AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Frisby v. Schultz, 487 U.S. 474** (1988)

*A doctor who lived in Brookfield, a small suburb of Milwaukee, performed abortions in clinics in nearby towns. In the spring of 1985, a group of pro-life activists began to picket outside the doctor’s home. In May 1985, the town board adopted an ordinance prohibiting all picketing, except in the case of labor disputes, in residential neighborhoods in Brookfield. Upon advice of attorneys, the board soon repealed that ordinance and replaced it with another that banned all picketing “before or about the residence or dwelling of any individual” in the town.*

*The abortion group filed suit in federal district court seeking an injunction blocking enforcement of the new town ordinance. The trial court granted a preliminary injunction, and a divided circuit court affirmed that ruling. In a 7-2 decision, the U.S. Supreme Court reversed the lower courts. The Court held that residential picketing ban was an appropriate time, place and manner regulation that left adequate alternative means for communicating the activists’ message and reasonably protected the public’s interest in the tranquility of residential neighborhoods and freedom from unwanted and intrusive speech.*

JUSTICE O’CONNOR delivered the opinion of the Court.

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The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of "uninhibited, robust, and wide-open" debate on public issues, we have traditionally subjected restrictions on public issue picketing to careful scrutiny. *United States v. Grace* (1983). Of course, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.* (1985).

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." . . .

The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. . . . Appellants, however, urge us to disregard these "cliches." They argue that the streets of Brookfield should be considered a nonpublic forum. Pointing to the physical narrowness of Brookfield's streets as well as to their residential character, appellants contend that such streets have not by tradition or designation been held open for public communication.

We reject this suggestion. Our 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. *Carey v. Brown* (1980). . . .

In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche," but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO* (1939). No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora. The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the anti-picketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora. . . .

. . . . [W]e accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is "narrowly tailored to serve a significant government interest" and whether it "leave[s] open ample alternative channels of communication."

. . . . [W]e are unable to accept [the lower court’s] potentially broader view of the ordinance's scope. We instead construe the ordinance more narrowly. This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the "picketing" proscribed by the ordinance. Thus, generally speaking, "picketing would be having the picket proceed on a definite course or route in front of a home." The picket need not be carrying a sign, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

So narrowed, the ordinance permits the more general dissemination of a message. . . .

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"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown* (1980). Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick, and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often `captives' outside the sanctuary of the home and subject to objectionable speech. . . does not mean we must be captives everywhere." *Rowan v. Post Office Department* (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. *FCC v. Pacifica Foundation* (1978). . . .

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It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. . . .

. . . . The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. . . . Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt. . . .

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The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. . . .

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*Reversed*.

JUSTICE WHITE, concurring.

I agree with the Court that an ordinance which only forbade picketing before a single residence would not be unconstitutional on its face. . . .

This leaves the question, however, whether the ordinance at issue in this case forbids only single-residence picketing. The Court says that the language of the ordinance suggests that it is so limited. But the ordinance forbids "any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." That language could easily be construed to reach not only picketing before a single residence, but also picketing that would deliver the desired message about a particular residence to the neighbors and to other passersby. Arguably, it would also reach picketing that is directed at the residences which are located in entire blocks or in larger residential areas. Indeed, the latter is the more natural reading of the ordinance. . . .

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. . . . In my view, if the ordinance were construed to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional on its face and hence prohibit its enforcement against those, like appellees, who engage in single-residence picketing. . . . I would put aside the overbreadth approach here, sustain the ordinance as applied in this case, which the Court at least does, and await further developments.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today sets out the appropriate legal tests and standards governing the question presented, and proceeds to apply most of them correctly. Regrettably, though, the Court errs in the final step of its analysis, and approves an ordinance banning significantly more speech than is necessary to achieve the government's substantial and legitimate goal. Accordingly, I must dissent.

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. . . . A crowd of protesters need not be permitted virtually to imprison a person in his or her own house merely because they shout slogans or carry signs. But 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.

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Without question there are many aspects of residential picketing that, if unregulated, might easily become intrusive or unduly coercive. Indeed, some of these aspects are illustrated by this very case. As the District Court found, before the ordinance took effect up to 40 sign-carrying, slogan-shouting protesters regularly converged on Dr. Victoria's home and, in addition to protesting, warned young children not to go near the house because Dr. Victoria was a "baby killer." Further, the throng repeatedly trespassed onto the Victorias' property and at least once blocked the exits to their home. Surely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses. Thus, for example, the government could constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains, conveyed perhaps by a lone, silent individual, walking back and forth with a sign. Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brookfield law. Therefore, the ordinance is not narrowly tailored.

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A valid time, place, or manner law neutrally regulates speech only to the extent necessary to achieve a substantial governmental interest, and no further. Because the Court is unwilling to examine the Brookfield ordinance in light of the precise governmental interest at issue, it condones a law that suppresses substantially more speech than is necessary. . . .