthy of governmental protection. The home must be a place where we can expect others to respect our privacy. However, a powerful constitutional right to free expression opposes the privacy interests implicated by focused residential picketing.

The Town of Brookfield had laws designed to protect residential privacy and public safety.<sup>154</sup> The Town Board could have minimized

alone or accompanied by others, whether on the streets or on the sidewalk . . . there are few of us that would feel comfortable knowing that a stranger lurks outside our home.

447 U.S. at 478-79 (Rehnquist, J., dissenting).

148. "But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy." 108 S. Ct. at 2503.

149. The Court held that marching through neighborhoods, alone or in groups, was not prohibited by the ordinance. *Id.*

150. Justice Brennan, in his dissent, argued that focusing speech does not strip it of its constitutional protection. The site-specific aspect of picketing can actually serve to enhance its communicative impact on the public. *Id.* at 2508. He further asserted that the picketers' ultimate goal—to influence the resident's conduct—did not defeat first amendment protection either. *Id.* (citing *Keefe*, 402 U.S. at 419).

151. All picketing is not prohibited in front of a residence, since the ordinance narrowly construed still permits marching through a neighborhood or walking a route in front of an entire block of houses. The Court, however, classifies single-residence picketing as a form of objectionable speech that can be constitutionally prohibited. "[T]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." 108 S. Ct. at 2503.

152. Public issue picketing has traditionally received full first amendment protection, regardless of its action component. *See supra* notes 33-35 and accompanying text.

153. *See supra* text accompanying notes 73-86.

154. The General Code of the Town of Brookfield contained several ordinances designed to preserve peace and order in the community. These included "§§ 9.05 Obstructing Streets and Sidewalks, 9.06 Loud and Unnecessary Noise Prohibited, 9.08 Loitering Prohibited, 9.09 De-

the intrusive or coercive aspects of picketing by constitutionally regulating the number of picketers and the hours during which they could picket.<sup>155</sup> However, the Court viewed the Town's interest in protecting residential privacy so substantial as to justify prohibiting focused picketing in a public forum.<sup>156</sup>

The Court in *Frisby* arguably extended the protection of residential privacy beyond that in previous decisions.<sup>157</sup> This extension may signal the Court's willingness to more narrowly restrict or even prohibit other first amendment activities in residential neighborhoods as well.

Ironically, *Frisby* may actually heighten the intrusion into family privacy. The practical effect of the holding may simply be to spread

struction of Property Prohibited, 9.10 Littering Prohibited, 9.943.13 Criminal Trespass to Land, 9.943.14 Criminal Trespass to Dwelling, and 9.947.01 Disorderly Conduct." *Schultz v. Frisby*, 619 F. Supp. at 794-95.

155. See *supra* note 134 and accompanying text.

156. More is at stake than just the physical disruption of the homeowner's peace and quiet or freedom of movement. The Court argued that targeted picketing creates psychological tensions and pressures as well. 108 S. Ct. at 2503. The resident will undoubtedly be concerned about his reputation in the neighborhood and the community at large. If the picketing relates to public issue, and by his own actions he has placed himself on one side of that issue, he may vigorously oppose the viewpoint of the picketers. Assuming the physical intrusions could be neutralized by less restrictive means, should these concerns justify prohibiting single-residence picketing? In his dissent, Justice Brennan suggested that

[T]he discomfort to which the Court must refer is merely that of knowing there is a person outside who disagrees with someone inside. This may indeed be uncomfortable, but it does not implicate the Town's interest in residential privacy and therefore does not warrant silencing speech.

*Id.* at 2508. The Court in *Terminiello v. Chicago* analyzed the purpose of free speech:

[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea . . . . [T]he alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

337 U.S. 1, 4-5 (1949).

157. The leafletting and solicitation cases did not result in a complete ban of either activity. See *supra* note 146.

The *Kovacs* decision, 336 U.S. 77 (1949), provides an interesting comparison. In a five-to-four decision, the Court upheld a municipal ordinance that imposed a criminal penalty upon persons using sound trucks which emit "loud and raucous noises." Only two members of the Court believed that a complete prohibition on sound amplification would be constitutional. The other justices agreed that there must be an accommodation between privacy and speech interests that would allow reasonable regulation of volume, time and place. Professor Emerson observed, "[s]uch a system [of privacy] does not require that all sound amplification be shut off. It does demand that sound trucks ranging through a residential area in the middle of the night be silenced." T. EMERSON, *supra* note 27, at 559.



out the picketers along the entire block.<sup>158</sup> If picketing in front of a single residence "inherently" invades the homeowner's privacy, will not a similar effect be created by picketing in front of an entire row of houses? The Court did not address the balance between the privacy interests of non-targeted neighbors and the privacy of the targeted resident.

*Frisby* also brings into focus two additional problems that arise when determining the constitutionality of restrictions on first amendment activities. First, *Frisby* illustrates that facially neutral regulations may allow suppression of speech on the basis of content. The history of the ordinance reveals that the Town Board adopted it in direct and urgent response to the pro-life demonstrations held in front of Dr. Victoria's home.<sup>159</sup> The Court never reached the question of whether the ordinance was designed to address the problem of residential picketing in Brookfield, or was merely a convenient way to get rid of what some considered a particularly offensive activity.<sup>160</sup> Although motivation is difficult to determine,<sup>161</sup> the Court should examine whether such a regulation is a refuge for those who desire to suppress viewpoints with which they disagree. Facially neutral restrictions which practically discriminate among viewpoints are a serious first amendment problem that deserve careful scrutiny.<sup>162</sup>

The second problem concerns the limits of a court's discretion in statutory construction. It is a longstanding principle that courts should interpret statutes to avoid constitutional difficulties.<sup>163</sup> However, the Court in *Frisby* had to so narrowly construe the ordinance to enable it to pass constitutional muster that its reading was contrary to both lower courts, and not even argued in the appellants' brief.<sup>164</sup>

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158. "General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance." 108 S. Ct. at 2501.

159. See *supra* text accompanying notes 1-6.

160. The fact that the town originally made an exception for peaceful labor picketing suggests that this ordinance may not have been aimed at residential picketing in general, but antiabortion picketing in particular. See *supra* note 5. Justice Stevens had a "hunch" that the town would probably not enforce even the present ban against friendly, innocuous, or even brief unfriendly picketing. 108 S. Ct. at 2510 (Stevens, J., dissenting).

161. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (inquiry into legislative motivation); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (causal relation of motivation in employee dismissal); see also, Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1970 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

162. See Lee, *supra* note 26, at 764 n.36.

163. 108 S. Ct. at 2501. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

164. 108 S. Ct. at 2505.

The Court has recognized that its role is not to redraft ordinances.<sup>165</sup> Arguably, the intent of the law when originally written was unconstitutionally overbroad. Perhaps the Court should have given the Town Board an opportunity to rewrite it. As Justice Black observed in his concurring opinion in *Gregory v. City of Chicago*,<sup>166</sup> “[n]arrowly drawn statutes regulating the conduct of demonstrators and picketers are not impossible to draft.”<sup>167</sup>

The Supreme Court encountered in *Frisby v. Schultz*<sup>168</sup> a classic confrontation between the privacy rights of citizens in their homes and the first amendment rights of picketers to free expression. With picketing regaining popularity as a means for effecting social change, especially among groups such as pro-life and gay rights activists, courts will continue to be confronted with the difficult task of dispassionately balancing competing interests. At best, *Frisby* represents a very fragile compromise between residential privacy and free speech.

*E. Gregory Wallace*

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165. See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (the Court's duty is to “extrapolate its allowable meaning” since it is not within Court's power to construe and narrow state laws). The Eighth Circuit cautiously followed the *Frisby* example in narrowly construing a provision of the Nebraska mass picketing statute to avoid unconstitutionality. However, the court refused to rewrite the broad straightforward language of another provision of the same statute in light of its legislative and enforcement history. *United Food and Commercial Workers Local 222 v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988).

166. 394 U.S. 111 (1969).

167. *Id.* at 124 (Black, J., concurring).

168. 108 S. Ct. 2495 (1988).