



FRISBY V. SCHULTZ
SUPREME COURT OF THE UNITED STATES
487 U.S. 474
June 27, 1988
[6 - 3]

OPINION: Justice O'Connor...Brookfield, Wisconsin, has adopted an **ordinance that completely bans picketing "before or about" any residence**. This case presents a facial First Amendment challenge to that ordinance.

Brookfield, Wisconsin, is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra C. Schultz and Robert C. Braun, are individuals strongly opposed to abortion and wish to express their views on the subject by **picketing on a public street outside the Brookfield residence of a doctor** who apparently performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20, 1985, and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. **The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct.** Nonetheless, the picketing generated substantial controversy and numerous complaints.

The Town Board, therefore,...passed an ordinance that prohibited all picketing in residential neighborhoods except for labor picketing. But after reviewing this Court's decision in *Carey v. Brown*, which invalidated a similar ordinance as a violation of the Equal Protection Clause, the town attorney instructed the police not to enforce the new ordinance and advised the Town Board that the ordinance's labor picketing exception likely rendered it unconstitutional. This ordinance was repealed on May 15, 1985, and replaced with the following flat ban on all residential picketing:

"It is unlawful for any person to engage in picketing **before or about the residence** or dwelling of any individual in the Town of Brookfield."

The ordinance itself recites the primary purpose of this ban: "the protection and preservation of the

home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants...[and] has as its object the harassing of such occupants." The ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel."

...Faced with the threat of arrest and prosecution, appellees ceased picketing in Brookfield and filed this lawsuit...on the grounds that the ordinance violated the First Amendment...

The District Court...concluded that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum...The...Court of Appeals affirmed...

The anti-picketing 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, *New York Times Co. v. Sullivan*¹, we have traditionally subjected restrictions on public issue picketing to careful scrutiny. Of course, "even protected speech is not equally permissible in all places and at all times."

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."** Specifically, we have identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum."

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. "Time out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks 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.** In *Carey v. Brown* -- which considered a statute similar to the one at issue here, ultimately striking it down as a violation of the Equal Protection Clause because it included an exception for labor picketing -- we expressly recognized that "public streets and sidewalks in residential neighborhoods

¹Case 1A-S-12 on this website.

were public fora." This rather ready identification virtually forecloses appellants' argument.

In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche," but recognition that "wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO*. 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 [and, therefore]...the anti-picketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

"In these quintessential public fora, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end...The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*.

As *Perry* makes clear, the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content...[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 "leaves open ample alternative channels of communication."

Because the last question is so easily answered, we address it first. Of course, before we are able to assess the available alternatives, we must consider more carefully the reach of the ordinance. The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words "residence" and "dwelling" suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. As Justice White's concurrence recounts, the lower courts described the ordinance as banning "all picketing in residential areas." But these general descriptions do not address the exact scope of the ordinance and are in no way inconsistent with our reading of its text. "Picketing," after all, is defined as posting at a particular place, a characterization in line with viewing the ordinance as limited to activity focused on a single residence. Moreover, while we ordinarily defer to lower court constructions of state statutes, we do not invariably do so. We are particularly reluctant to defer when the lower courts have fallen into plain error, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. Thus, unlike the lower courts' judgment that the ordinance does not contain an implied exception for labor picketing, we are unable to accept their 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. As appellants explain, the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain:

"Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching...They may go door-to-door to proselytize their views. They may distribute literature in this manner...or through the mails. They may contact residents by telephone, short of harassment."

We readily agree that the ordinance preserves ample alternative channels of communication and thus move on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy.

"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*. Our prior decisions have often remarked on the unique nature of the home...and have recognized that "preserving 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 Dept.*² 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...

This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas...In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In

²Case 1A-S-19 on this website.

Schneider, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only "to one willing to receive it." Similarly, when we invalidated a ban on door-to-door solicitation in *Martin v Struthers*, we did so on the basis that the "home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.'" We have "never intimated that the visitor could insert a foot in the door and insist on a hearing." There simply is no right to force speech into the home of an unwilling listener.

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.** A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil -- visual blight -- was not merely a possible byproduct of the activity, but was created by the medium of expression itself."

The same is true here. 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. *Schneider* (handbilling); *Martin* (solicitation); *Murdock v. Pennsylvania* (solicitation); *Gregory v. Chicago* (marching). *Perry* (in traditional public forum, "the government may not prohibit all communicative activity"). In such cases "the flow of information is not into...households, but to the public." *Organization for a Better Austin v. Keefe*. 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:

"To those inside...the home becomes something less than a home when and while the picketing...continues...The tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility." *Carey*.

In this case, for example, appellees subjected the doctor and his family to the presence of a relatively large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions. But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy...The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance thus can scarcely be questioned...

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...Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home" is "created by the medium of expression itself." Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance -- to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketers present at a particular home by invitation of the resident -- may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy and since it speaks only of a "residence or dwelling," not a place of business...Moreover, since our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to such hypotheticals remains open to question. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those **who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Thus, largely because of its narrow scope, the facial challenge to the ordinance must fail. The contrary judgment of the Court of Appeals is Reversed...**

DISSENT: Justice Brennan/Marshall...[T]he 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...

The ordinance before us absolutely prohibits picketing "before or about" any residence in the town of Brookfield, thereby restricting a manner of speech in a traditional public forum. Consequently,... the ordinance is subject to the well-settled time, place, and manner test: **the restriction must be content and viewpoint neutral, leave open ample alternative channels of communication, and be narrowly tailored to further a substantial governmental interest.**

Assuming one construes the ordinance as the Court does, I agree that the regulation reserves ample alternative channels of communication. I also agree with the Court that the town has a substantial interest in protecting its residents' right to be left alone in their homes. It is, however, critical to specify the precise scope of this interest. The mere fact that speech takes place in a residential neighborhood does not automatically implicate a residential privacy interest. It is the intrusion of speech into the home or the unduly coercive nature of a particular manner of speech around the home that is subject to more exacting regulation. Thus, the intrusion into the home of an unwelcome solicitor (*Martin v. Struthers*) or unwanted mail (*Rowan v. Post Office Dept*) may be forbidden. Similarly, the government may forbid the intrusion of excessive noise into the home (*Kovacs v.*

Cooper), or, in appropriate circumstances, perhaps even radio waves (*FCC v. Pacifica Foundation*)³. Similarly, the government may prohibit unduly coercive conduct around the home, even though it involves expressive elements. 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.** See *Organization for a Better Austin v. Keefe*.

The foregoing distinction is crucial here because it directly affects the last prong of the time, place, and manner test: whether the ordinance is narrowly tailored to achieve the governmental interest. I do not quarrel with the Court's reliance on *City Council of Los Angeles v. Taxpayers for Vincent*, for the proposition that a blanket prohibition of a manner of speech in particular public fora may nonetheless be "narrowly tailored" if in each case the manner of speech forbidden necessarily produces the very "evil" the government seeks to eradicate. However, the application of this test requires that the government demonstrate that the offending aspects of the prohibited manner of speech cannot be separately, and less intrusively, controlled. Thus here, if the intrusive and unduly coercive elements of residential picketing can be eliminated without simultaneously eliminating residential picketing completely, the Brookfield ordinance fails the *Vincent* test.

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...** Therefore, the ordinance is not narrowly tailored.

The Court nonetheless attempts to justify the town's sweeping prohibition. Central to the Court's analysis is the determination that:

"In contrast to other forms of communication, the picketing here 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

³Case 1A-S-30 on this website.

activity nonetheless inherently and offensively intrudes on residential privacy."

That reasoning is flawed. First, the ordinance applies to all picketers, not just those engaged in the protest giving rise to this challenge. Yet the Court cites no evidence to support its assertion that picketers generally, or even appellees specifically, desire to communicate only with the "targeted resident."...While picketers' signs might be seen from the resident's house, they are also visible to passersby. To be sure, the audience is limited to those within sight of the picket, but focusing speech does not strip it of constitutional protection. Even the site-specific aspect of the picket identifies to the public the object of the picketers' attention. Nor does the picketers' ultimate goal -- to influence the resident's conduct -- change the analysis; as the Court held in *Keefe*, such a goal does not defeat First Amendment protection...

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. I dissent.

DISSENT: Justice Stevens..."GET WELL CHARLIE -- OUR TEAM NEEDS YOU." In Brookfield, Wisconsin, it is unlawful for a fifth grader to carry such a sign in front of a residence for the period of time necessary to convey its friendly message to its intended audience...

Justice Stevens knows full well that Charlie is not going to be seeking an injunction.
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Two characteristics of picketing -- and of speech more generally -- make this a difficult case. First, it is important to recognize that, "like so many other kinds of expression, picketing is a mixture of conduct and communication." If we put the speech element to one side, I should think it perfectly clear that the town could prohibit pedestrians from loitering in front of a residence. On the other hand, it seems equally clear that a sign carrier has a right to march past a residence -- and presumably pause long enough to give the occupants an opportunity to read his or her message -- regardless of whether the reader agrees, disagrees, or is simply indifferent to the point of view being expressed. Second, it bears emphasis that:

"A communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive -- perhaps because it is too loud or too ugly in a particular setting. Other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message."

Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantive message conveyed.

The picketing that gave rise to the ordinance enacted in this case was obviously intended to do more

than convey a message of opposition to the character of the doctor's practice; it was intended to cause him and his family substantial psychological distress. As the record reveals, the picketers' message was repeatedly redelivered by a relatively large group -- in essence, increasing the volume and intrusiveness of the same message with each repeated assertion. As is often the function of picketing, during the periods of protest the doctor's home was held under a virtual siege. **I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected. I do believe, however, that the picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family.** Thus, I agree that the ordinance may be constitutionally applied to the kind of picketing that gave rise to its enactment.

On the other hand, the ordinance is unquestionably "overbroad" in that it prohibits some communication that is protected by the First Amendment. The question, then, is whether to apply the overbreadth doctrine's "strong medicine" or to put that approach aside "and await further developments."

...In this case the overbreadth is unquestionably "real." Whether or not it is "substantial" in relation to the "plainly legitimate sweep" of the ordinance is a more difficult question. My hunch is that the town will probably not enforce its ban against friendly, innocuous, or even brief unfriendly picketing, and that the Court may be right in concluding that its legitimate sweep makes its overbreadth insubstantial. But there are two countervailing considerations that are persuasive to me. The scope of the ordinance gives the town officials far too much discretion in making enforcement decisions; while we sit by and await further developments, potential picketers must act at their peril. Second, it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose. Accordingly, I respectfully dissent.