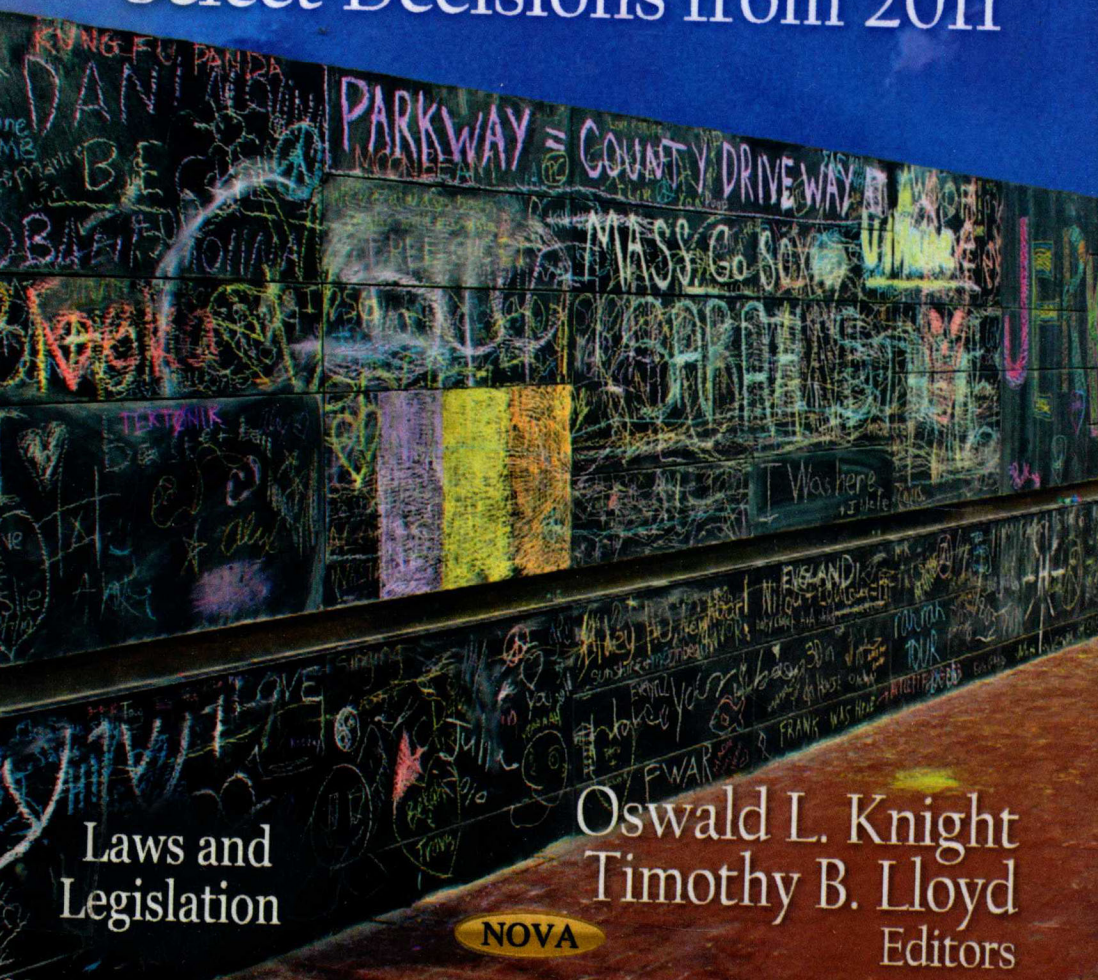
Free Speech and the Supreme Court

Select Decisions from 2011



Laws and Legislation

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PREFACE

This book explores select decisions from the Supreme Court relative to free speech. Topics discussed in this compilation include the Westboro Baptist Church (WBC) and its protests of military funerals. Also discussed is the constitutionality of restrictions on the use of health data for commercial purposes. Companies that collect, analyze, and sell this data have challenged the law, claiming that they were unconstitutionally restricted from their free speech rights under the First Amendment. The case of Sorrell v. IMS Health, Inc. is analyzed as well.

Chapter 1 - The Westboro Baptist Church (WBC or Church) has been protesting military funerals for a number of years. The Church has gained national attention as a result. Its primary message is that God hates the United States and is punishing the country for its tolerance of homosexuality. The Church chooses to protest the funerals of fallen soldiers to make the point that in their opinion soldiers are dying as part of God's retribution for this country's sins. Though it began protesting military funerals, it has since branched out to funerals of fire fighters, police officers, and other public servants. It has protested events beyond funerals as well. These protests have incited anger across the country. State and local regulations have been passed banning the protest of funerals within a certain distance of the services, creating so-called "buffer zones." The federal government passed similar bans on protests at military funerals in federally controlled cemeteries as well as wherever they might occur throughout the country. Individuals whose loved ones' funerals have been protested by the Church have sued the Church as well. Recently, the Supreme Court decided a case involving whether the Church could be held liable for intentional infliction of emotional distress and intrusion upon seclusion by the family of a soldier, Matthew Snyder, whose

funeral the Church protested. The Supreme Court held that, at least in the case of Matthew Snyder's funeral, the speech of the WBC was fully protected by the First Amendment. There are two lines of cases, those analyzing the constitutionality of buffer zones and those analyzing tort liability. They present distinct, but related and significant First Amendment questions. This report will discuss the Supreme Court's recent decision in Snyder vs. Phelps, which deals with the question of the WBC's tort liability. It will then analyze the constitutional issues facing federal laws that create funeral protest buffer zones. Finally, it will discuss some legislative options for amending the federal laws restricting funeral protests, including the recently introduced H.R. 961.

Chapter 2 - For the past 20 years, the congregation of the Westboro Baptist Church has picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military. The church's picketing has also condemned the Catholic Church for scandals involving its clergy. Fred Phelps, who founded the church, and six Westboro Baptist parishioners (all relatives of Phelps) traveled to Maryland to picket the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. The picketing took place on public land approximately 1,000 feet from the church where the funeral was held, in accordance with guidance from local law enforcement officers. The picketers peacefully displayed their signs—stating, *e.g.,* "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell"—for about 30 minutes before the funeral began. Matthew Snyder's father (Snyder), petitioner here, saw the tops of the picketers' signs when driving to the funeral, but did not learn what was written on the signs until watching a news broadcast later that night.

Chapter 3 - Health related data can be very valuable to researchers, scientists, and other academics. It can be just as valuable to participants in the market for the provision of health care. For example, pharmaceutical manufacturers use a process known as detailing to market prescription drugs. Detailing involves sending representatives of the pharmaceutical manufacturers to individual doctors' offices with information about prescription drugs and their various uses. The more information a detailer has about the doctor (or medication prescriber) that he or she is planning to market to, the better targeted, and more effective, the detailing becomes. Consequently, information about the past prescribing practices of doctors can be valuable to detailers in designing their marketing strategies. An industry has developed to collect, aggregate, and analyze these prescriber data. These data gatherers sell the information they collect from pharmacies and hospitals about

prescriber practices to pharmaceutical manufacturers for use in marketing. They also sell the data to researchers and others that might use the data, but this market is far smaller than the market consisting of pharmaceutical manufacturers and marketers. Some doctors find better-targeted detailing to be useful. Other doctors find the sharing of their prescriber history without their consent, and its subsequent use as a marketing tool, to be an invasion of privacy. Three states—Maine, New Hampshire, and Vermont—have enacted statutes to restrict the sale and use of prescriber history data for the purposes of marketing (though not for any other purpose) without the consent of the doctor. The states claimed to be protecting the privacy interest of the doctors. Also, the states were interested in lowering the costs of health care. Because detailing effectively encourages the prescription of more expensive, brand-name drugs, data suggest that health care costs are measurably increased by detailing. The states reasoned that if detailing were less effective, then doctors might be more likely to prescribe generic drugs, which are cheaper than brand-name drugs, and health care costs overall would go down. The companies that collect, analyze, and sell these data challenged the laws, claiming that they were an unconstitutional restriction of their free speech rights under the First Amendment. The First Circuit Court of Appeals upheld the laws enacted by Maine and New Hampshire as restrictions on conduct rather than speech, and further found that even if the laws did restrict speech they were constitutional restrictions on commercial speech. The Second Circuit Court of Appeals struck down a functionally identical Vermont statute. The Second Circuit found that the Vermont law unconstitutionally restricted commercial speech. In order to resolve this split in the circuits, the Supreme Court granted certiorari in the Second Circuit Case. A divided Court affirmed the decision of the Second Circuit but applied a slightly different standard than the lower court.

Chapter 4 - Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." Pharmacies receive "prescriber-identifying information" when processing prescriptions and sell the information to "data miners," who produce reports on prescriber behavior and lease their reports to pharmaceutical manufacturers. "Detailers" employed by pharmaceutical manufacturers then use the reports to refine their marketing tactics and increase sales to doctors. Vermont's Prescription Confidentiality Law provides that, absent the prescriber's consent, prescriber-identifying information may not be sold by pharmacies and similar entities, disclosed by those entities for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vt. Stat. Ann., Tit. 18, §4631(d). The prohibitions are subject

to exceptions that permit the prescriber-identifying information to be disseminated and used for a number of purposes, e.g., "health care research." §4631(e).

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Chapter 1

FUNERAL PROTESTS: SELECTED FEDERAL LAWS AND CONSTITUTIONAL ISSUES*

Kathleen Ann Ruane

ABSTRACT

The Westboro Baptist Church (WBC or Church) has been protesting military funerals for a number of years. The Church has gained national attention as a result. Its primary message is that God hates the United States and is punishing the country for its tolerance of homosexuality. The Church chooses to protest the funerals of fallen soldiers to make the point that in their opinion soldiers are dying as part of God's retribution for this country's sins. Though it began protesting military funerals, it has since branched out to funerals of fire fighters, police officers, and other public servants. It has protested events beyond funerals as well.

These protests have incited anger across the country. State and local regulations have been passed banning the protest of funerals within a certain distance of the services, creating so-called "buffer zones." The federal government passed similar bans on protests at military funerals in federally controlled cemeteries as well as wherever they might occur throughout the country.

Individuals whose loved ones' funerals have been protested by the Church have sued the Church as well. Recently, the Supreme Court decided a case involving whether the Church could be held liable for

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intentional infliction of emotional distress and intrusion upon seclusion by the family of a soldier, Matthew Snyder, whose funeral the Church protested. The Supreme Court held that, at least in the case of Matthew Snyder's funeral, the speech of the WBC was fully protected by the First Amendment.

There are two lines of cases, those analyzing the constitutionality of buffer zones and those analyzing tort liability. They present distinct, but related and significant First Amendment questions. This report will discuss the Supreme Court's recent decision in *Snyder vs. Phelps*, which deals with the question of the WBC's tort liability. It will then analyze the constitutional issues facing federal laws that create funeral protest buffer zones. Finally, it will discuss some legislative options for amending the federal laws restricting funeral protests, including the recently introduced H.R. 961.

INTRODUCTION

The Westboro Baptist Church (WBC or Church) has been protesting military funerals for a number of years. The Church has gained national attention as a result. Its primary message is that God hates the United States and is punishing the country for its tolerance of homosexuality. The Church chooses to protest the funerals of fallen soldiers to make the point that in its opinion soldiers are dying as part of God's retribution for this country's sins. Though it began protesting military funerals, it has since branched out to funerals of fire fighters, police officers, and other public servants. It has protested events beyond funerals as well.

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SNYDER V. PHELPS

In 2006, Marine Lance Corporal Matthew Snyder was killed in combat. His body was returned to his hometown of Westminster, Maryland, where his family chose to bury him.[1] They held services at a local Catholic Church and a local cemetery, which were noticed publicly in local newspapers. The WBC chose to protest Matthew Snyder's funeral to express their message that his death was God's retribution for the sinful ways of the United States. It contacted local law enforcement and, with the guidance of law enforcement, set up its protest on the day of the funeral on public land that was a distance of about 1000 feet from the church where the funeral was held, though the funeral procession passed within 200 to 300 feet of the protest.

Matthew Snyder's father testified that, as he passed by, he only saw the tops of the WBC's signs. However, he was exposed to the signs and to the Church's message when he saw the protest covered by the evening news. Its message distressed him greatly and caused emotional and psychological harm. Snyder's father sued the WBC for intentional infliction of emotional distress and intrusion upon seclusion. The federal jury awarded him $2.9 million dollars in compensatory damages and $8 million dollars in punitive damages. The U.S. District Court for the District of Maryland reduced the punitive damages award to $2.1 million dollars.[2] The WBC appealed arguing that the First Amendment protected their speech and barred Snyder's damage award. The Fourth Circuit Court of Appeals agreed and reversed the jury verdict.[3] The Supreme Court granted certiorari, and, in an 8-1 opinion, with Justice Alito as the lone dissenter, affirmed the Court of Appeals ruling.

The majority, in an opinion written by Chief Justice Roberts, found that the case turned primarily on whether the WBC's speech was on matters of a public or private concern.[4] Speech on a matter of public concern is accorded

the highest level of First Amendment protection. Whereas, speech on a matter of private concern is subject to a "less rigorous" First Amendment standard.

"Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"[5] However, in the case before the Court, one of the main questions was whether the speech of the WBC was directed at matters of public concern, or at the Snyder family personally. To determine if the speech was on a matter of public concern, the Court looked to the "content, form, and context" of the speech, "as revealed by the whole record."[6] Furthermore, the Court made clear that the particular outrageousness or offensiveness of the speech at issue has no bearing on whether the speech is on a matter of public concern.

Turning to the protest itself, the Court determined that the content of the message conveyed by the WBC was unquestionably on a matter of public concern. The Church is expressing its belief that the United States is bringing doom upon itself for its tolerance of homosexuality, as well as other evils that the Church has identified. "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic Church—are matters of public import."[7] Furthermore, the Court determined that the context of the speech should also be fairly characterized as speech on a matter of public concern. The fact that the speech was delivered in connection with Snyder's funeral was not enough to overcome this characterization and transform the speech into speech on a matter of private concern. The Court noted that the protest occurred on public land adjacent to a public street. The Church members worked with law enforcement to engage in the protest, and were 1,000 feet away from the church where the services were held. The protest was peaceful and not unruly. These facts, taken together, convinced the Court that the protest's mere connection with a military funeral was on a matter of public concern. In this case, there was not enough evidence to overcome the First Amendment protection of the speech and allow the Snyders' recovery.

In relation to the intrusion upon seclusion claim, the Court declined to consider the Snyder family or other funeral attendees to be a "captive audience" in this circumstance.[8] The Court cited the distance from the funeral services the WBC kept and the fact that there was no evidence that the protest interfered with the funeral services in any way. This leaves open the possibility, which will be discussed below, that in a different context those

attending a funeral may be considered a "captive audience," though they were not in this case.

The majority also repeatedly noted that their decision was very narrow. The Court examined only the facts of the case in this circumstance and whether this particular protest was protected by the First Amendment. The majority did not offer an opinion on other protests the WBC might have engaged in, though the Court did offer guidance for analyzing whether the speech in future cases could be fairly characterized as relating to a matter of public concern which would bar recovery for tort suits. As a result, it may be possible, with different factual circumstances, for families who have been aggrieved by the WBC protests to recover for torts like intentional infliction of emotional distress in the future. The Court also took pains to point out that laws regulating targeted picketing, for example setting up buffer zones, were not at issue in this case and raised "very different questions."[9]

CONSTITUTIONALITY OF THE FEDERAL FUNERAL PROTEST LAWS

Currently, there are two principle prohibitions on protesting at military funerals contained in federal law. Both make such protests a federal crime if held within a certain distance of a military funeral and within a certain time of the funeral services. The first, 38 U.S.C. § 2413, creates a buffer zone around all funeral services that occur in cemeteries under the control of the National Cemetery Administration and in Arlington National Cemetery.[10] There is prohibition on a demonstration that "disturbs or tends to disturb the peace or good order" of the funeral within 150 feet of the entrance to the cemetery, beginning one hour before and extending to one hour after any funeral service. There is also a prohibition on impeding the access to or egress from the cemetery within 300 feet of the cemetery's entrance. The second federal statute, 18 U.S.C. § 1388, creates very similar protest restrictions for military funerals wherever they are held throughout the country, if they are not held at a federally controlled cemetery.[11] The constitutional analysis below discusses § 1388, but due to the similarity between § 1388 and 38 U.S.C. § 2413 the same analysis could be applied to both.[12]

The more general funeral protest statute, which applies to funerals held outside of federally controlled cemeteries, contains two distinct, but related prohibitions. First, 18 U.S.C. § 1388 (a)(1) prohibits persons from willfully

engaging in activities that tend to disrupt or otherwise disturb the peace of military funerals with the intent of causing such disturbance. The statute limits these activities within 150 feet of the boundary of the funeral and the road leading up to the location of the funeral for one hour prior and extending to one hour after the funeral service. This restriction is similar to other buffer zone laws that have been enacted by the states. Second, 18 U.S.C. § 1388 (a)(2) prohibits activities within 300 feet of a funeral that willfully impede the access to or egress from the funeral beginning one hour before and extending to one our after any military funeral.

Prohibition on Intentional Disturbance of a Military Funeral

There is no uniform distance or design for laws that would create speech buffer zones. The "size of the buffer zone is context-sensitive."[13] Any analysis of statutory buffer zones is necessarily specific to the particular statute at issue. The subsection in question, 18 U.S.C. § 1388 (a)(1), has never been challenged in court, and it does not appear that it has ever been enforced. As a result it is difficult to say whether the law is constitutional. However, the Supreme Court has decided a number of cases analyzing buffer zones in different contexts, which may inform the analysis of this statute. Furthermore, lower federal courts have reviewed state funeral protest restrictions that may provide assistance to the analysis as well.

In general, funeral protest laws, as well as laws that establish other types of speech buffer zones, have been analyzed as content-neutral, time, place, and manner restrictions on speech.[14] Content-neutral, time, place, and manner restrictions receive a more lenient standard of scrutiny than content-based restrictions on speech.[15] To be constitutional, a time, place, and manner speech restriction must (1) be content-neutral, (2) serve a significant government interest, (3) be narrowly tailored to achieve that interest, and (4) leave open ample alternative channels for communication of the information.[16] A court examining the constitutionality of the 18 U.S.C. § 1388 would likely apply this test as well, using Supreme Court precedent and circuit court analysis of state funeral protest buffer zones as a guide.

Content-Neutrality

Laws restricting speech are considered to be content-neutral if they are justified without reference to their content.[17] This is so regardless of the legislature's motivation in passing the legislation. "The plain meaning of the

text controls."[18] The federal statute prohibits the willful "making or assisting in the making of any noise or diversion that is not part of [a military] funeral or tends to disturb the peace or good order of [a military] funeral with the intent" of disturbing the funeral.[19] It is likely that a reviewing court would find this language to be content-neutral, despite the fact that it likely was enacted to target specifically the protests of the kind staged by the Westboro Baptist Church, which were discussed, at length, above.

The Supreme Court has previously held laws restricting protests outside of residences and medical facilities to be content-neutral, despite the fact that they were primarily enacted to restrict abortion protesting.[20] The laws in these cases applied to speech that carried the acute danger of disruption of persons in vulnerable situations, regardless of the content of the speech. The Sixth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have also held that state laws restricting funeral protests were content-neutral for similar reasons.[21] The federal law is analogous in that it seeks to prevent the disruption of a military funeral to protect the attendees, who are, no doubt, vulnerable. The content of the prohibited speech is irrelevant. The relevant questions for violations of the statute are whether persons are creating a diversion that tends to disrupt the funeral, and whether such disruption was intended. As a result, it is likely that a court would find 18 U.S.C. § 1388 (a) to be content-neutral.

Significant Interest

The next question a reviewing court would address is whether the government has a substantial interest in enacting the restriction. In the case of restrictions at issue here, the interest the government would likely advance is the protection of the dignity of military funerals and the privacy and emotional well-being of the family and friends in attendance.[22] However, a ruling court would likely weigh the significance of this interest against the First Amendment interests of speakers in conveying their message. The Supreme Court has never squarely addressed this question, but previous case law may be informative.

The general First Amendment rule is that the burden is on the listener to avoid speech that she does not wish to hear.[23] The Supreme Court has recognized exceptions to this rule for "captive audiences." The Court initially announced its recognition of the government's interest in protecting "captive audiences" in *Frisby v. Schultz*.[24] The restriction at issue in that case prohibited focused picketing before or about an individual residence. The Court said, "[although] in many locations we expect individuals simply to

avoid speech they do not want to hear, the home is different."[25] The Court was concerned that persons within their homes are particularly vulnerable, and that protests directly outside a home, regardless of the size of the protest, could inflict a great deal of stress on the home's occupants and fundamentally alter the character of the home itself, which is traditionally one's last refuge from the day's onslaught.

Since *Frisby*, the Court has sparingly extended its captive audience analysis beyond the home.[26] The other instance in which the Court expressly found that individuals outside of their homes are similarly situated to those within their homes is in the medical privacy context. In *Madsen v. Women's Health Center*, which partially upheld an injunction against abortion protesters in Florida, the Court found that the government's strong interest in residential privacy applies by analogy in the medical context.[27] Those entering medical facilities as patients are often in fragile physical, emotional, and mental states. The Court found that the targeted picketing of a home threatens the emotional and psychological well being of its occupants in the same way that the picketing of medical facilities could threaten the physical and mental well being of patients attempting to exit or enter the facilities. Patients were "captive" by medical circumstance, in the Court's eyes.[28]

It is unclear, however, whether funeral attendees would be considered "captive." Analogies exist. Funeral attendees must be in a given place for a particular period of time in order to attend the funeral. They have also just experienced the loss of a loved one, who may have perished in the course of military service. It could be argued that protests of military funerals threaten the emotional and psychological well-being of funeral attendees in the same way that such protests threaten medical patients and those who are within their homes. It could also be argued that funeral attendees are just as powerless to avoid unwanted speech during the funeral service as patients entering medical facilities and those within their homes.

In *Hill v. Colorado*, the Court recognized an unwilling listener's "right to be let alone," which has special force in the home and immediate surroundings but may also be applied in "confrontational settings."[29] In recognizing this application, the Court was analyzing a law that restricted approaching within eight feet those entering medical facilities for the purpose of engaging in protests or leafleting without consent. This law more clearly applied to one on one confrontation. The federal law at issue seems to apply to more generalized speech, but it may be argued that, due to the acutely personal nature of funerals, any protest of a funeral might be characterized as sufficiently confrontational to satisfy the constitutional standard.