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DESPITE THE BEST OF INTENTIONS: PROHIBITING PROTESTS AT MILITARY FUNERALS AND THE FIRST AMENDMENT

*Robyn Bowland**

In 2006, the United States Congress considered and passed two bills prohibiting protests and picketing near military funerals.¹ Many senators and representatives were shocked that service members and their families needed such legislation to protect the funerals of deceased service members.² In the first bill passed, the Respect for America's Fallen Heroes Act,³ Congress encouraged states to pass similar legislation prohibiting demonstrations at military funerals. Many states followed Congress' advice and passed their own laws restricting protests at funerals. Despite the heartfelt desire of many lawmakers to protect the dignity of military funerals, these laws raise legitimate First Amendment concerns. Part I of this Note will describe the circumstances surrounding the current protests at military funerals. Part II will describe some of the laws passed in an attempt to restrict these protests. Part III will provide an overview of First Amendment law. In Part IV, this Note will examine the constitutional validity of the laws against protests at military funerals. Part V will examine the effect these laws have on protesters. Part VI will discuss possible alternatives to statutory restrictions on protests at military funerals. This Note will conclude that the laws against protesting at military funerals are constitutionally suspect; more importantly these laws are poorly conceived because they give the protesters an even greater opportunity to use military funerals for the protesters' own publicity purposes.

I. BACKGROUND

In order to fully understand the controversy surrounding protests at military funerals, one must know some background information regarding the protesters, the non-legislative response to the protesters, and the importance of the military funeral

* Robyn Bowland received her J.D. from Notre Dame Law School, *magna cum laude*, in 2008. She received a B.S. in Mechanical Engineering from the United States Military Academy in 2000. She would like to thank Carolyn Blessing for her patient editing and the members of the Journal of Legislation for their assistance and hard work preparing this Note for publication. This Note is dedicated to the members of the Long Gray Line who died while fighting the global war on terrorism.

1. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (2006); Respect for the Funerals of Fallen Heroes Act, Pub. L. No. 109-464, 120 Stat. 3480 (2006).

2. "It is sad that such legislation is needed, but these protesters have been malicious and hateful to these families, who are bearing the brunt of this war." *Cost-Of-Living Adjustment Act and Other Veterans Bills: Hearing on H.R. 5037 Before the Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On H. Veterans Affairs*, 109th Cong. 52-53 (2006) (statement of Rep. Silvestre Reyes). "Although I am glad to have the opportunity to support the service members in my home state of Kansas and around the world, I am disappointed that we even need this bill." 152 CONG. REC. H2199, 2207 (daily ed. May 9, 2006) (statement of Rep. Ryun).

3. Respect for America's Fallen Heroes Act § 1381.

generally.

A. *The Protesters: The Westboro Baptist Church*

The Westboro Baptist Church is located in Topeka, Kansas.⁴ Although it is a small church of approximately sixty to seventy members, comprised almost entirely of the extended family of Fred Phelps, it has incited controversy and disgust by protesting at the funerals of service members killed in Iraq and Afghanistan.⁵ The message of the protests is even more disturbing for lawmakers and family members of the deceased service members.

The Church has conducted what it calls a “protest ministry” for the past fifteen years.⁶ This ministry involves protesting at military funerals, high-profile funerals of homosexual individuals, and natural disasters.⁷ The protesters hold signs that read, “God Hates Fags,” “Semper Fi Semper Fag,”⁸ and “Thank God for dead soldiers.”⁹ The members of the Church believe that the deceased at the funerals they protest died as a result of God’s retribution for the United States’ toleration of homosexuality.¹⁰ Fred Phelps, the Church’s founder, is remarkably blunt when discussing the protests. When asked why he and his followers did not feel that mourners at a funeral deserve empathy, he responded, “What I’m sorry about . . . is that they raised their children for the devil in hell . . . I’m saying to those people, ‘If your boy, your dead soldier son, could come back to earth and talk to you, what he would tell you is, listen to Phelps.’”¹¹ Unlike many other churches, the Westboro Baptist Church does not preach a message of hope. “This nation has ticked off the Almighty, and it’s too late to repent,” according to Phelps.¹² “The group believes that anyone who dies of anything other than natural causes . . . has been ‘cut off by God before their time and . . . they deserved to die and are in Hell.’”¹³

Just as the Westboro Baptist Church recently added protests at military funerals to its “protest ministry,”¹⁴ it seems that the church has added a new target to its list. At the funeral of Lance Corporal Philip J. Martini on April 19, 2006, protesters held up

4. Molly McDonough, *Picket Fencing: Laws Blunting Church’s Protests Worry First Amendment Experts*, A.B.A. J. July 2006, at 16.

5. *Id.*

6. *Id.*

7. The Westboro Church picketed the funeral of Matthew Shepard in 1998 and a memorial service for miners killed in a mining accident in January 2006. Judy Keen, *Funeral Protesters Say Laws Can’t Silence Them; Their Belief: Troops Dying Because USA Tolerates Gays*, USA TODAY, Sept. 14, 2006, at 5A.

8. McDonough, *supra* note 4, at 16.

9. Dave McKinney, *Did Anti-gay Church Have Rights Violated?: Funeral Protest Law Could Face ACLU Challenge*, CHI. SUN TIMES, Oct. 6, 2006, at 3. Other notable signs include: “God Hates Your Tears,” “Soldiers Die, God Laughs,” and “Thank God for 9/11.” Michael Sangiacomo, *Preaching Pain; Sect Damns America and Its Heroes*, PLAIN DEALER, Dec. 8, 2006 at B9.

10. McDonough, *supra* note 4. Protesting the United States’ tolerance of homosexuality at military funerals is particularly ironic considering the U.S. government’s policy on homosexuals in the military. The “Don’t Ask, Don’t Tell” policy forces members of the military who are homosexual to keep their sexual orientation secret. Failure to do so would lead to discharge from military service. 10 U.S.C.A. § 654 (2007).

11. Keen, *supra* note 7.

12. *Id.*

13. Sangiacomo, *supra* note 9.

14. Protests at military funerals began in June 2005. Keen, *supra* note 7.

signs reading “God Hates Cripple Soldiers” and “Thank God for Maimed Soldiers.” They planned to use those signs during a protest outside of a nearby Veteran’s Administration Hospital the next day.¹⁵ According to Representative Silvestre Reyes, the Church planned additional protests outside Walter Reed Army Medical Center and other medical facilities for severely injured soldiers.¹⁶

B. *The Response: The Patriot Guard Riders*

The Patriot Guard Riders is an organization that formed in the fall of 2005 in response to the Westboro Baptist Church’s protests at military funerals. The group is made up of several different motorcycle groups, and rides at military funerals. The primary purpose of the Patriot Guard Riders is to use their motorcycles’ engines to drown out the shouts of the Westboro protesters and draw attention away from the protesters. Often fifty to one hundred bikers show up at a funeral, holding flags and sometimes leading the funeral procession. Kurt Mayer, one of the founding members of the group, said that the Patriot Guard works through military officers to get permission from the family to ride at the funeral before the service.¹⁷

The Patriot Guard’s response to the protests at military funerals occurred before Congress took action to prohibit protests near military funerals. Many of the congressmen who worked on the Respect for America’s Fallen Heroes Act praised the members of the Patriot Guard even as they worked to outlaw demonstrations near military funerals.¹⁸ The Senate even passed a resolution commending the Patriot Guard for protecting military funerals from the Westboro Baptist Church’s protests.¹⁹

C. *The Military Funeral*

Why is the government so concerned about protecting the funerals of service members who died in Iraq or Afghanistan? The government does have an interest in protecting the sanctity of funerals generally.²⁰ However, based upon the response to protests at military funerals (as opposed to other funerals or memorial services for homosexual individuals or victims of disasters),²¹ it seems that most Americans regard the funerals of service members with more reverence and feel the need to protect military funerals more urgently.

15. McDonough, *supra* note 4, at 16.

16. *Cost-Of-Living Adjustment Act and Other Veterans Bills: Hearing on H.R. 5037 Before the Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On H. Veterans Affairs*, 109th Cong. 52–53 (2006) (statement of Rep. Reyes).

17. Alan Feuer, *Revsing their Engines, Remembering a War’s Toll*, N.Y. TIMES, May 29, 2006, at B1.

18. 152 CONG. REC. H2199, 2203 (daily ed. May 9, 2006) (statement of Rep. Miller).

19. S. Res. 535, 109th Cong., 152 CONG. REC. S7767-01 (daily ed. July 18, 2006) (enacted).

20. See 152 CONG. REC. H2199-01, 2204 (daily ed. May 9, 2006) (statement of Rep. Reyes) (“It is just not appropriate. And somewhere along the line they didn’t learn the lesson that they should not intrude on somebody’s private time to grieve and be at peace . . .”). See also 2006 Ky. Rev. Stat. & R. Serv. 90 (West) (preamble to Kentucky’s statute against protests at funerals, “Whereas, all mourners should be left in peace . . .”).

21. See Keen, *supra* note 7 (describing protests at Matthew Sheperd’s funeral and the memorial service for the West Virginia miners in 2006).

One possible reason for this reverence is the role military funerals and honoring our military dead plays in the country's psyche. Identifying and burying soldiers during wartime has always been difficult, yet Americans have gone to great lengths to ensure that their dead are treated honorably.²² During World War I, trench warfare and the massive number of casualties incurred at one time made it very difficult to recover bodies, identify them, and bury them. The British chose to bury all of their soldiers where they lay and issued a General Order prohibiting any soldier's body from being recovered and brought home for burial. The Americans found this method of dealing with their military dead unacceptable and expended considerable time and effort to recover, identify, and bury their dead with honor.²³ However, despite the effort that Americans exert in recovering and identifying their military dead, some recovered soldiers' bodies remain unidentifiable. The desire to honor those that the nation could not identify and bury in a marked grave resulted in the establishment of the Tomb of the Unknowns in Arlington National Cemetery.²⁴

Another possible reason for the importance Americans attach to military funerals is the concern of the surviving members of the military family.²⁵ For example, a full uniform is placed on a deceased service member's remains even when the remains are not in a viewable condition.²⁶ Additionally, the military funeral is a strong symbol of the "respectful and reverent relationship between the comrades of the deceased and the grieving family."²⁷ No matter what reason is given for the significance of military funerals in American life, it is apparent that protecting the reverence of the military funeral was an important goal of Congress when it passed the statutes prohibiting protests at funerals.²⁸

II. STATUTES AGAINST PROTESTS AT FUNERALS

In response to the outcry over protests at military funerals, Congress and some state legislatures have passed legislation aimed at prohibiting demonstrations at funerals. Some of these statutes restrict demonstrations only at military funerals while others

22. There is "no more honor paid to Soldier Dead than to find them, identify them when possible, and then set aside land for a graveyard in which they are buried." MICHAEL SLEDGE, *SOLDIER DEAD* 202 (2005).

23. *Id.* at 183.

24. *Id.* at 211.

25. The members of the military treat their deceased members with the utmost respect, even when they must bury them on the battlefield. A poem by Walt Whitman (who treated the injured during the Civil War) describes a soldier's burial of his friend:

My comrade I wrapt in his blanket, envelop'd well his form,
Folded the blanket well, tucking it carefully over head and carefully under feet . . .
I rose from the chill ground and folded my soldier well in his blanket,
And buried him where he fell.

Id. at 190-91 (quoting Walt Whitman, *Vigil Strange I Kept on the Field One Night*).

26. A full uniform with all awards is prepared and pinned to a blanket covering the service member's remains. *Id.* at 225.

27. SLEDGE, *supra* note 22, at 235.

28. "Words like 'reprehensible' and 'disgusting' simply do not adequately describe the slogans or this stunt on such a solemn occasion. The men and women who have given what Lincoln called 'the last full measure of devotion' deserve better than this." 152 CONG. REC. H2199, 2203 (daily ed. May 9, 2006) (statement of Rep. Kennedy).

restrict demonstrations at all funerals. The time and place restrictions placed upon protesters also vary from statute to statute. Despite their differences, legislatures arguably passed all of these statutes in response to the Westboro Baptist Church protests. The following section describes the two federal statutes against protests at military funerals, as well as a selection of three state statutes that restrict protests at funerals.

A. Federal Statutes

1. Respect for America's Fallen Heroes Act

The Respect for America's Fallen Heroes Act prohibits demonstrations in federal cemeteries without the approval of the cemetery superintendent.²⁹ Additionally, the Act restricts demonstrations near³⁰ federal cemeteries for one hour before, after, and during a funeral.³¹ The Act defines demonstrations as picketing, oration or speech that is not part of the funeral ceremony, displaying any placard or banner, and distributing handbills other than funeral programs.³² Finally, the Act encourages the states to pass their own legislation protecting all military funerals in that state.³³ As noted below, several states have taken Congress' advice and passed legislation prohibiting demonstrations at funerals.

President George W. Bush signed the Respect for America's Fallen Heroes Act into law on May 29, 2006. The demonstrations at service members' funerals, mentioned above, prompted Congress to introduce and pass the law. Representative Steve Buyer, Chairman of the Committee on Veterans' Affairs, recognized the protesters' role in motivating the legislation by discussing the protests on the House floor.³⁴ Other members of the House also specifically noted the Westboro Baptist Church in their remarks. Representative Solomon Ortiz stated, "I was horrified that members of Topeka, Kansas, based Westboro Baptist Church were verbally abusing and interrupting the funerals of service members who gave the last full measure of devotion to this Nation."³⁵ Minority Leader Nancy Pelosi also issued a statement that read in part, "Americans may debate and disagree about foreign and domestic policy. This is the

29. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, § 2413(a)(1), 120 Stat. 387 (2006).

30. The specific distance provisions of the bill restrict demonstrations within 150 feet of a route of ingress or egress from the cemetery that include individuals making noise or causing a diversion or demonstrations within 300 feet of a route of ingress or egress that impede access to the cemetery. Respect for America's Fallen Heroes Act §2413(a)(2).

31. *Id.*

32. Respect for America's Fallen Heroes Act § 2413(b).

33. Respect for America's Fallen Heroes Act § 1387.

34. Representative Buyer (IN) reminded the House of his remarks on March 2, 2006, in which he relayed the experiences of Sergeant Ricky Jones' mother who received a phone call in which the caller told her they were thankful her son had died. 152 CONG. REC. H2199, 2200 (daily ed. May 9, 2006) (statement of Rep. Buyer). Additionally, several other members of the House noted their own experiences with funeral protesters from the Westboro Baptist Church. Representative Bartlett (MD) noted that six protesters attended Lance Corporal Matthew Snyder's funeral carrying signs and chanting "Thank God for dead soldiers." *Id.* at 2203 (statement of Rep. Bartlett).

35. *Id.* at 2207 (statement of Rep. Ortiz).

essence of our democracy. But when it comes to our military men and women, America must stand united and honor them as the heroes that they are.”³⁶

The remarks on the Senate floor discussing the bill after its passage in the House also alluded to the Westboro Baptist Church’s role in affecting the legislation. Senator Larry Craig was referring to the Westboro Baptist Church when he stated, “The fringe group responsible for these demonstrations believes that 2,752 of our Nation’s finest have lost their lives in defense of America because, unbelievably, God is exacting His revenge on the United States for its permissive laws respecting homosexuality.”³⁷ Additionally, Senator Bill Frist, after the passage of the bill in the Senate, said, “We may never understand what compels a small group of small minded and mean hearted people to harass a family in mourning.”³⁸ Both the House of Representatives and the Senate had the Westboro Baptist Church in mind when they passed the Respect for America’s Fallen Heroes Act. More importantly, the members of Congress were not shy about stating their disapproval for the method and message of the Church.

Members of Congress also outlined the purpose of the Respect for America’s Fallen Heroes Act. Representative Steve Chabot, a co-sponsor of the bill, remarked, “Two 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 fight to uphold the Constitution.”³⁹ Representative Mike Rogers also expounded upon the purpose of the bill. He stated that “American military men and women, who give their lives in service to the nation, deserve to be buried peacefully and with dignity.”⁴⁰ The purpose of the Respect for America’s Fallen Heroes Act, as outlined by Congress, is to protect military funerals from protests Congress finds unacceptable, as exemplified by the Westboro Baptist Church.

2. Respect for the Funerals of Fallen Heroes Act

The Respect for the Funerals of Fallen Heroes Act prohibits demonstrations at funerals of all members or former members of the Armed Forces.⁴¹ The Act essentially applies the same restrictions of the Respect for America’s Fallen Heroes Act to all military funerals not conducted on federal cemetery lands.⁴² Unlike the Respect for America’s Fallen Heroes Act, the Respect for the Funerals of Fallen Heroes Act

36. *Id.* at 2203 (statement of Rep. Pelosi).

37. 152 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig).

38. *Id.* at 5130 (statement of Sen. Frist).

39. *Cost-Of-Living Adjustment Act and Other Veterans Bills: Hearing on H.R. 5037 Before the Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On H. Veterans Affairs*, 109th Cong. 46–48 (2006) (statement of Rep. Steve Chabot).

40. *Cost-Of-Living Adjustment Act and Other Veterans Bills: Hearing on H.R. 5037 Before the Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On H. Veterans Affairs*, 109th Cong. 44–45 (2006) (statement of Rep. Mike Rogers).

41. Respect for the Funerals of Fallen Heroes Act, Pub. L. No. 109-464, § 1388, 120 Stat. 3480 (2006).

42. *Id.* Respect for the Funerals of Fallen Heroes Act § 1388. The Respect for the Funerals of America’s Heroes Act uses the same distance restrictions as the Respect for America’s Fallen Heroes Act, but redefines routes of ingress or egress as the intersection between the boundary line of the funeral and a route of ingress or egress. See Respect for America’s Fallen Heroes Act, Pub. L. No. 109-228, § 2413(a), 120 Stat. 387 (2006).

restricts speech that does not necessarily occur on federal land.⁴³ One possible constitutional concern with the Respect for the Funerals of Fallen Heroes Act is the source of Congress' power to pass this legislation. Members of the Senate claimed the power to enact this legislation through Congress' power to raise and support armies.⁴⁴ The Respect for the Funerals of Fallen Heroes Act might be subject to a constitutional challenge which claims that Congress lacked the power to act because military funerals neither raise nor support armies. A discussion of Congress' power, or lack of power, to enact the Respect for the Funerals of Fallen Heroes Act under Article I Section 8 is beyond the scope of this Note.

It seems that Members of Congress also passed the Respect for the Funerals of Fallen Heroes Act in response to the activities of the Westboro Baptist Church. Senator Richard Durbin, who introduced the bill along with three other senators, noted that the Respect for the Funerals of Fallen Heroes Act was necessary because some of the statutes States passed in the wake of the Respect for America's Fallen Heroes Act were constitutionally suspect and likely to be struck down as unconstitutional.⁴⁵ Senator Evan Bayh noted that the protesters at military funerals, along with their message, were the impetus for the Act: "The protesters who have tried to disrupt funerals in Indiana and elsewhere represent the worst. This legislation will provide needed protection to all our servicemembers and veterans, regardless of where they are laid to rest."⁴⁶ On the floor of the House, Representative Chris Cannon, while introducing the bill previously passed in the Senate, mentioned the Westboro Baptist Church and their protest activities specifically.⁴⁷ Despite the Act's general applicability as written, it seems clear that Congress passed the Respect for the Funerals of Fallen Heroes Act in an attempt to restrict the Westboro Baptist Church's protests at military funerals. Some state statutes passed in an attempt to restrict the Westboro Baptist Church's protests were less carefully worded than the Federal statutes.

B. State Statutes

1. Kentucky

The Kentucky statute is already under Constitutional assault.⁴⁸ Kentucky's statute prohibits demonstrations and other "unreasonable noise" within 300 feet of a cemetery

43. A funeral that does not occur on federal cemetery land would most likely occur in a private church, funeral home, or on the lands of a private cemetery.

44. 152 CONG. REC. S10682, 10746 (daily ed. Sept. 29, 2006) (statement of Sen. Durbin). Congress' constitutional power to raise and support armies is found in Article I, Section 8 of the United States Constitution. U.S. CONST. art. I, § 8.

45. 152 CONG. REC. S10682, 10745 (daily ed. Sept. 29, 2006) (statement of Sen. Durbin). See *supra* Part IV.B. for a discussion of the constitutionality of some state statutes restricting speech at military funerals.

46. *Sens. Durbin, Chambliss, Bayh, Conrad Introduce Bi-Partisan Respect for Funerals of Fallen Heroes Act*, U.S. FED NEWS, Oct. 2, 2006.

47. 152 CONG. REC. H9198, 9198 (daily ed. Dec. 8, 2006) (statement of Rep. Cannon).

48. Deborah Yetter, *Funeral Protest Law Blocked*, THE COURIER-J., Sep. 27, 2006, at 1B. See *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (holding provisions of state law barring visual and auditory displays and literature distribution near funerals unconstitutional).

during a funeral, funeral home during viewing, funeral procession, or memorial service with knowledge of the presence of the event.⁴⁹ Additionally, the statute prohibits blocking or impeding access to or from a funeral and making noise or distributing literature without the authorization of the deceased or the person conducting the funeral.⁵⁰ Finally, in its preamble, the statute notes that “certain despicable individuals have been disrupting the funerals of soldiers who died while serving in the United States Armed Forces . . . [and] the military dead and their families deserve respect and compassion”⁵¹ Thus, the stated purpose of Kentucky’s statute, despite its effect of prohibiting demonstrations at all funerals, is to prohibit demonstrations at military funerals.

2. Michigan

Michigan’s statute stands out because of its distance-based restrictions and because it imposes a harsh punishment. Michigan outlaws all loud noises, intimidating gestures, or any other conduct that would reasonably disturb or disrupt a funeral within 500 feet of a funeral procession or burial.⁵² The 500 foot prohibition around the entire funeral is substantially larger than the federal 150 and 300 foot restrictions at ingress and egress points. This opens the statute to challenge as an unreasonable restriction on speech. Also, violations of most state statutes and the federal statutes restricting funeral protests are punished as misdemeanors.⁵³ In contrast, a violation of the Michigan statute is a felony punishable by two years of imprisonment and/or a \$5,000 fine. A second violation of Section 167(d) could result in four years of imprisonment and/or a \$10,000 fine.⁵⁴

3. Minnesota

Minnesota’s statute is unique because it restricts picketing outside a family member’s home in addition to protests or picketing within 500 feet of a funeral or burial site.⁵⁵ The Minnesota statute also provides a civil remedy to surviving family members of the deceased. The relief allowed under the statute includes monetary damages, injunctive relief, and other appropriate remedies. A prevailing plaintiff may also recover attorney’s fees.⁵⁶

The statutes passed by the States in response to the protests and Congress’ invitation are of varying constitutional validity. The statutes reflect the States’ attempts

49. KY. REV. STAT. ANN. § 525.055(1) (West 2007).

50. *Id.*

51. 2006 Ky. Rev. Stat. & R. Serv. 90 (West).

52. MICH. COMP. LAWS ANN. § 750.167d (West 2006). Making loud noises is proscribed only if the loud noises continue after being asked to stop. *Id.*

53. See Respect for America’s Fallen Heroes Act, Pub. L. No. 109-228, § 1387, 120 Stat. 387 (2006); Respect for the Funerals of Fallen Heroes Act, Pub. L. No. 109-464, § 1388(b), 120 Stat. 3480 (2006); KY. REV. STAT. ANN. §§ 525.055(2), 525.145(2), 525.155(2) (West 2007); MINN. STAT. ANN. § 609.501(2) (West 2007).

54. MICH. COMP. LAWS ANN. § 750.168(2)(b) (West 2006).

55. MINN. STAT. ANN. § 609.501(2) (West 2006).

56. MINN. STAT. ANN. § 609.501(3) (West 2006).

to modify the basic idea of the federal statutes to make them more effective. Punishing violations of the statutes as felonies and allowing civil remedies for violations may make the state statutes more effective. However, as restrictions on speech, all statutes against protests at funerals are subject to scrutiny under the First Amendment.

III. OVERVIEW OF FIRST AMENDMENT LAW

The First Amendment of the United States Constitution forbids Congress from making a law that “abridg[es] the freedom of speech.”⁵⁷ Historically, the Supreme Court of the United States and other federal courts have interpreted this statement to allow for restriction of freedom of speech in certain essential situations. Thus, determining whether or not a statute runs afoul of the First Amendment’s protection of free speech is more complicated than simply determining whether or not it restricts speech.

A. *Content-Based vs. Content-Neutral Restrictions*

The first determination a court must make when considering a claim based on the government’s restriction of free speech is whether the restriction is content-based or content-neutral. The Supreme Court has dictated a much more stringent test for content-based speech than content-neutral speech,⁵⁸ due to a concern that allowing the government to restrict speech based on its content is more prone to abuses when restricting the message of dissident groups.⁵⁹ However, the distinction between content-based and content-neutral speech is not a bright-line distinction.

In order for a restriction to be content-neutral, the restriction must be both viewpoint neutral and subject matter neutral.⁶⁰ Thus, a restriction based on the message espoused or the topic of the speech is not content-neutral. For example, a law passed by Congress specifically forbidding any anti-war activist from protesting at a service member’s funeral would be viewpoint restrictive and therefore content-based. Similarly, a law forbidding all protests regarding the political policies of an ongoing war (either for or against the war) would be subject matter restrictive and therefore content-based.

The Supreme Court has determined that some facially content-based restrictions are content-neutral because of their underlying purpose.⁶¹ In *Renton v. Playtime Theaters*, the Court determined that the City of Renton’s zoning restriction forcing adult theaters to locate a specified distance from buildings such as schools and churches, was content-neutral because the law was aimed at controlling the secondary effects of adult theaters rather than the message or topic of the theaters themselves.⁶²

The more difficult question is whether the courts would deem a facially content-

57. U.S. CONST. amend. I.

58. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

59. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICES* 903 (2d ed. 2002).

60. *Id.* at 904.

61. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986).

62. *Id.*

neutral law content-based due to its underlying purpose. The decision in *Renton*, by focusing on the purpose of the underlying law, seems to indicate that the Supreme Court would be amenable to this argument.⁶³ However, the Court's later decision in *Hill v. Colorado*⁶⁴ seems to reject this view. In *Hill*, a state statute prohibited approaching⁶⁵ another person within one hundred feet of a healthcare facility for the purpose of "passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person"⁶⁶ Although facially content-neutral, the statute was meant to restrict the ongoing activities of anti-abortion protesters.⁶⁷ The Supreme Court found that the law was content-neutral because it was facially content-neutral and its stated underlying purpose, to protect those entering the abortion clinics, was its actual purpose.⁶⁸ Additionally, the statute allowed stationary protests, including the display of signs, chanting, and shouting near abortion clinics. The statute only restricted approaching those entering the abortion clinics.⁶⁹

Although *Hill* seems to reject the position that a facially content-neutral law could be content-based in light of its underlying purpose, *Hill* may not have been the best test for this position. First, the very abusive nature of some of the "sidewalk counselors" could adversely affect the health of the women entering the abortion clinic.⁷⁰ Additionally, the statute only restricted approaching people as they entered the abortion clinic, not all protests generally.⁷¹ A law which restricts behavior that is not physically aggressive or detrimental to the listener's health and restricts all protests generally would be a better statute for considering whether a facially content-neutral law becomes content-based in light of its underlying purpose. Once a court decides whether a restriction is content-based or content-neutral, it must apply the proper standard to evaluate the restriction.

B. The Test for Content-Based Restrictions

If a court determines that a restriction is content-based, it must apply the strict scrutiny standard to the statute. In order to survive the strict scrutiny test, the court must determine that the legislation is "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."⁷² Additionally, the actions the legislature takes must be the least

63. *Id.*

64. *Hill v. Colorado*, 530 U.S. 703 (2000).

65. The statute defined "approaching" as being within eight feet of the other person. *Id.* at 707 (citing COLO. REV. STAT. § 18-9-122(3) (1999)).

66. *Id.*

67. *Id.* at 709–10. The purpose of the statute, according to the State of Colorado's reply, was to provide patients entering abortion clinics with protection from protests which had sometimes become confrontational and blocked access to the clinics. Colorado also provided evidence that some "sidewalk counselors" had used strong and abusive language and pictures of bloody fetuses. *Id.*

68. *Id.* at 719–20.

69. *Id.* at 738 (Souter, J., concurring).

70. *Hill*, 530 U.S. at 709–10 (majority opinion).

71. *Id.* at 738 (Souter, J. concurring).

72. *Carey v. Brown*, 447 U.S. 455, 461–62 (1980).

restrictive means of effecting its purpose.⁷³ As a practical matter, it is very difficult for a content-based restriction to meet the strict scrutiny requirement.

C. *The Test for Content-Neutral Restrictions*

If a court determines that a restriction is content-neutral, it must determine where the restriction is occurring and then apply the appropriate test. The three area categories are public forums, non-public forums, and private property.

1. Public Forums

The Supreme Court has defined public forums as the traditional forums of free speech. These forums include sidewalks and public parks.⁷⁴ In order for a statute that restricts freedom of speech in public forums to be constitutional, it must represent a “reasonable time, place or manner restriction,”⁷⁵ be narrowly tailored to achieve the government’s purpose, and leave open a sufficient number of other channels with which to convey the message.⁷⁶ Additionally, if the statute includes a licensing requirement, the statute must provide criteria for the licensor that contain “narrow, objective, and definite standards to guide the licensing authority.”⁷⁷

2. Non-Public Forums

The Supreme Court has also recognized that certain property, although owned by the United States government, constitutes a non-public forum (not a traditional forum of free speech) and may, therefore, be closed to speech as long as the restriction on speech is reasonable and viewpoint neutral.⁷⁸ The purpose of the property seems to determine whether it is a public or non-public forum. For example, in *Greer v. Spock*⁷⁹ the Court determined that military bases are non-public forums, even if generally open to the public, because the purpose of a military base is training soldiers, not providing forums for free speech.⁸⁰ The Court has determined that other government-owned properties are also non-public forums in other cases. These properties include areas around prisons and jails,⁸¹ utility poles,⁸² the Combined Federal Campaign,⁸³ post office

73. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

74. *CHEMERINSKY*, *supra* note 59, at 1086.

75. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

76. *Id.*

77. *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1968)).

78. *CHEMERINSKY*, *supra* note 59, at 1097.

79. *Greer v. Spock*, 424 U.S. 828 (1976).

80. *Id.* at 831.

81. *See Adderly v. Florida*, 385 U.S. 39 (1966).

82. *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

83. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788 (1985). The Combined Federal Campaign is an annual campaign which solicits contributions from federal employees for specified charitable organizations. The case concerned an Executive Order which limited solicitation of federal employees on behalf of charitable organizations during working hours to the Combined Federal Campaign (which excluded legal defense organizations). *Id.* at 790–95.

properties,⁸⁴ airports,⁸⁵ and government-owned television stations.⁸⁶

3. Private Property

In general, there is no right to free speech on private property.⁸⁷ However, the Supreme Court has decided that states may apply the constitutional right of free speech to access to shopping centers.⁸⁸ With that being said, this decision seems to limit disputes relating to the right of free speech on private property to shopping centers.

Armed with a basic understanding of First Amendment law, this Note will now examine the constitutionality of the statutes against protests at funerals.

IV. CONSTITUTIONAL CONCERNS REGARDING STATUTES AGAINST PROTESTS AT FUNERALS

As discussed in Part III, any abridgment of the freedom of speech invokes First Amendment concerns. All of the statutes prohibiting demonstrations at military funerals abridge the freedom of speech by restricting the ability of demonstrators to convey their message in the manner and place they choose. The next section discusses the constitutionality of the statutes previously described in Part II, beginning with the federal statutes.

A. Federal Statutes

1. Respect for America's Fallen Heroes Act

As of the writing of this Note, the Respect for America's Fallen Heroes Act had not been challenged in court. There could be a few reasons for this. First, only a fraction of military funerals occur on federal cemetery land.⁸⁹ Second, the Act became law fairly recently.⁹⁰ Finally, a court would most likely consider a federal cemetery non-public land under the standard for content-neutral speech restrictions; therefore, a much less stringent test would apply. However, if there were a challenge to the law, a court's characterization of the restriction as content-neutral or content-based would determine the constitutionality of the statute.

84. See *United States v. Kokinda*, 497 U.S. 720 (1990).

85. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

86. See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

87. *Hudgens v. Nat'l Labor Relations Bd.*, 424 U.S. 507, 519 (1976) (quoting *Lloyd Corp. Ltd. v. Tanner*, 407 US 551, 567 (1972)).

88. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

89. Approximately 650,000–700,000 funerals occur annually for service members and military veterans. Approximately 90,000 of those funerals occur in federal cemeteries. *Sens. Durbin, Chambliss, Bayh, Conrad Introduce Bi-Partisan Respect for Funerals of Fallen Heroes Act*, *supra* note 46.

90. The President signed the Respect for America's Fallen Heroes Act into law on May 29, 2006. Pub. L. No. 109-228, 120 Stat. 387 (2006).

a. *The Content-Neutral Restriction Argument*

The Respect for America's Fallen Heroes Act is facially content-neutral. Several lawmakers pointed out that the language of the bill parroted language that the Supreme Court had already determined was constitutional and content-neutral.⁹¹ Some legal scholars also consider the law content-neutral and constitutional.⁹² Additionally, the law is facially content-neutral because it disallows all protests near military funerals on federal cemeteries, regardless of their message or topic.⁹³

A court's first consideration when analyzing a speech restriction on public land is where the restriction occurs. As noted above, certain areas of public land are traditionally the forum for free speech, and the government may only restrict speech in those areas if the restrictions are "reasonable [in] time, place, or manner",⁹⁴ are narrowly tailored to the government's purposes, and leave open adequate alternate channels of communication.⁹⁵ If the area is considered a non-public forum, free speech may be restricted as long as the restriction is reasonable and content-neutral.⁹⁶

It is likely that a court would determine that federal cemeteries are non-public areas, and therefore, the government may restrict free speech as long as the restriction is reasonable and content-neutral. Federal cemeteries are not similar to public parks or sidewalks, which the Supreme Court previously determined are traditional public forums.⁹⁷ Federal cemeteries are best analogized with military installations.⁹⁸ Just as a military base's primary purpose is the training of service members, a federal cemetery's primary purpose is providing a final resting place for service members. Because the primary purpose of a federal cemetery is not conducive to protests, Congress may determine that it is reasonable to prohibit protests on federal cemetery land as long as it does so in a content-neutral manner. Thus, unless opponents of the Respect for America's Fallen Heroes Act can make a viable argument that the statute is actually a content-based restriction, courts would most likely uphold the Act as constitutional.

91. The language of the Respect for America's Fallen Heroes Act comes directly from *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1315 (Fed. Cir. 2002) and *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972). The Supreme Court upheld the language as constitutional in both cases. *Cost-Of-Living Adjustment Act and Other Veterans Bills: Hearing on H.R. 5037 Before the Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On H. Veterans Affairs*, 109th Cong. 46–48 (2006) (statement of Rep. Steve Chabot).

92. David Forte, Professor of Law at Cleveland-Marshall College of Law, supplied written testimony to the Subcommittee on Disability Assistance and Memorial affairs which was later read into the Congressional Record. Prof. Forte concluded that the Act was content-neutral and the restrictions were reasonable in time, place and manner. See 152 CONG. REC. H2199, 2205-07 (daily ed. May 29, 2006) (entire text of Prof. Forte's legal analysis as read into the Congressional Record).

93. 152 CONG. REC. H2199, 2206 (daily ed. May 29, 2006).

94. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

95. *Id.*

96. CHEMERINSKY, *supra* note 59, at 1097.

97. *Id.* at 1086.

98. See *Greer v. Spock*, 424 U.S. 828 (1976) for a discussion of military installations and their status as non-public forums for speech.

b. The Content-Based Restriction Argument

As noted above, the Respect for America's Fallen Heroes Act is facially content-neutral. This facial content-neutrality was espoused by lawmakers and confirmed by legal scholars.⁹⁹ However, the remarks made by lawmakers in the Houses of Congress open the door to the admittedly difficult argument that, although the statute is facially content-neutral, its underlying purpose is content-based.¹⁰⁰ The sharply different treatment of the Westboro Baptist Church protesters and the Patriot Guard Riders, both arguably conducting demonstrations near military funerals, supports this argument.

Members of Congress, when discussing the Respect for America's Fallen Heroes Act, often referred to the Westboro Baptist Church demonstrations at military funerals as the underlying reason for the Act. Senator Frist called the members of the church "a small group of small minded and mean hearted people."¹⁰¹ Representative Reyes specifically cited protesters carrying signs reading "Thank God for IED's" and "Thank God for Dead Soldiers" at military funerals as the reason for the introduction of the Respect for America's Fallen Heroes Act.¹⁰² Representative Ortiz named the Westboro Baptist Church in his remarks on the House floor during deliberations.¹⁰³ These remarks on the floors of the House and Senate reflect the members' disdain for the activities of the Westboro Baptist Church.

Contrast the members' derisive remarks about the Westboro Baptist Church with their remarks concerning the Patriot Guard riders:

I also want to take this moment to thank the National Commander Jeff Brown of the Patriot Guard Riders. These are individuals that saw an injustice and said that we will not permit people to dance on sacred ground and we will not wait for the government to act. We will defend these families and set the standards of dignity in our country with regard to military funerals.¹⁰⁴

In addition, the Senate passed a resolution commending the Patriot Guard Riders for "preserving the memory of fallen service members and for preserving the dignity of their funerals."¹⁰⁵

The Patriot Guard's activities are most likely considered to be demonstrations

99. See *Cost-Of-Living Adjustment Act and Other Veterans Bills: Hearing on H.R. 5037 Before the Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On H. Veterans Affairs*, 109th Cong. 6-8 (2006) (opening statement of Rep. Chabot); 152 CONG. REC. H2199, 2205-07 (daily ed. May 9, 2006) (entire text of Prof. Forte's legal analysis as read into the Congressional Record).

100. For a discussion of the viability of this argument see *supra* Part III.A. The difficulty of the argument is demonstrated by the fact that at least one federal court has already decided that the Respect for America's Fallen Heroes Act is content-neutral when considering a motion for a preliminary injunction. *Phelps-Rober v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437, at *2 (W.D. Mo. Jan. 26, 2007).

101. 152 CONG. REC. S5129, 5130 (daily ed. May 24, 2006) (statement of Sen. Frist).

102. *Cost-Of-Living Adjustment Act and Other Veterans Bills: Hearing on H.R. 5037 Before the Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On H. Veterans Affairs*, 109th Cong. 8-10 (2006) (statement of Rep. Reyes).

103. 152 CONG. REC. H2199-01, 2207 (daily ed. May 9, 2006) (statement by Rep. Ortiz).

104. 152 CONG. REC. H3208-02, 3211 (daily ed. May 24, 2006) (statement by Rep. Buyer).

105. S. Res. 535, 109th Cong., 152 CONG. REC. S7767-01 (2006) (enacted).

under the Respect for America's Fallen Heroes Act. The use of their motorcycles' engines to drown out the protesters' voices and the display of the American flag (not as part of the funeral ceremony) while lined up outside the funeral home or church where the funeral is conducted¹⁰⁶ could be considered a demonstration. However, it is clear from the remarks of Members of Congress that the Act was intended to prohibit demonstrations conducted by the Westboro Baptist Church (and any other protest Congress would consider disrespectful) but not curtail the activities of the Patriot Guard Riders (or any other demonstration Congress would consider respectful and patriotic). This restriction of speech based on content, or the "appropriateness" of the demonstration, is an underlying content-based purpose, even though the Respect for America's Fallen Heroes Act is facially content-neutral.

The strict scrutiny standard applies to content-based restrictions.¹⁰⁷ Strict scrutiny requires that the statute is narrowly tailored to serve a substantial government interest¹⁰⁸ and that the statute employs the least restrictive means for effecting that interest.¹⁰⁹ The Respect for America's Fallen Heroes Act would likely fail this test. Although the government has an important interest in preserving the dignity of military funerals,¹¹⁰ it is not a substantial governmental interest like protecting national security. As such, if it is determined that the Act is content-based, a court would likely find that the Act is unconstitutional even as applied only to federal cemeteries.

2. Respect for the Funerals of Fallen Heroes Act

The Respect for the Funerals of Fallen Heroes Act became law very recently¹¹¹ and, as of this writing, has not been challenged in the courts. The First Amendment analysis for the Respect for the Funerals of Fallen Heroes Act is different from that of the Respect for America's Fallen Heroes Act because of the different location of the speech restrictions.

a. *The Content-Neutral Restriction Argument*

Just as the Respect for America's Fallen Heroes Act is facially content-neutral, the Respect for the Funerals of Fallen Heroes Act is facially content-neutral. Many of the same arguments that Congress and academics made in support of the constitutionality of the Respect for America's Fallen Heroes Act could be made in support of the Respect for the Funerals of Fallen Heroes Act.¹¹² The prohibition makes no distinction between

106. For a discussion of the Patriot Guard's activities during funerals see Feuer, *supra* note 17.

107. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 804 (2000).

108. *Carey v. Brown*, 447 U.S. 455, 461–62 (1980).

109. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

110. 152 CONG. REC. H2199-01, 2205-07 (daily ed. May 9, 2006) (entire text of Prof. Forte's legal analysis as read into the Congressional Record).

111. On December 22, 2006, Congress passed the Respect for the Funerals of Fallen Heroes Act, Pub. L. No. 109-464, 120 Stat. 3480 (2006).

112. Senator Durbin, while introducing the Respect for the Funerals of Fallen Heroes Act in the Senate, noted that the language of the Act tracks the language of a city ordinance the Supreme Court upheld in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the same argument that proponents of the Respect for America's Fallen Heroes Act advanced. 152 CONG. REC. S10682, 10746 (daily ed. Sep. 29, 2006) (statement

the contents of speech or the topics of the speech, and legal scholars have opined that it is consistent with the provisions of the First Amendment.¹¹³

However, some of the provisions of the Respect for the Funerals of Fallen Heroes Act are different from those of the Respect for America's Fallen Heroes Act. First, the Respect for the Funerals of Fallen Heroes Act will apply to lands outside of the federal government's control. The restricted areas, especially the distances restricted around routes of ingress and egress, will most likely either be private property (churches, funeral homes and private cemeteries) or traditionally public forums like sidewalks.¹¹⁴ Enforcing restrictions on speech in a public forum or on private property will affect the content-neutral analysis. Additionally, the Respect for the Funerals of Fallen Heroes Act applies only to the funerals of service members and former service members.¹¹⁵

One wrinkle in the content-neutral argument that proponents would have to overcome is the fact that the restriction only applies to military funerals. Congress would most likely argue that it limited the restriction to military funerals because of the limited power of Congress, not a desire to restrict anti-military speech.¹¹⁶ Assuming that the constitutional power to raise and support armies covers military funerals, this argument would be adequate.¹¹⁷

If a court determines that the Respect for the Funerals of Fallen Heroes Act is content-neutral based on its facial content-neutrality, it would likely be upheld as a reasonable time, place, and manner restriction in a public forum, narrowly tailored to achieve a governmental interest, and allowing sufficient alternative routes of communication. The government interest, as noted above,¹¹⁸ would be preserving the dignity of military funerals.

The restriction would be a reasonable time, place, or manner restriction. First, it is restricted to one hour before, after, and during a funeral.¹¹⁹ Second, it only prohibits protests in an area reasonably calculated to allow for access to and from a funeral without disruption.¹²⁰ Third, it only restricts activity that would disrupt a funeral, such as blocking access or making excessive noise.¹²¹ Finally, the Act allows all forms of

of Sen. Durbin). *See supra* Part IV.A.1.a.

113. Senator Durbin stated that Professor Geoffrey Stone from the University of Chicago Law School believed the Respect for the Funerals of Fallen Heroes Act was consistent with the First Amendment. 152 CONG. REC. S10682, 10746 (daily ed. Sep. 29, 2006) (statement of Sen. Durbin).

114. The Respect for the Funerals of Fallen Heroes Act prohibits demonstrations within the property lines of a place where a funeral is being held as well as 150 feet from any point of ingress or egress. This would most likely include public roads and sidewalks around private funeral homes, cemeteries, and churches. Respect for the Funerals of Fallen Heroes Act, 18 U.S.C. § 1388(a) (2006).

115. 18 U.S.C. § 1388(a) (2006).

116. 152 CONG. REC. S10682, 10746 (daily ed. Sep. 29, 2006) (statement of Sen. Durbin).

117. A discussion of the powers of Congress under Art I, Sec 8 of the Constitution is beyond the scope of this note.

118. *Supra* Part I.C.

119. 18 U.S.C. § 1388(a) (2006).

120. *See* 152 CONG. REC. S5129, 5129 (daily ed. May 24, 2006) (statement of Sen. Craig). Senator Craig introduced a Senate amendment to the original Respect for America's Fallen Heroes Act, which changed the protected "bubble" around the funeral site to only 150 feet from points of ingress and egress to specifically ensure that the Act did not cover too much area while still ensuring that funeral processions would not be impeded. The Senate took this directly from the Respect for America's Fallen Heroes Act and inserted it into the Respect for the Funerals of Fallen Heroes Act. *Id.*

121. 152 CONG. REC. S10682, 10746 (daily ed. Sep. 29, 2006) (statement of Sen. Durbin).

protest outside of the restricted area immediately adjacent to the funeral and its access points.¹²² Thus, it is likely that the Respect for the Funerals of Fallen Heroes Act would be found unconstitutional only if rules for content-based restrictions were applied.

b. The Content-Based Restriction Argument

The content-based restriction argument for the Respect for the Funerals of Fallen Heroes Act is essentially the same as the argument for the Respect for America's Fallen Heroes Act,¹²³ with the added argument that the Respect for the Funerals of Fallen Heroes Act restricts only anti-military speech by prohibiting protests only at military funerals. However, this additional argument is likely to fail because of the limited powers of Congress and because the Respect for the Funerals of Fallen Heroes Act, on its face, prohibits all protests at military funerals, regardless of their message.¹²⁴

Thus, the proponent of the content-based restriction argument must convince a court that although the Respect for the Funerals of Fallen Heroes Act is facially content-neutral, its underlying purpose is content-based. In addition to the comments from lawmakers concerning the Respect for America's Fallen Heroes Act, which the Respect for the Funerals of Fallen Heroes Act was intended to expand,¹²⁵ lawmakers also made comments exposing their true purpose during deliberation on the Respect for the Funerals of Fallen Heroes Act. Senator Durbin, while introducing the Respect for the Funerals of Fallen Heroes Act in the Senate, noted at least 129 "disruptions" of military funerals by a group calling itself a church.¹²⁶ During deliberations on the floor of the House, Representative Cannon mentioned the Westboro Baptist Church by name and cited its protests as the reason for the bill.¹²⁷ Thus, a court could find that the Act is content-based if it applies the theory that a facially content-neutral statute's underlying purpose may make a statement content-based.

If a court determines that the Respect for the Funerals of Fallen Heroes Act is a content-based restriction, it is even less likely than the Respect for America's Fallen Heroes Act to survive the strict scrutiny test. Not only is the government's interest in preserving the dignity of military funerals not a substantial interest, but the statute would also fail the "narrowly tailored" test. This Act would restrict speech at the funerals of approximately 650,000-700,000 service members and veterans a year;¹²⁸ however, its primary purpose is merely to restrict undignified speech at the funerals of

122. See 152 CONG. REC. H2199, 2206 (daily ed. May 9, 2006) (Professor Forte's legal analysis as read into the Congressional Record). Professor Forte notes that persons may picket in other areas not covered by the Act. Because the location of the restrictions is similar for both Acts, this analysis should also apply to the Respect for the Funerals of Fallen Heroes Act. *Id.*

123. See *supra* Part IV.A.1.b.

124. U.S. CONST. art. I, § 8 (enumerating Congress's power to raise and support armies); 152 CONG. REC. S10682, 10746 (daily ed. Sep. 29, 2006) (statement of Sen. Durbin) (noting that the language of the Act tracks language already determined by the Supreme Court to be content-neutral).

125. See *supra* Part IV.A.1 for comments on the Respect for America's Fallen Heroes Act.

126. 152 CONG. REC. S10682, 10745 (daily ed. Sep. 29, 2006) (statement of Sen. Durbin).

127. 152 CONG. REC. H9198, 9198 (daily ed. Dec. 8, 2006) (statement of Rep. Cannon).

128. *Sens. Durbin, Chambliss, Bayh, Conrad Introduce Bi-Partisan Respect for Funerals of Fallen Heroes Act*, *supra* note 46.

the over 3,500 service members who died in Iraq or Afghanistan.¹²⁹ Once again, the constitutionality of the statute hinges on a court's acceptance or rejection of the argument that a facially content-neutral law's underlying content-based purpose can make the statute content-based.

B. State Statutes

The statutes enacted by some states arguably pose greater constitutional questions than the federal statutes. The following section discusses various First Amendment concerns with the three state statutes previously mentioned in Part II of this Note.

1. Kentucky

A supporter of the Westboro Baptist Church, although not a member of the church, challenged Kentucky's statute prohibiting protests at all funerals in the summer of 2006. In *McQueary v. Stumbo*¹³⁰ the plaintiff, McQueary, claimed that the Kentucky statute violated his First Amendment rights by failing to be narrowly tailored to serve a significant government interest, failing to leave open alternative channels for communication, and making speech on public property contingent upon the approval of a private party.¹³¹ McQueary requested a preliminary injunction barring the application of the Kentucky statute and the court granted it.¹³²

The *McQueary* court accepted the argument that the main purpose of a statute is the predominant factor in determining whether or not a statute is content-based.¹³³ The court then found that the Kentucky statute was "motivated by a specific desire to restrict the WBC's ability to demonstrate at soldiers' funerals" and determined that the provisions of the statute enacted with the purpose of restricting a certain speaker or message were content-based restrictions.¹³⁴ The court assumed that the government had an interest in protecting citizens from "unwanted communications that are so obtrusive that they are impractical to avoid,"¹³⁵ but determined that the statute was not narrowly tailored because it would prohibit speech that would not interfere with a funeral.¹³⁶ The statute prohibits all sounds and signs, not just those that would interfere with a funeral. Thus, the court determined that it was not narrowly tailored.¹³⁷ The court issued the preliminary injunction because the court considered it likely that McQueary would succeed on his claim, that he would be irreparably harmed by the

129. As of Sept. 6, 2007, 3,760 U.S. service members had lost their lives in Iraq and 435 U.S. service members had lost their lives in Afghanistan. War in Iraq: US & Coalition/Casualties, CNN, <http://edition.cnn.com/SPECIALS/2003/iraq/forces/casualties/> (last visited Sept. 10, 2007); Enduring Freedom Casualties, CNN, <http://edition.cnn.com/SPECIALS/2004/oef.casualties/> (last visited Sept. 10, 2007).

130. *McQueary v. Stumbo*, 453 F.Supp. 2d 975 (E.D. Ky. 2006).

131. *Id.* at 978.

132. *Id.* at 998.

133. *Id.* at 983.

134. *Id.* at 984.

135. *McQueary*, 453 F.Supp. 2d at 992.

136. *Id.* at 996-97.

137. *Id.*

enforcement of the law, that an injunction would not cause substantial harm to others, and that the public interest would not be harmed by an injunction.¹³⁸

After McQueary's successful challenge of Kentucky's statute, protests at military funerals in Kentucky resumed.¹³⁹ Although not specifically cited by the sponsors of the Respect for the Funerals of Fallen Heroes Act, this court decision could have been a motivating factor for the expansion of federal protection for military funerals embodied by the Act.

2. Michigan

The Michigan statute is more likely to be held constitutional than the Kentucky statute. First, the preamble of the Michigan statute does not establish the restriction of protests at military funerals as its primary purpose. Second, the Michigan statute prohibits conduct that would "disturb, disrupt or adversely affect" the funeral.¹⁴⁰ Nonetheless, the statute does have some provisions that make it constitutionally suspect.

First, section (1)(a) of the statute makes it a criminal offense to "make loud and raucous noise and continue to do so after being asked to stop."¹⁴¹ However, the statute does not specify who would have the authority to request that the loud party stop making noise. This leaves a remarkable amount of discretion to the requester and runs the risk of allowing people to censor speech around funerals by only allowing those messages that they agree with and silencing those with which they disagree.¹⁴² This could result in content-based restrictions on speech.

The Michigan statute also prohibits protests within 500 feet of the location of any funeral or funeral procession.¹⁴³ This is a significantly more substantial restriction than the federal restriction prohibiting all protests within 150 feet of routes of ingress or egress and blocking funeral processions within 300 feet of routes of ingress or egress.¹⁴⁴ The Michigan statute would restrict speech on private land and traditional public forums such as sidewalks and parks. It could conceivably force a landowner to turn off a stereo playing on private property if the authorities consider it "loud and raucous." A court is not likely to consider this a narrowly tailored provision.

Finally, a violation of the Michigan statute is a felony offense, punishable by up to two years in jail for the first violation.¹⁴⁵ Although there is nothing in First Amendment jurisprudence which makes this provision *per se* unconstitutional, the fear of a felony conviction and two years in jail is highly likely to chill free speech. A

138. *Id.* at 997–98.

139. *Buffer Gone, Protesters Picket Military Funeral*, L.A. TIMES, Oct 1, 2006, at A24.

140. MICH. COMP. LAWS ANN. § 750.167d(1)(c) (West 2006).

141. MICH. COMP. LAWS ANN. § 750.167d(1)(a) (West 2006).

142. The Patriot Guard Riders' motorcycle engines create a "loud and raucous" noise near funerals in addition to the chants of the Westboro protesters. It is likely that the family of a deceased service member would ask the Westboro protesters to stop making noise, but would allow the Patriot Guard to ride. Thus, the family (or whoever is authorized under Michigan law to request silencing) has the discretion to decide which messages may be conveyed. Although this may seem fair under the circumstances, it is certainly not constitutional. *See Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

143. MICH. COMP. LAWS ANN. § 750.167d(1) (West 2006).

144. 18 U.S.C. § 2413(a) (2006); 18 U.S.C. § 1388(a) (2006).

145. MICH. COMP. LAWS ANN. § 750.168(2) (West 2006).

federal court might also consider a felony conviction and two years in jail disproportionate punishment and therefore unconstitutional as “cruel and unusual punishment.”¹⁴⁶ However, the possible Eighth Amendment argument is beyond the scope of this Note.

3. Minnesota

While the Minnesota statute is more narrowly construed than the Michigan and Kentucky statutes, it may still be vulnerable to a constitutional challenge based on a failure to narrowly construe the law. The Minnesota law prohibits protests within 500 feet of a burial site and within 500 feet of an entrance to a place used for a funeral service or burial.¹⁴⁷ The 500 foot bubble created around the burial site and entrances is much larger than the 150 foot bubble around routes of ingress and egress in the federal laws,¹⁴⁸ opening the Minnesota statute to a constitutional challenge.

One unique feature of the Minnesota statute is that it provides a civil remedy for family members of the deceased person. A person who intentionally disrupts a military funeral may be liable to the surviving family members of the deceased person for the damages caused by the disruption, may be enjoined prior to the disruption, and may be required to pay the attorney’s fees of a prevailing plaintiff.¹⁴⁹ This civil remedy parallels the remedy sought in a defamation suit brought against the Westboro Baptist Church in Maryland in its attempt to dissuade protests at military funerals by hitting the protesters in their pocketbooks.¹⁵⁰ If the restrictive provisions of the Minnesota statute stand up to constitutional challenge, this civil remedy may be an effective way to lessen the number of protests at funerals in Minnesota.

Although the federal and state statutes against protests have varying degrees of effectiveness and susceptibility to constitutional challenge, the practical effects of these statutes are very similar.

V. EFFECT OF STATUTES AGAINST PROTESTS AT FUNERALS

The protests of the Westboro Baptist church, although generally small, have certainly garnered abundant attention since the expansion of their “protest ministry” to military funerals. The protests have induced outrage in the media¹⁵¹ and have resulted in the passage of two federal laws and numerous state laws. Importantly for the Church, the protests have been more effective in spreading the church’s message than any other protest strategy the Church had undertaken.¹⁵² While other protests, most

146. The Eighth Amendment prohibits cruel and unusual punishment. U.S. CONST. amend VIII.

147. MINN. STAT. ANN. § 609.501 (West 2006).

148. 18 U.S.C. §2413(a) (2006); 18 U.S.C. § 1388(a), (2006).

149. MINN. STAT. ANN. § 609.501(3) (West 2006).

150. *Snyder v. Phelps*, No. RDB-06-1389, 2006 U.S. Dist. LEXIS 79020 (D. Md. Oct. 30, 2006). See *infra* Part VI for a discussion of the case.

151. See Keen, *supra* note 7; Feuer, *supra* note 17; Sangiacomo, *supra* note 9.

152. Phelps and the Westboro Baptist Church have been picketing at funerals and other events for sixteen years. Most Americans learned of the church only after it began picketing at military funerals. Keen, *supra* note 7.

notably the protest at the funeral of Matthew Shepherd,¹⁵³ involved some publicity for the Church, protesting at military funerals has resulted in an exponential increase in the amount of publicity. It seems likely that the Church conceived these protests as a way to gain publicity for the message of their “protest ministry.”¹⁵⁴

The statutes passed to outlaw protests at funerals potentially give this group even more publicity because they allow the Church to use the court system to challenge the constitutionality of the statutes.¹⁵⁵ A First Amendment challenge this divisive is certain to garner even more attention. In the court system, the Church may characterize itself as a victim. If the court upholds the statutes, the Church has gained a victory through the increased publicity. If the statutes against protests at funerals fall as unconstitutional, the Church gains a treble victory. The Church would gain publicity, could resume protests at military funerals, and could also receive monetary damages from the government.¹⁵⁶ In an attempt to curb protests at military funerals, legislators may have unintentionally increased the Westboro Baptist Church’s (and any other attention-craving organization’s) incentive to protest at military funerals.

Another side-effect of the statutes against protests is the ironic switch in positions by the American Civil Liberties Union (ACLU) and the American Center for Law and Justice (ACLJ). In the 1980s, the ACLU and ACLJ fought over the constitutionality of limits on the rights of protesters outside abortion clinics. The ACLJ came down on the side of the protesters, arguing that the protesters’ First Amendment rights were violated by restricting the forms and forums of their speech. The ACLU argued on the side of lawmakers who were attempting to protect women entering abortion clinics and abortion clinics themselves.¹⁵⁷

In the First Amendment fight over statutes against protests at funerals, the ACLJ backs lawmakers, claiming that the restrictions represent reasonable time, place, and manner restrictions.¹⁵⁸ The ACLU backs the protesters, arguing that the statutes violate the protesters’ First Amendment rights.¹⁵⁹ It is ironic that the ACLU and ACLJ will both find themselves limited by decisions they supported and making the arguments their opponents promulgated during the fight over protests outside abortion clinics.¹⁶⁰

153. Matthew Shepard was a homosexual student murdered in Wyoming in 1998. Keen, *supra* note 7.

154. It seems that Fred Phelps, the founder of the Westboro Baptist Church, finds the attention appealing. In an interview he asked, “How in the world did we get this humble message from this humble little old nothing of a church to shake this whole country up?” Keen, *supra* note 7.

155. In addition to the court challenges previously mentioned, the Westboro Baptist Church challenged the constitutionality of the Ohio statute in *Phelps-Roper v. Taft*, No. 1:06 CV 2038, 2007 WL 915109 (N.D. Ohio Mar. 23, 2007).

156. *Id.*

157. Cases representative of the positions of the ACLU and ACLJ include *Frisby v. Schultz*, 487 U.S. 474 (1988) and *Hill v. Colorado*, 530 U.S. 703 (2000).

158. *ACLJ Offers Legal Assistance to Keep Inappropriate Protests from Disrupting Military Funerals Honoring American War Heroes*, BUS. WIRE, Sep 5, 2006.

159. The ACLU represented protester McQueary in *McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D. Ky. 2006). McDonough, *supra* note 4. The ACLU has requested information on the application of the Illinois statute. McKinney, *supra* note 9. The ACLU recently failed in an initial attempt to block application of statute in Missouri, although the court did not dismiss the case. Robert Patrick, *Church Loses Bid to Protest at Soldier’s Funeral*, ST. LOUIS POST-DISPATCH, Sep. 15, 2006, at C9.

160. The ACLU’s best argument against application of the federal protest laws that the underlying purpose of the law is content-based even if the law as written is content-neutral, is the argument seemingly rejected in *Hill v. Colorado*, 530 U.S. 703 (2000).

VI. POSSIBLE ALTERNATIVES TO STATUTORY RESTRICTIONS

If anti-protest laws are constitutionally risky endeavors,¹⁶¹ what can the government do to protect the funerals and burials of service members? As acknowledged at the beginning of this Note, the way military dead are treated directly affects the morale of the living military.¹⁶² Families who suffer the pain of a service member's ultimate sacrifice should be allowed to bury their sons and daughters with dignity. However, we should not adopt legislation that only increases the attention paid to a small number of protesters and could be struck down as unconstitutional.

One option is for the deceased service member's family to sue the Church and protesters for defamation, invasion of privacy, intentional infliction of emotional distress, and any other tort that may be applicable. The family of one Marine killed in Iraq, Lance Corporal Matthew Snyder, pursued this course and sued Fred Phelps for the above torts.¹⁶³ The family claimed that Phelps published defamatory material on one of the church's many websites and encouraged Phelps' followers to protest at Lance Corporal Snyder's funeral in Westminster, Maryland.¹⁶⁴ Thus far, the suit has survived Phelps' motion to dismiss the action and is still pending.¹⁶⁵

At least one state has enacted legislation to encourage family members to file civil lawsuits against funeral protesters. The Minnesota statute, as mentioned previously, creates a new civil cause of action for disruption of a funeral.¹⁶⁶ While dragging the Westboro Baptist Church into court on civil claims may give the Church more publicity, it would re-cast the Church as the perpetrator rather than the victim. Additionally, it may raise the cost of its "protest ministry" to a point where the church is unable to sustain the ministry, especially if the families prevail and obtain judgments against Phelps and the Church.

Another option is to continue and expand the efforts of counter-protest groups such as the Patriot Guard Riders. The Patriot Guard Riders would probably not appreciate this Note's earlier characterization of their activities as protests. However, their response to the indignity shown at military funerals may represent the best way to honor our military dead. Those who find the activities of the Westboro Baptist Church unacceptable can exercise their own freedom of speech by lining a funeral procession route or holding up supportive signs near military funerals.¹⁶⁷ This would result in publicity for the support shown for the families of deceased service members rather than the protests of the Westboro Baptist Church.

Increasing the number of national cemeteries could reduce the number of military funerals that occur on private property and provide less publicity for protesters at military funerals. As mentioned in earlier sections, the federal government may restrict

161. Professor Steve McAllister of the University of Kansas stated that the Supreme Court "has never really approved a buffer of any significance" for protesters. Keen, *supra* note 7.

162. See *supra* Part I.C.

163. Snyder v. Phelps, No. RDB-06-1389, 2006 U.S. Dist. LEXIS 79020 (D. Md. Oct. 30, 2006).

164. *Id.* at *1.

165. *Id.* at *2.

166. MINN. STAT. ANN. § 609.501(3) (West 2006).

167. Many of the statutes against protests at funerals would restrict holding up signs with supportive messages in an attempt to be content-neutral. See *supra* Part II.

speech on its own non-public lands more freely than private lands.¹⁶⁸ For this reason, a statute such as the Respect for America's Fallen Heroes Act, which restricts protest activities only on federal lands, is less subject to challenge. If more military funerals, especially funerals for soldiers killed in Iraq or Afghanistan, were conducted in national cemeteries, fewer protections from overarching laws like the Respect for the Funerals of Fallen Heroes Act would be required. Congress holds the power to increase the number of national cemeteries and the amount of cemetery space available for military funerals. Although increasing the number of national cemeteries would be expensive, it would be a solution that would not give the Westboro Baptist Church or other protesters undue attention.

VII. CONCLUSION

Many of the statutes prohibiting protests at funerals could conceivably be upheld by the courts, although they are all vulnerable to First Amendment challenges. The attention given to the protesters through the fight over these laws is counterproductive to the stated purpose of the laws, preserving the dignity of military funerals. Instead, the legislation makes military funerals a First Amendment battleground. When we give a small group of misguided protesters an avenue to garner more attention, they will take the attention. Although well-meaning, the statutes prohibiting protests at funerals have given funeral protesters even more attention, and the courts may determine that the statutes are unconstitutional. This would be an unnecessary windfall for funeral protesters. Instead of passing laws susceptible to First Amendment arguments, the government should promote other less counter-productive options, including providing civil remedies for disrupting funerals that may be collected by the deceased's family, encouraging the formation and continued existence of counter-protest groups, and considering increasing the availability of federal cemeteries as final resting places for our war dead.

168. See *supra* Part III.C.2.