Speech Shouldn't be “Free” at Funerals: An Analysis of the Respect for America’s Fallen Heroes Act

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I. INTRODUCTION

Like most Americans, Alexander Jordan liked living in America. He especially enjoyed the outdoors and often went camping, target shooting, or to barbecues.1 Like most Americans, Alexander Jordan was also deeply affected by the terrorist attacks on September 11, 2001 in New York City and Washington D.C.2 In fact, the attacks prompted Jordan to join the Army in order to help protect his country against future attacks.3 In September of 2003, Jordan enlisted in the Army and in the following January he was assigned to Fort Richardson Army post in Alaska.4 Jordan planned on serving his country in the Army and then becoming a police officer and starting a

2. Id.
3. Id.
family of his own. He was never given that chance. On September 10, 2006, while deployed to Iraq, Corporal Jordan’s unit came under small-arms fire from insurgents and he was shot and killed. Corporal Alexander Jordan was thirty-one years old.

Corporal Andrew Kemple also joined the Army in 2003, just two years after graduating from high school. On February 12, 2006, while deployed to Iraq, Corporal Kemple and his unit went on a mission to search for a hidden weapons cache and his Humvee came under attack from insurgents. Corporal Kemple was killed during the attack. Minnesota Governor Tim Pawlenty described Corporal Kemple as “a devoted soldier who loved serving his country and did so with great pride.” Corporal Andrew Kemple was just twenty-three years old.

Sergeant Joshua Youmans also died from injuries he sustained while serving his country in Iraq. On November 21, 2005, Sergeant Youmans was wounded when an Improvised Explosive Device, commonly referred to as an IED, exploded near his vehicle. In addition to injuring Sergeant Youmans, the devastating blast killed one man instantly and badly burned three others. While Sergeant Youmans was trying to recover at Brooks Army Medical Center in San Antonio Texas, he had the opportunity to hold his daughter, McKenzie, for the first time. On March 1, 2006, a week after meeting his daughter, Sergeant Youmans died from his injuries. Sergeant Joshua Youmans was twenty-six years old.

These three individuals have much in common. Not only are they members of a long list of men and women who have sacrificed their lives in

6. Ex-Cibola Student Killed in Iraq; Mother Says 9/11 Was One Reason Her Son Joined the Army, ALBUQUERQUE J., Sept. 16, 2006, at El.
7. Id.
8. Ben Cohen, Services Set for Minnesotan Killed in Iraq, STAR TRIB., Feb. 21, 2006, at 7B.
9. Id.
10. Id.
12. Ben Cohen, Services Set for Minnesotan Killed in Iraq, STAR TRIB., Feb. 21, 2006, at 7B.
15. Id.
16. Id.
service to the United States of America, but they are also members of an alarmingly growing list of service members whose funerals were protested in an offensive and disrespectful manner. At Corporal Jordan’s funeral, protesters held up signs that read “THANK GOD FOR DEAD SOLDIERS” and “GOD HATES FAGS.” Similar activity took place at Corporal Kemple’s funeral in Minnesota where protesters chanted “GOD HATES AMERICA” and “GOD LOVES IEDs.” However, in addition to these chants, the protesters also confronted Corporal Kemple’s mother and “taunted” her as she entered the church to say goodbye to her son. The same disturbing chants were directed at Sergeant Youmans’ wife as she entered the church where her husband’s memorial took place. United States Congressional Representative Mike Rogers of Michigan attended the service and described the “chants and . . . taunting as some of the most vile things [he] had ever heard.”

Unfortunately, these three stories are not unique. Protesters have been disrupting and dishonoring service member funerals all over the United States since June of 2005. In Indiana, the mother of Sergeant Ricky Jones received multiple phone calls stating: “I am glad your son is dead,” “He deserved to die,” and “I’m glad your son is coming home in a body bag.” Someone also threw eggs at Mrs. Jones’ home and put trash all over her front yard during the night. In Kansas, protesters showed up at the funeral of Sergeant Donald Hasse carrying their trademark signs. The question most Americans have is why? Who would preach hate to the family members of soldiers who gave their lives protecting their country?

A. THE WESTBORO BAPTIST CHURCH

The people responsible for these disturbing protests are members of the Westboro Baptist Church. The Westboro Baptist Church is based in

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24. Id.
27. Id.
Topeka, Kansas and is led by 76 year-old pastor Fred Phelps. The church is not very large in number, with only about 75 members, but it has been engaged in a campaign that has had a deleterious effect on millions of American citizens. The basic message promoted by the Westboro Baptist Church is that God hates homosexuals and America’s tolerance of homosexual conduct has lead to various acts of punishment from God including Hurricane Katrina, the death of soldiers in Iraq, the terrorist attacks on September 11, 2001, and many other natural disasters. The group first gained notoriety in 1998 when several church members protested at the funeral of Matthew Shepard, a University of Wyoming student who had been brutally murdered because of his homosexual preference. At his funeral, members of the Westboro Baptist Church held up signs that read “GOD HATES FAGS” and chanted “FAGS DIE, GOD LAUGHS.”

In June of 2005, members of the Westboro Baptist Church began protesting at funerals of American troops who were killed in combat. However, the link between the Church’s message and these dead soldiers is not entirely clear. According to a senior correspondent for the Chicago Tribune, the protesters are not protesting the individual sexual preference of the dead soldier, they are not protesting the military’s “don’t ask, don’t tell” policy concerning homosexuality, and they are not even protesting the estimated three percent of military members who are homosexuals. Instead,

30. See id.
31. A Ministry of Hate, THE RECORD, June 10, 2006, § Faith, at 8. The protestors also recently picketed the funerals of some of the students who were killed in the violent shooting spree at Northern Illinois University on February 14, 2008. Jameel Naqvi, Small Group of Protestors Fail to Disrupt Funeral Services, DAILY HERALD, Feb. 19, 2008, available at http://www.dailyherald.com/story/?id=137589. Protestors at Ryanne Mace’s funeral held up signs that read “God Sent the Shooter.” Id. Paulette Phelps, one of the protestors at the funeral, spent about a thousand dollars on a flight to Chicago and justified the expense saying, “‘When this is what you do as your hobby, as your leisure time, this is what you spend your money on . . . This is our vacation. This is our fun time.’” Id.
32. Id.
33. Id.
34. Id.
35. See Howard Witt, Lawmakers Rush to Blunt Anti-gay Church, Virulent Protests at Funerals Raise the Question: Is There a Limit to 1st Amendment Protections?, CHI. TRIB., Apr. 4, 2006, Zone C, at 1 (claiming the protests have nothing to do with the military’s “don’t ask, don’t tell” policy concerning tolerance of homosexuality). But see Nyier Abdou, When Duty Calls, These Riders Hit the Road, THE STAR-LEDGER, Jan. 15, 2006, § New Jersey, at 19 (stating that the Westboro Baptist Church believes part of God’s punishment is a direct result of the military’s tolerance of homosexuality through its “don’t ask, don’t tell” policy).
the Westboro Baptist Church claims that these soldiers are "guilty by association." When asked why his group was protesting at military funerals, Phelps said "You connect the dots... This evil nation has taught from the cradle to the grave that it's OK to be gay. Now God is over in Iraq picking off America's kids. They turned America over to fags, now they are coming home in body bags." The group claims that it has protested at over 200 military funerals across the nation and over 34,000 total demonstrations. The protester's activities have generally been limited to displaying signs and shouting during funerals, but in some cases there have been reports of violence between protesters and funeral attendees.

B. CONGRESSIONAL RESPONSE

In response to these protests, Congress passed The Respect for America's Fallen Heroes Act on May 29, 2006 (hereinafter "Act"). The Act places specific limitations on protests at any cemetery controlled by the National Cemetery Administration or at Arlington National Cemetery. First, the Act prohibits all demonstrations on cemetery land unless "the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located." This is essentially a congressional codification of Veterans Administration regulations already in place. Second, the Act restricts demonstrations that occur within sixty minutes prior to a funeral and sixty minutes immediately following a funeral if: 1) the demonstration "takes place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery

37. Id.
38. Id. The Group had even planned on protesting at the funerals of five Amish girls who were murdered in their Pennsylvania schoolhouse and only abandoned those plans when a radio talk show host offered to give them fifty minutes of air-time in exchange for a promise not to disrupt the funerals. Jacques Steinberg, Air Time Instead of Funeral Protest, N.Y. TIMES, Oct. 6, 2006, at A14.
42. 38 U.S.C § 2413 (2006).
43. Id. However, on December 22, 2006, President Bush signed into law the Respect for the Funerals of Fallen Heroes Act which expands the coverage of the Respect for America's Fallen Heroes Act to include any funeral of a member (or former member) of the armed forces, even if the funeral takes place on land not controlled by the National Cemetery Administration. See 18 U.S.C § 1388 (2006).
44. 38 U.S.C § 2413 (2006).
45. See 38 C.F.R. § 1.218 (2006) (delegating the authority to manage federal cemeteries to the Veterans Administration).
property” and “includes, as part of such demonstration, any individual will-fully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony;” or 2) “is within 300 feet of such cemetery and impedes the access to or egress from such cemetery.” The Act goes on to describe the definition of demonstration to mean: 1) “Any picketing or similar conduct;” 2) “Any oration, speech, use of sound amplification equipment or device, or similar conduct that is not part of a funeral, memorial service, or ceremony;” 3) “The display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony;” and (4) “The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.”

The Respect for America’s Fallen Heroes Act received virtually unanimous bipartisan support in the House of Representatives with an official vote of 403 in favor and 3 opposed. After passing in the House of Representatives, the bill went to the Senate where members of the Senate proposed an amendment to tighten the distance restriction in an effort to make the Act more narrowly tailored. In fact, the Senate amendment to tighten the restriction is one example of an underlying theme throughout the legislative history of this Act: to make sure the Act withstands constitutional scrutiny. The Senate floor debate acknowledged that special sensitivity is required any time the federal government seeks to expand “zones of Federal influence or regulation, especially to cover lands that are not its own.” While most Americans probably disagree with what the members of the Westboro Baptist Church are doing, many feel that they have a constitutional right to do so and that for Congress to legislate against their protest activities creates a dangerous precedent for future free speech restric-
tions. I believe this federal statute will be challenged as a facially unconstitutional restriction on free speech, in part because at least three of the comparable state statutes have already been challenged and in part because a Westboro Baptist Church spokesperson has stated the church "would challenge anything it considers restrictive." This comment will analyze the facial constitutionality of the protest limitation provisions of The Respect for America’s Fallen Heroes Act under the First Amendment’s free speech clause and will argue that it is a valid time, place, and manner restriction on free speech because it is content-neutral and is narrowly tailored to advance a significant governmental interest while leaving open ample alternative means of communication. This comment will briefly discuss some of the issues that individual states will have in drafting similar legislation and attempt to provide an analytical framework for drafting state legislation that will withstand constitutional scrutiny.

II. BACKGROUND OF RELEVANT FREE SPEECH LAW

The First Amendment is arguably one of the most revered aspects of American jurisprudence because it embodies the concepts of freedom upon which the United States was founded. The First Amendment states "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." The expressed constitutional right to free speech has been deemed necessary to promote the "uninhibited, robust, and wide-open" debate implicit in a democratic nation. This language appears plain and straightforward but has generated countless volumes of case-law interpreting its meaning. The most important conclusion to be drawn from these many legal decisions is that the rights granted to citizens of the United States and of the individual states concerning freedom of speech, while fundamental, are not absolute.

56. U.S. CONST. amend. I.
57. N.Y. Times Co., 376 U.S. at 270.
One of the most famous examples of unprotected speech came from former Supreme Court Justice Oliver Wendell Holmes who claimed that falsely yelling fire in a crowded theatre would never receive First Amendment protection. Similarly, fighting words, defined as "words likely to cause an average addressee to fight," are not constitutionally protected. Additionally, advocating illegal action is unprotected if it falls under the modern clear and present danger test announced in Brandenburg v. Ohio. Furthermore, speech that falls into the categories of either obscenity or defamation is also not entitled to constitutional protection. Apart from these discrete classes of unprotected speech, the Supreme Court has also found reasonable time, place, and manner restrictions on free speech rights to be valid. So while the language of the Constitution states that Congress shall make no law abridging the freedom of speech, clearly something other than a literal application of this language is required.

A. STANDARD OF REVIEW

In general, the first step in any constitutional analysis is to determine the appropriate standard of review. Since First Amendment rights relating to free speech are deemed fundamental, the initial reaction is to apply strict scrutiny to any governmental action that restricts or denies those rights. However, not all free speech cases require strict scrutiny. Two important factors must be analyzed together in order to determine the appropriate standard of review. The first factor is the type of forum to which the restriction is applicable and the second factor relates to whether the re-

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59. Schenck, 249 U.S. at 52.
60. Chaplinsky, 315 U.S. at 573.
SPEECH SHOULDN'T BE "FREE" AT FUNERALS

... restriction distinguishes permitted speech from prohibited speech based on the content of the speech.68

The Court has recognized three forum classes for First Amendment purposes.69 The first is the traditional public forum, the clearest example of which is usually considered to be public streets, parks, and sidewalks.70 In this traditional public forum, any content-based restriction on free speech must pass strict constitutional scrutiny by being narrowly tailored to advance a compelling governmental interest.71 The second type of forum is the government created public forum whereby the government has opened up an otherwise non-public forum to public debate.72 In this government-created public forum, strict scrutiny also applies to any content-based restriction and such restrictions will have to be narrowly tailored to serve a compelling governmental interest.73 The only practical difference between the government created public forum and the traditional public forum is that the government is not required to indefinitely maintain the forum as open for public debate and could turn such a forum into a non-public forum by closing it to all public debate.74 The final public forum category is the non-public forum.75 In a non-public forum, content-based restrictions do not trigger strict scrutiny as long as the restrictions reasonably relate to the intended purpose of the forum and do not go beyond content-based restrictions to viewpoint-based restrictions.76 Essentially, content-based restrictions require strict scrutiny in both the traditional public forum and the government created public forum but do not require strict scrutiny, at least to the extent that they are not viewpoint-based, in the non-public forum.77

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68. Frisby, 487 U.S. at 479-81.
70. E.g., id. at 44-45; Frisby, 487 U.S. at 480.
73. Id.
74. Id.
75. Id.
76. Id. Viewpoint-based discrimination occurs where the government seeks to suppress the speaker's view on a particular subject. Id. at 46. For example, in Texas v. Johnson, the Court concluded that a Texas state statute that prohibited burning the United States flag in such a way as to offend one or more persons was viewpoint-based because it promoted one side of a debate: whether the flag should be honored as a symbol of national unity. 491 U.S. 397, 413 n.9 (1989). This viewpoint-based discrimination is distinguishable from content-based discrimination in that it does more than discriminate based upon a particular topic by advocating one side of the argument related to a particular topic. See Perry Educ. Assn., 460 U.S. at 46.
77. See Perry Educ. Assn., 460 U.S. at 44-46.
In the traditional public forum and the government-created public forum, a different analysis applies if the restriction is content-neutral. If the restriction is content-neutral, an intermediate level of scrutiny applies and the restriction is deemed constitutional if it is "narrowly tailored to serve a significant government interest" and "leave[s] open ample alternative channels of communication." These types of restrictions are commonly called reasonable time, place, and manner restrictions and do not require strict scrutiny because of the recognized principle that free speech rights, even in the most public of places, are not absolute.

The content-based versus content-neutral distinction is one of the most important aspects of any free speech analysis because in most cases it dictates the standard of review. The content-based versus content-neutral distinction is one of the most important aspects of any free speech analysis because in most cases it dictates the standard of review. As in other constitutional challenges, meeting the high standard of strict scrutiny places a heavy burden on the government to justify a restriction, and the government will often not meet this standard. For example, the Supreme Court has held anti-picketing statutes with specific exceptions for labor dispute picketing to be content-based and unconstitutional. In Police Dep't of Chicago v. Mosley, the Court reasoned that allowing an exception for labor picketing in an anti-picketing ordinance was a content-based restriction because the "ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter." In Boos v. Barry, the Court also found an impermissible content-based restriction when a District of Columbia statute prohibited certain expressive conduct within 500 feet of a foreign embassy if the expressive conduct tended to bring that foreign government into "public disrepute." The Court reasoned that while the

80. See Frisby, 487 U.S. 474.
83. See generally Christina E. Wells, Fear and Loathing in Constitutional Decision-Making, 2005 Wis. L. Rev. 115, 209 (2005) (reasoning that "the application of strict scrutiny means that the Court likely will strike down a restriction on speech").
85. Id. at 99. In Mosley, the city of Chicago prohibited "Pickets or demonstrations on a public way within 150 feet of any primary or secondary school building while the school is in session . . . provided, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute." Id. at 92-93.
secondary effects of expressive conduct can be the basis for a content-neutral restriction, "regulations that focus on the direct impact of speech on its audience" are content-based because the "emotive impact of speech on its audience is not a 'secondary effect.'"87 On the other hand, the Court has determined that numerous anti-picketing statutes aimed at abortion protesters are not content-based.88 In Hill v. Colorado, the Court reasoned that a Colorado statute prohibiting certain demonstrations within 100 feet of a health care facility89 was content-neutral because it applied equally to all potential protesters and made no reference to the content of the prohibited speech.90 Generally, if a restriction makes no facial distinction with regard to the topic of the prohibited speech, the restriction will be considered content-neutral.91

B. TIME, PLACE, AND MANNER RESTRICTIONS

If a statute applies in either a traditional public forum or a government created public forum and is found to be content-based, then it may only be justified if it is narrowly tailored to advance a compelling government interest.92 However, if a statute is found to be content-neutral then it is justified if it is narrowly tailored to advance a significant government interest while also leaving open ample channels for communication.93 It is not very difficult to find a significant government interest that would satisfy a time, place, or manner restriction. Traditional police powers such as protecting the health and safety of citizens,94 reducing crime,95 protecting citizens from intrusive noise,96 and promoting the orderly flow of traffic on streets and sidewalks97 have all been recognized as significant governmental interests.

Another interesting factor that the Court seems to take into account when determining whether a significant state interest is at stake concerns whether the speech is directed at a captive audience or significantly interferes with a privacy interest.98 The Court has made it clear that in many
situations it expects "individuals simply to avoid speech they do not want to hear;" however, when a substantial privacy interest is invaded in an intolerable manner, the state may legitimately restrict speech on a captive audience theory. For example, the Court in Frisby v. Schultz concluded that protecting unwilling listeners inside their home is a significant government interest. The Court stated, "[t]here simply is no right to force speech into the home of an unwilling listener." The Court reasoned that subjecting individuals to unwelcome speech in their own home implicates the captive audience theory because listeners are left "with no ready means of avoiding the unwanted speech." However, under the captive audience doctrine, a regulation designed to restrict speech aimed at a captive audience must still be narrowly tailored to advance that significant interest.

While the narrowly-tailored requirement in a time, place, and manner restriction might be harder to demonstrate than the significant interest, it is not the same narrowly-tailored analysis that applies under strict scrutiny. In order to be narrowly tailored under a time, place, and manner analysis, a regulation does not have to be the least restrictive means available, as is the standard under a strict scrutiny analysis; rather, the regulation would be narrowly tailored if the substantial government interest would be achieved less effectively absent the restriction. In Ward v. Rock Against Racism, the Court reasoned that a content-neutral time, place, and manner restriction is narrowly tailored if the "means chosen are not substantially broader than necessary to achieve the government's interest." In Ward, the Court concluded that a statute requiring a city sound technician to control the soundboard during musical performances at a city park directly served the city's significant interest in noise control. The Court further reasoned that the statute was narrowly tailored because the city's interest would have been achieved less effectively absent the restriction. It was of no consequence that other methods of controlling the sound may have existed, even if those

99. Frisby, 487 U.S. at 484. See also Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (finding that individuals using a city's public transportation were a captive audience and therefore the city could limit advertisements in public transportation to less controversial types of advertisements).
101. Frisby, 487 U.S. at 488.
102. Id. at 485.
103. Id. at 487.
104. Id. at 485.
106. Ward, 491 U.S. at 798 n.6, 799.
107. Id. at 800.
108. Id.
109. Id.
other methods may have been less restrictive on free speech. Further, in *United States v. Albertini*, the Court stated that “[t]he validity of [time, place, or manner] restrictions does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.”

The final part of the time, place, and manner analysis concerns whether the restriction leaves open ample alternatives for the speech. In order to demonstrate that a restriction does not leave open ample alternatives for the speech, there must be a showing that other avenues for the speech are inadequate. This part of the analysis addresses the degree to which the statute is narrowly tailored because while the restriction does not need to be the least restrictive means, it must leave open other viable means of communication. In *Frisby*, the Court said that a restriction on residential picketing left open ample channels of communication because protesters were still able to enter neighborhoods, go door-to-door promoting their views, distribute literature through the mail, and contact people by phone so long as it did not amount to harassment. The Court reasoned that due to the statute’s limited application, the availability of alternative channels of communication was self-evident. Similarly, the Court in *Perry Educ. Assn. v. Perry Local Educators’ Assn.* held that a restriction on the use of a school district’s internal mail system left open ample alternative channels for communication in part because the United States’ mail system was a viable alternative.

III. ANALYSIS OF THE RESPECT FOR AMERICA’S FALLEN HEROES ACT

Turning to the constitutionality of the free speech restrictions in The Respect for America’s Fallen Hero’s Act, the first step is to determine the appropriate standard of review.

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110. *Id.*
114. *Frisby*, 487 U.S. at 484.
115. *Id.* at 483.
A. STANDARD OF REVIEW

1. Forum Analysis

To determine the standard of review, it is important to consider the type of forum to which the Act applies. The first paragraph of the Act codifies current Veterans Administration regulations that require prior approval by the cemetery superintendent in order to conduct any demonstration on cemetery property under the control of the National Cemetery Administration or on Arlington National Cemetery property. This paragraph only applies to the actual cemetery property, not to the public sidewalks or streets surrounding the cemetery, and cemetery property is considered to be a non-public forum for free speech purposes. However, the Act's application goes beyond the actual cemetery property because it also places certain restrictions on demonstrations that take place "within 150 feet of a road, pathway, or other route of ingress to or egress from" cemetery property. Further, the Act places restrictions on speech within 300 feet of the cemetery if it impedes access to the cemetery. These two provisions of the Act clearly extend into the traditional public forum because they would restrict speech on the public sidewalks and streets surrounding cemetery property.

2. Content-Based or Content-Neutral Analysis

The second aspect of determining the appropriate standard of review relates to whether the Act is a content-neutral or content-based restriction. Since the Act applies in the traditional public forum, a content-based re-

117. The standard of review is dependent upon the type of forum being regulated. See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983). The Respect for America's Fallen Heroes Act clearly places restrictions on speech activity and this comment assumes the restricted speech at issue is protected under the 1st Amendment and subject to constitutional review.

118. The first paragraph of the Act states that no person may carry out "a demonstration on the property of a cemetery under the control of the National Cemetery Administration or on the property of Arlington National Cemetery unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located." 38 U.S.C § 2413(a)(1) (2006).


121. Id.

122. Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1322 (Fed. Cir. 2002).


striction will have to meet strict scrutiny, while a content-neutral restriction will be subject to the less rigorous intermediate scrutiny standard through a reasonable time, place, and manner analysis.\textsuperscript{126} In determining whether this Act restricts speech based on its content there are two possibilities that must be considered. The first is to look at the Act on its face to determine whether the language itself differentiates permissible speech from prohibited speech on the basis of content.\textsuperscript{127} The second is to look at the purpose behind the restriction to see if the Act, while neutral on its face, might still be considered a content-based restriction because of the motivation behind its enactment.\textsuperscript{128}

\textit{a. Statutory Language on its Face}

The legislative history of this Act makes it clear that Congress drafted The Respect for America's Fallen Heroes Act in a very careful manner with the goal of avoiding constitutional infirmities.\textsuperscript{129} Congress was careful to choose language that had been upheld in previous Supreme Court decisions as being content-neutral and therefore the Act tends to appear neutral on its face.\textsuperscript{130} For example, the Act does not describe prohibited speech in terms of its message but rather prohibits speech that has not been "approved by the cemetery superintendent or the director," speech that is "not part of a funeral, memorial service, or ceremony," and speech that "disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony."\textsuperscript{131}

Examining the plain language of the Act, it does not restrict speech on the basis of content. The language requiring prior approval for speech on cemetery property (properly categorized as a non-public forum) does bring into question the doctrine of prior restraint\textsuperscript{132} and does not reference the content of the speech.\textsuperscript{133} Nothing in this language specifically requires the

\begin{itemize}
  \item \textsuperscript{126} See supra notes 69-80 and accompanying text.
  \item \textsuperscript{128} See infra notes 155-59 and accompanying text.
  \item \textsuperscript{129} See supra note 50.
  \item \textsuperscript{130} See e.g., Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
  \item \textsuperscript{131} 38 U.S.C § 2413 (2006).
  \item \textsuperscript{132} This comment will not address the doctrine of prior restraint. However, In Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002), the United States Court of Appeals for the Federal Circuit determined that the discretion granted to the Veterans Administration is "reasonable in light of the characteristic nature and function of national cemeteries." \textit{Id.} at 1325.
  \item \textsuperscript{133} See 38 U.S.C § 2413(a)(1) (2006). Even if this language did reference the content of prohibited speech, strict scrutiny would only apply if the reference could also be considered viewpoint-based because this part of the statute only applies in the non-public forum. See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983).)
\end{itemize}
appropriate official to grant or deny approval for certain types or subjects of speech.\textsuperscript{134} Similarly, the language that restricts speech unless it is "part of a funeral, memorial service, or ceremony" does not reference the content of the speech, so if the speech is part of the official ceremony there would be no restriction on the speech, regardless of its content.\textsuperscript{135} Conversely, if the speech is not part of the official ceremony and the speech falls under the specific time and distance restrictions, it would be prohibited regardless of the content of the speech. For example, some commentators have suggested that the Act is content-based because it would allow the Patriot Guard Riders to attend these funerals, wave American flags, and stand between protestors and family members.\textsuperscript{136} These commentators are only correct if the Patriot Guard Riders have not been given permission to be there as part of the funeral, memorial service, or ceremony.\textsuperscript{137} Since the Patriot Guard Riders only attend funerals to which they have been invited,\textsuperscript{138} they would be part of the funeral, ceremony, or service and are not restricted in any way by the Act. However, the Act would prohibit uninvited riders from demonstrating at a funeral.\textsuperscript{139} It is the invitation to attend the funeral, not the fact that their speech is patriotic, that allows their speech to take place without limitation. The language "part of a funeral, memorial service, or ceremony" does not require the appropriate official to look at the content of the speech to know whether it is permissible or impermissible because a determination as to whether the speech is part of the official service is dispositive.\textsuperscript{140} Therefore, the language in both of these provisions would be considered content-neutral on their faces because neither distinguishes permissible speech from impermissible speech by reference to the message being conveyed.\textsuperscript{141}

The language relating to disturbing the peace or good order of a ceremony at least allows for an argument that it is content-based. Prohibiting speech based solely upon the direct impact it has on an audience is generally not a content-neutral restriction.\textsuperscript{142} In \textit{Boos v. Barry} the Court dealt

\begin{itemize}
\item \textsuperscript{134} See 38 U.S.C § 2413(a)(1) (2006).
\item \textsuperscript{135} 38 U.S.C. § 2413(b) (2006).
\item \textsuperscript{136} See Andrea Cornwell, Comment, \textit{A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals}, 56 Am. U. L. Rev. 1329, 1353 (2007).
\item \textsuperscript{137} See 38 U.S.C § 2413(b) (2006).
\item \textsuperscript{138} Patriot Guard Riders Home Page, http://www.patriotguard.org (last visited Feb. 21, 2008). See also Tom Gantert, \textit{Kansas Protest Group Threatens to Picket Funeral, Doesn't Show}, ANN ARBOR NEWS, Oct. 31, 2006, at A1 (stating that the Patriot Guard Riders said that they only attend the funerals of veterans if they have been invited).
\item \textsuperscript{139} See 38 U.S.C § 2413(b) (2006).
\item \textsuperscript{140} Id.
\item \textsuperscript{142} Boos v. Barry, 485 U.S. 312, 321 (1988).
\end{itemize}
with an anti-picketing ordinance that applied within 500 feet of a foreign embassy. The ordinance prohibited speech that brought any foreign government into “public disrepute.” In finding the ordinance content-based, the Court reasoned that the ordinance only prohibited speech that was critical of a foreign government and would not have prohibited certain topics of speech, such as speech related to a labor dispute with a foreign government. The city tried to argue that the ordinance was not content-based because it was only aimed at limiting a secondary effect of the speech: offending the dignity of foreign diplomats. In rejecting this argument the Court said that secondary effects of speech, which may be validly regulated as content-neutral restrictions, do not include the direct impact of speech on its audience. The argument that The Respect for America’s Fallen Heroes Act also facially restricts speech based on content would likely be that by defining the prohibited speech by the language “disturbs or tends to disturb the peace or good order,” the Act only restricts speech based upon the direct impact it has on an audience. This argument fails because unlike the ordinance in Boos, enforcement of the Act here does not depend on the message being conveyed. In Boos, a labor dispute rally would not be prohibited by the ordinance, while such a labor rally would be prohibited by The Respect for America’s Fallen Heroes Act. To take it one step further, speech that is supportive of a foreign embassy would not fall under the scope of the ordinance in Boos, while even speech that is supportive of the individual for whom a funeral service is being held would fall under the scope of The Respect for America’s Fallen Heroes Act unless it is part of the official funeral service. Additionally, the exact language used by

143. Id. at 315.
144. Id.
145. Id. at 318-19.
146. Id. at 320.
147. Id. at 320-21.
149. Id. While an argument could be made that these protests implicate the Hostile Audience Doctrine such an argument would likely fail because the solution to a hostile audience problem is to have more law enforcement present. See Feiner v. New York, 340 U.S. 315, 321 (1951). This argument is especially weak when an event is planned ahead of time, such as a funeral, where law enforcement officials are on notice that such an event may create a hostile crowd. See id. Additionally, there is very little factual support for the contention that these funeral attendees are on the verge of the imminent violent action necessary to trigger the doctrine.
151. See id. (reasoning that only speech critical of a foreign embassy would be prohibited under the ordinance).
152. See 152 CONG. REC. H2199, H2206 (daily ed. May 9, 2006) (statement of Professor David Forte) (stating that speech does not have to be disruptive to fall under the Act if the speech occurred within the cemetery).
Congress here was deemed content-neutral by the Supreme Court in *Grayned v. City of Rockford*. In *Grayned*, the Court dealt with a noise ordinance that restricted speech near schools if the speaker made "any noise or diversion which disturbs or tends to disturb the peace or good order" of a school session. The Court did not explicitly say that the language was content-neutral but merely conducted a "reasonable time, place, and manner" analysis and concluded that this language was facially valid. Looking at the Respect for America’s Fallen Heroes Act on its face, the references to prohibited speech do not depend on the content of the speech and therefore the Act must be considered content-neutral.

b. Legislative Purpose

However, there is still the argument that while the language is content-neutral on its face, the clear purpose behind the Act is to prohibit disagreeable speech on the basis of its content. More specifically, the argument is that Congress created this law because it does not agree with the content of the Westboro Baptist Church’s message that God is punishing America because of its general tolerance of homosexuality and, therefore, the Act should be deemed a content-based restriction despite the fact that the Act’s language does not reference the content of this disagreeable message on its face. The underlying proposition here is that legislative intent may be considered to turn an otherwise facially content-neutral restriction into a content-based restriction. However, if the predominate intent behind the regulation is content-neutral then the Act should be considered content-neutral even if suppression of speech based on its content was a motivating factor. The Supreme Court has recognized that for free speech cases,

154. Id. at 108.
155. Id. at 121. In Grayned the Court was dealing with an overbreadth and vagueness challenge, yet apparently, the petitioner did not challenge whether the ordinance prohibited speech on the basis of content. See id. at 108.
157. See generally Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that the “principal inquiry in determining content neutrality” concerns “whether the government has adopted a regulation of speech because of disagreement with the message it conveys”); Clark v. Cnty. for Creative Nonviolence, 468 U.S. 288, 295 (1984) (holding that a speech restriction is content-neutral so long as it is not “applied because of disagreement with the message presented”); see also Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGEORGE L. REV. 595, 620 (2003) (arguing that while “an actual content-based purpose can corrupt a facially content neutral action, [the Court] almost never labels an action according to this determination”).
“[i]nquiries into congressional motives or purposes are a hazardous matter” and it will be reluctant to “void a statute that is . . . constitutional on its face” based on what a few legislators have said about it.\textsuperscript{159}

Even if a court were inclined to find a statute to be content-based despite its facial neutrality on the basis of legislative intent, it would not be justified in doing so if the predominate purpose behind enacting the statute is content-neutral.\textsuperscript{160} Only a cursory reading of the congressional record related to this Act is required in order to recognize that the predominant intent behind this legislation is to protect the privacy of funeral attendees and the sanctity of funeral services as opposed to restricting the content of a particular message.\textsuperscript{161} The record clearly states that Congress believes these protesters have a right to deliver their message\textsuperscript{162} and it is void of any evidence that Congress may have had the devious purpose of suppressing free speech rights simply because it disagrees with the message the speech conveys.\textsuperscript{163} While the restriction may have been motivated \textit{in response} to the actions of these protesters, such a motivation does not amount to a content-based legislative purpose.\textsuperscript{164} To hold otherwise would bring into question the constitutionality of every anti-picketing statute and free speech restriction, especially those created in response to abortion clinic protests.\textsuperscript{165} It would be an anomaly to say that the legislative response of creating an anti-picketing or anti-protesting ordinance is \textit{per se} content-based if it follows demonstrations by a particular group.\textsuperscript{166} The effect would be that as soon as there is a recognized need for such an ordinance, any ordinance would have to withstand strict scrutiny as a content-based restriction on free speech. A finding that an ordinance is content-neutral, subject to the less rigorous intermediate scrutiny standard, would seemingly only occur if the ordinance were enacted before the need for it ever arose. In \textit{Hill v. Colorado} it was abundantly clear that the statute at issue had been enacted in response to statewide demonstrations at abortions clinics where protesters opposed to

\textsuperscript{160.} \textit{E.g.}, \textit{Ward}, 491 U.S. at 791; \textit{Renton}, 475 U.S. at 48.
\textsuperscript{161.} \textit{See generally} 152 \textit{Cong. Rec.} H2199, H2206 (daily ed. May 9, 2006) (statement of Professor David Forte) (reasoning that this legislation is aimed at allowing family members of deceased soldiers to say goodbye to their loved ones in peace).
\textsuperscript{163.} \textit{See} 152 \textit{Cong. Rec.} H2199, 2206 (daily ed. May 9, 2006) (statement of Professor David Forte).
\textsuperscript{166.} \textit{See generally} \textit{Hill v. Colorado}, 530 U.S. 703, 724-25 (2000) (arguing that just because legislation is motivated by those on a particular side of a debate does not make the legislation viewpoint-based).
abortion initiated various confrontations.\textsuperscript{167} However, in analyzing the purpose behind the statute, the Court said that the statute was not created because of disagreement with the protesters' message, but rather because of the state's interest in protecting privacy.\textsuperscript{168} This same analysis is applicable to The Respect for America's Fallen Heroes Act; just because Congress acted in response to a particular group's demonstrations does not make Congress' predominant purpose content-based.\textsuperscript{169}

A careful consideration of the language and legislative history of The Respect for America's Fallen Heroes Act thus reveals that the Act is both facially content-neutral and enacted for a predominantly content-neutral purpose. Consequently, intermediate scrutiny should apply, and the Act should be deemed constitutional if it is narrowly tailored to advance a significant governmental interest while leaving open ample alternatives of communication.\textsuperscript{170}

B. SIGNIFICANT GOVERNMENT INTEREST

Since The Respect for America's Fallen Heroes Act is a content-neutral restriction on free speech in the traditional public forum, the next step is to apply intermediate scrutiny to determine if this restriction advances a significant governmental interest. This part of the analysis is relatively straightforward because the Act advances several significant governmental interests. Congress has previously stated "[a]ll national and other veterans' cemeteries under the control of the National Cemetery Administration shall be considered national shrines as a tribute to our gallant dead."\textsuperscript{171} This 1973 statement by Congress codified the significant interest of ensuring that federal cemeteries are treated as places to show honor and respect to America's "gallant" dead.\textsuperscript{172} In fact, Congress considers national cemeteries to be so sacred that anyone who has been convicted of a state or federal capital offense is statutorily forbidden from being buried in a national cemetery or from having his or her memory honored in a national cemetery.\textsuperscript{173}

However, honoring America's gallant dead and respecting the sacred ground upon which they are laid to rest are not the only significant governmental interests advanced by this Act. One of the most fundamental gov-

\begin{footnotesize}
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\item\textsuperscript{167} Hill v. Colorado, 530 U.S. 703, 709 (2000).
\item\textsuperscript{168} Id. at 719-20.
\item\textsuperscript{169} \textit{See id.}
\item\textsuperscript{170} Frisby v. Schultz, 487 U.S. 474, 482 (1998).
\item\textsuperscript{171} 38 U.S.C. § 2403(c) (2000) (originally enacted in 1973 at the establishment of a National Cemetery Administration system).
\item\textsuperscript{172} \textit{See} 38 U.S.C. § 2403(c) (2000).
\end{enumerate}
\end{footnotesize}
ernmental interests is to protect the health and safety of its citizens. 174 In both *Hill v. Colorado* and *Madsen v. Women’s Health Ctr., Inc.*, the Court recognized that the interest in protecting health and safety rationally extends to protecting people from psychological trauma. 175 In finding a significant state interest, the Court in both of these cases referenced the patient’s psychological trauma due to confrontations with protesters at abortion clinics. 176 The *Madsen* Court agreed with the lower court’s analogy that the state’s interest in protecting residential privacy, as found in *Frisby*, 177 applied with equal force to protecting the privacy of patients who are seeking medical care. 178 The reasoning used in *Madsen* is that patients who are seeking medical care are often in a precarious psychological state that is exceptionally vulnerable to attack. 179 This same reasoning should be applied to the funeral setting. Funerals are obviously somber events, and family members who have recently learned of the death of a loved one are often in an even more precarious psychological state 180 that equally justifies legislative protection. The federal government has a significant interest in protecting the mental health of funeral attendees and shielding them from the psychological trauma associated with being subjected to protester speech during a funeral ceremony. 181

The government also has a significant interest in shielding funeral attendees from unwanted speech under a captive audience theory. A recent federal district court opinion analyzing a Kentucky state statute that restricts protests at funerals concluded that funeral “attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person’s interest in avoiding such communications inside his home.” 182 The district court went on to say, “like medical patients entering a medical facility, funeral attendees are captive.” 183 Funeral attendees fit within the definition of a captive audience because they are left with no reasonable means of

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175. *See generally Hill v. Colorado*, 530 U.S. 703, 715 (2000) (reasoning that the avoidance of patient trauma stemming from confrontations with protesters is a significant state interest); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (arguing that picketing at a health care facility threatens the patients psychological and physical well-being).
179. *Id.*
183. *Id.*
avoiding unwanted speech. 184 Those who attend a funeral arguably do so by choice, but it would be unreasonable to say that they could avoid this disagreeable speech simply by choosing not to come to the funeral or leaving in the middle of the service if they found the nearby protesters to be too offensive. 185 In Madsen, the Court reasoned that women seeking an abortion are held “captive by medical circumstance.” 186 Seeking an abortion is also a choice, but it would be unreasonable to say that a woman could avoid offensive speech by simply choosing not to go to an abortion clinic. 187 In each of these scenarios there is arguably a choice to go to the place where the speech occurs, but because of the reasonableness aspect of the captive audience doctrine, the audience is properly categorized as captive. 188 While the Constitution demands tolerance of disagreeable speech in most settings, it does not demand tolerance of speech that interferes with a “substantial privacy interest . . . in an intolerable manner.” 189 Since funeral attendees are properly categorized as a captive audience, the government has a significant interest in protecting them from unwanted speech. 190

Maintaining cemeteries as places to honor America’s gallant dead, protecting the health and safety of citizens from psychological harm, and shielding captive audiences from unwanted speech all demonstrate that Congress has significant interests in placing reasonable time, place, and manner restrictions on speech near national cemeteries. As long as the restrictions are narrowly tailored to advance these significant interests while leaving open ample alternatives for the speech, The Respect for America’s Fallen Heroes Act should be upheld as a valid free speech restriction.

C. NARROWLY TAILORED

The narrowly tailored aspect of the analysis arguably leaves more room for debate than the significant interest analysis. In order for a content-neutral time, place, and manner restriction to be narrowly tailored it must advance the government’s significant interests without burdening “substantially more speech than is necessary.” 191 To be narrowly tailored under a time, place, and manner analysis, the restriction does not need to be the

\[\text{187. See generally, Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 768 (1994) (reasoning that women seeking an abortion are held captive by medical circumstance and by definition it would be unreasonable for a person in such a circumstance to avoid the speech by choosing to avoid the place where the speech occurs).}\]
\[\text{188. See id.}\]
\[\text{189. Cohen, 403 U.S. at 41.}\]
\[\text{190. McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006).}\]
least restrictive means possible as it does under a strict scrutiny analysis. The idea that a time, place, and manner analysis does not require that the statute be the least restrictive means was starkly criticized by Justice Marshall in his dissent as being too deferential. Id. at 803-05 (Marshall, J., dissenting). However, there should be no question as to the current state of the law as the Supreme Court recently reaffirmed this lower standard for a statute to be narrowly tailored under intermediate scrutiny. Hill v. Colorado, 530 U.S. 703, 726 n.3 (2000).

192. Id. at 798 n.6. The idea that a time, place, and manner analysis does not require that the statute be the least restrictive means was starkly criticized by Justice Marshall in his dissent as being too deferential. Id. at 803-05 (Marshall, J., dissenting). However, there should be no question as to the current state of the law as the Supreme Court recently reaffirmed this lower standard for a statute to be narrowly tailored under intermediate scrutiny. Hill v. Colorado, 530 U.S. 703, 726 n.3 (2000).

So long as the time and distance restrictions in The Respect for America's Fallen Heroes Act do not burden substantially more speech than necessary to advance the significant interests involved, the Act is narrowly tailored. Taking all of the government's significant interests together, they can best be summarized as preserving a grieving family's right to be left alone during a funeral or memorial service. If the specific restrictions do not burden substantially more speech than is required to preserve this interest, the Act must be considered narrowly tailored. The Act's provisions do not violate this standard, in part because they only partially protect the significant interest. Funeral protesters have repeatedly used sound amplification devices at these funerals and nothing in the Act precludes the continued use of such devices so long as they are not used both within 150 feet of the entrance to the cemetery and within a sixty minute window before and after the funeral. This means that even during the funeral, protesters are permitted to congregate 151 feet away from the entrance to the cemetery and use their sound amplification devices to effectively interfere with the solemnity of the funeral service. The Act only attempts to prohibit demonstrations that are the most disruptive to the grieving family's
privacy interest, it does not attempt to uphold the privacy interest absolutely.\textsuperscript{201}

The Act is also narrowly tailored because it only prohibits speech that will actually interfere with the significant interest.\textsuperscript{202} Demonstrations are not prohibited unless they interfere with, or have a tendency to interfere with, the funeral procession as it enters or exits the cemetery, or with the ceremony itself.\textsuperscript{203} For example, in the event that a group of union workers were to picket their employer's place of business that is located within 300 feet of a national cemetery, their actions would not fall under scope of this Act unless they were interfering with the ability to enter or exit the cemetery during a sixty-minute window of time before or after the funeral service.\textsuperscript{204} If the place of business was located within 150 feet of the entrance to a national cemetery, the protesters' actions would only be restricted if they were so loud and distracting that they actually interfered with solemnity of the service during the proscribed time frame.\textsuperscript{205} If either of these situations occurred, the protesters would not be prohibited from delivering their message; it may only be that they would be required to temporarily limit the activity that actually interferes with the procession or ceremony.\textsuperscript{206} Even if the Act did have the effect of placing some restrictions on speech that does not actually disrupt the funeral procession or ceremony itself, such restrictions would fall short of restricting substantially more speech than necessary to further the significant interest.\textsuperscript{207}

However, even if a reviewing court were to be inclined to follow a seemingly more restrictive approach, such as the one discussed in \textit{Frisby v. Schultz},\textsuperscript{208} The Respect for America's Fallen Heroes Act would still be narrowly tailored. In \textit{Frisby}, the Court stated that a "statute is narrowly tailored

\begin{itemize}
\item \textsuperscript{201} Id.
\item \textsuperscript{202} See \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 799 (1989) (reasoning that a statute is not narrowly tailored if a "substantial portion of the burden on speech does not serve to advance its goals").
\item \textsuperscript{203} 38 U.S.C. § 2413 (2006).
\item \textsuperscript{206} See 38 U.S.C. § 2413 (2006).
\item \textsuperscript{207} See generally \textit{Hill v. Colorado}, 530 U.S. 703, 729 (2000) (reasoning that while Colorado's general distance restriction will sometimes have the effect of prohibiting harmless speech, such incidental effects do not condemn the statute to violate the narrowly tailored requirement).
\item \textsuperscript{208} \textit{Frisby v. Schultz}, 487 U.S. 474, 485 (1988). The current standard seems to allow for a lot of discretion at the trial court level so even though the Supreme Court does not require a least restrictive means test, a lower court could end up applying something much closer to a least restrictive means test without actually using that language. See generally \textit{McQueary v. Stumbo}, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (holding a state anti-protesting statute not narrowly tailored in part because it eliminated more than the source of evil it sought to remedy).
\end{itemize}
if it targets and eliminates no more than the exact source of 'the evil' it seeks to remedy.\textsuperscript{209} Despite this seemingly restrictive language, the Court found the ordinance in question to be narrowly tailored to advance the significant interest of eliminating targeted residential picketing.\textsuperscript{210} The Court also conceded that even a complete ban on speech is narrowly tailored so long as the prohibited activity is an "appropriately targeted evil."\textsuperscript{211} Even if a court were to require that the restriction target and eliminate no more than the exact source of evil, The Respect for America's Fallen Heroes Act would still meet that standard. In \textit{Frisby}, the evil the ordinance sought to eliminate was targeted residential picketing where a protester or protesters picketed in front of an individual home and directed their message at an individual family or occupant.\textsuperscript{212} As the lower courts construed the language of the statute, the restriction did not apply to general residential demonstrations but only to targeted picketing.\textsuperscript{213} The Court thus had no difficulty in concluding that the restriction eliminated no more speech than the targeted evil.\textsuperscript{214}

The Respect for America's Fallen Heroes Act also eliminates no more than the targeted evil. The main targeted evil this Act seeks to eliminate is the destruction of a grieving family's right to be left alone while a lost loved one is honored and buried.\textsuperscript{215} The Act achieves this goal in a narrow manner. First, it restricts the willful making of any noise or diversion that "disturbs or tends to disturb" a funeral or memorial service.\textsuperscript{216} Second, it restricts actions that impede access to a national cemetery.\textsuperscript{217} The first part eliminates no more speech than the targeted evil because the relevant portions only apply to willfully created noises or diversions within a narrow window of time that actually disturb or tend to disturb the funeral or memorial service.\textsuperscript{218} For example, there is absolutely no restriction on any activity that does not disturb or does not tend to disturb the funeral service, even if made within the time and distance restrictions.\textsuperscript{219} Arguably, a demonstra-

\textsuperscript{209}. \textit{Frisby}, 487 U.S. at 485.
\textsuperscript{210}. \textit{id.} at 488.
\textsuperscript{211}. \textit{id.} at 486.
\textsuperscript{212}. \textit{id.}
\textsuperscript{213}. \textit{id.} at 483.
\textsuperscript{214}. \textit{id.} at 488. Without this narrowed interpretation, the ordinance would not be narrowly tailored because it would prohibit all residential picketing and would have the effect of prohibiting substantially more speech than necessary to achieve the valid interest. \textit{id.} at 491 (White, J., concurring).
\textsuperscript{219}. \textit{id.}
tion could take place on, or pass through, the public street that adjoins the entrance to a national cemetery while a funeral is in process so long as that demonstration does not disturb or tend to disturb the service. While this might be an unlikely scenario, it is only unlikely because most demonstrations that occur within such close proximity of a funeral are probably going to have the logical effect of disturbing the funeral. In other words, the only reason why an activity would be prohibited is because it falls directly in line with the exact evil that this Act purports to eliminate.

The Act also eliminates no more speech than the targeted evil because the relevant portions only apply to actions that actually impede access to or egress from a cemetery during a narrow window of time prior to and following a ceremony. Demonstrations that occur within 300 feet of the cemetery (but beyond 150 of the entrance to the cemetery) and within the sixty-minute time restriction would only be prohibited if they actually impede access to or egress from the cemetery. This provision is narrowly tailored toward preventing the targeted evil because if the demonstration does not actually impede access to the cemetery, then the grieving family’s privacy interest is not affected (at least not to the point that Congress has deemed substantial enough to protect) and the statute does not apply. As in the first provision, only if the targeted evil of disturbing a family’s right to be left alone is infringed upon will the Act’s punitive provisions apply. Even if a court were to apply the seemingly stringent language from Frisby, this Act is narrowly tailored.

D. LEAVES OPEN AMPLE ALTERNATIVES FOR COMMUNICATION

Applying either the more lenient narrowly-tailored analysis the Supreme Court has adopted in most of its cases, or the stricter narrowly-tailored analysis discussed in Frisby, both lead to the conclusion that The Respect for America’s Fallen Heroes Act is narrowly tailored. However, the time, place, and manner analysis for a content-neutral restriction also requires that the restriction leave open ample alternatives for communication. This requirement raises two potential concerns in this situation.

The first concern is whether there are ample alternatives of communication for protesters who want to gather near a cemetery for purposes unre-
related to a funeral service, such as a labor dispute protest at a nearby business. In this situation, protesters could potentially be restricted from engaging in certain activities if those activities fall within the distance restrictions and take place within a sixty-minute window before or after a funeral service. If there were only one funeral service at the cemetery on a given day the alternatives for such a group of protesters to communicate a message are more than ample because the restrictions would usually only apply for a period of between two and three hours (sixty minutes before the service, the time it takes to conduct the service, and sixty minutes after the service). The protesters would have the remainder of the day to conduct demonstrations free from the Act’s punitive provisions. The problem is more significant if funeral services were lined up all day long, effectively blocking off certain areas from being used by protesters at any time during business hours. However, because protesters would only be prohibited from conducting activities that disturb or tend to disturb the funeral service if they are within 150 feet of an entrance to the cemetery, ample alternatives would still exist. The protesters could either move to an area just beyond 150 feet of the entrance, or limit their activities so as not to actually disturb the funeral, likely by limiting the amount of noise they generate. While the Act does encompass the use of signs and banners, the use of such signs and banners would probably only tend to disturb a funeral if they were directed at the funeral attendees. The use of banners and signs directed at a business across the street from a cemetery would probably not tend to disturb the funeral services and would be a viable alternative for demonstrators protesting at a business so close in proximity to a national cemetery. The alternatives are even more ample for protesters beyond 150 feet of a cemetery entrance because their activities would only be restricted if they occur within 300 feet of a cemetery during the prohibited time frame and actually impede access to or egress from the cemetery. Because the restricted activity in this scenario is so narrow, ample alternatives are virtually self-evident. Additionally, alternative methods of communication such as the use of the federal mail system, handing out pamphlets door-to-door, making

228. See id.
229. See id.
232. In Grayned v. City of Rockford the Supreme Court indicated that the words "tend to disturb" should be interpreted to mean that an actual disturbance is imminent. 408 U.S. 104, 111-12 (1972).
233. See Grayned, 408 U.S. at 111-12.
235. See generally Frisby v. Schultz, 487 U.S. 474, 483 (1998) (reasoning "the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain").
telephone calls, all previously recognized by the Supreme Court, would be viable alternatives for protesters in these scenarios.

The second concern relates to protesters whose message is directed at funeral attendees themselves. Alternative methods of communicating a message to this audience are slightly less apparent because by sixty minutes after the completion of the funeral service, when the protesters could resume their activities without any restrictions, the audience would generally have dispersed. However, the mere fact that a restriction tends to limit the "potential audience" for certain speech "is of no consequence" unless it can be shown that "the remaining avenues of communication are inadequate." One of the factors the Court seems to look at in determining whether there are ample alternatives of communication is whether the form of communication sought to be restricted is of such a unique character as to render all other forms of communication inherently less adequate. In *Linmark Assoc's Inc., v. Township of Willingboro* the Supreme Court struck down a local ordinance that banned the posting of "For Sale" signs in front yards. The Court reasoned that using "For Sale" signs was a particularly effective means of communicating that a piece of property is for sale and that the use of newspaper advertisements and the passing out of fliers were not practical alternatives within that specific real estate market. In the funeral protest scenario, the form of speech sought to be restricted is not of any special or unique significance whereby any other form or manner of speech would be inherently less adequate. This statute regulates protests and demonstrations, forms of speech that have been common to the public forum for centuries, not a unique form of communication that has no viable alternatives. The only issue here is to what extent protesters can effectively reach a specifically targeted audience with traditional public forum type speech. One alternative is for protesters to communicate their message from just beyond the distance restrictions. For example, beyond 300 feet from a cemetery protesters are free to congregate and display their signs without any special restrictions, even if those activities tended to interfere with a funeral service or procession. Other alternatives include the use of the mail system, handing out pamphlets door-to-door or placing them

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236. *Frisby*, 487 U.S. at 484.
239. *See generally* *Linmark Assoc's Inc., v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (holding that a city ordinance restricting the use of "For Sale" signs did not provide ample alternatives of communication because leaflets, sound trucks, and demonstrations were not practical forms of communication to sell real estate in that market).
241. *Id.* at 93.
on car windshields, and making phone calls; all of which could be used to
convey a message to virtually any targeted audience.\textsuperscript{244}

Regardless of whether protesters are directing their message at funeral
attendees or whether their activities are unrelated to the funeral ceremony,
ample alternatives of communication exists because of the limited applica-
bility of the time and distance restrictions and the lack of any prohibition of
a unique form of communication. The Respect for America’s Fallen Heroes
Act is a content-neutral time, place, and manner restriction that is narrowly
tailored to advance a significant governmental interest while also leaving
open ample alternatives of communication.

\section*{IV. SIMILAR STATE LEGISLATION}

While The Respect for America’s Fallen Heroes Act is a significant
step towards protecting the privacy of funeral attendees, it only applies to
national cemeteries or funerals of military members; it does not apply to the
state funerals of nonmilitary target groups and would not have protected the
family of Wyoming student Matthew Shepard.\textsuperscript{245} In order to adequately
protect the privacy rights of grieving families, every state needs to adopt
similar legislation. The legislative history of The Respect for America’s
Fallen Heroes Act urges states and local governments to pass similar legis-
lation to ensure protection of funeral attendees’ privacy at all cemeteries
across the country.\textsuperscript{246} State legislatures have rushed to pass similar legis-
lation, but due to imprecise drafting some of these state laws could end up
being struck down. At least three lawsuits, in Kentucky, Kansas, and Ohio,
have been filed challenging the constitutionality of state legislation aimed at
protecting the privacy of funeral attendees.\textsuperscript{247}

Part of the Kentucky statute was struck down as burdening “substan-
tially more speech than is necessary to prevent interferences with a fu-
eral.”\textsuperscript{248} In \textit{McQuery v. Stumbo}, Federal District Court Judge Karen Cal-
dowell reasoned that the Kentucky statute was not narrowly tailored because it
prohibited certain actions whether or not they interfered with the funeral

\begin{footnotesize}
\begin{footnotes}
\item 244. \textit{See} Frisby v. Schultz, 487 U.S. 474, 484 (1998). While these alternatives re-
quire that the speaker find out the identity of the audience members, such information is
generally available in local newspapers, at least with regard to close family members.
\item 246. 152 CONG. REC. H3209 (daily ed. May 24, 2006) (statements read by Clerk).
\item 247. \textit{See} McQueary v. Stumbo, 453 F. Supp. 2d 975 (E.D. Ky. 2006); Dave McKin-
ney, \textit{Did Anti-gay Church Have Rights Violated?: Funeral Protest Law Could Face ACLU
\item 248. \textit{McQueary}, 453 F. Supp. 2d at 997. The Kentucky statute defined interference
with a funeral as including any time anyone “[c]ongregates, pickets, patrols, demonstrates,
or enters on that portion of a public right-of-way or private property that is within three
hundred (300) feet of an event specified in paragraph (a) of this subsection.” \textit{Id.}
\end{footnotes}
\end{footnotesize}
and whether or not the funeral attendees had authorized such activities. The Kentucky statute did not contain the same "disturbs or tends to disturb" language found within the federal statute. Judge Caldwell also expressed concern over the distance restriction because the 300 foot buffer zone applied to cemeteries during a funeral, funeral homes during a viewing, funeral processions, and funeral or memorial services. She commented that the buffer zone would extend to "public sidewalks and streets and would restrict private property owners' speech on their own property."

This Kentucky statute highlights some of the biggest obstacles states will have in enacting legislation similar to The Respect for America’s Fallen Heroes Act. In order to achieve a similar level of effectiveness, state restrictions may have to be much broader due to the particular layout of the actual cemetery. Additionally, most states will want to extend the protections beyond the cemetery to include funeral services at churches, funeral homes, and funeral processions. Restrictive buffer zones covering these areas will probably extend to private property, and drafters will have to be particularly cautious when enacting restrictions that might limit what private landowners can do on their own property. One possible solution might be to limit the statute’s application to public property and specifically exempt private property, but that carries the risk of limiting the statute’s effectiveness. Additionally, states should adopt the language from the federal statute that restricts its applicability to actions that disturb or tend to disturb the funeral service. Without such a limitation the statute will likely not survive a challenge for the same reasons the Kentucky statute was partially struck down.

Individual states will face unique challenges in drafting legislation that adequately protects the privacy interests of funeral attendees while avoiding constitutional infirmities. Drafters will need to look at proposed legislation from an adversarial point of view and determine how and where it could be attacked. Drafters should pay close attention to how their proposed legisla-

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249. Id. at 996.
251. McQueary, 453 F. Supp. 2d at 977.
252. Id. at 996.
253. The original Respect For America's Fallen Heroes Act as drafted by Congress restricted activity within 500 feet of a federal cemetery but the Senate amendment altered the distance restriction in part because it concluded that the unique layout of federal cemeteries (committal shelters where funeral ceremonies are actually held are a minimum of 300 feet from the property line) did not necessitate a larger restriction. See 152 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Mr. Craig). Additionally, trees and shrubs almost always block the property line so the 500-foot restriction did not add much, if any, protection. Id.
254. See McQueary, 453 F. Supp. 2d at 977.
255. McQueary, 453 F. Supp. 2d at 996.
tion will affect speech unrelated to the funeral service or procession and try to ensure that their legislation only restricts speech that actually interferes with or imminently will interfere with the privacy interests at stake.

V. CONCLUSION

The Respect for America’s Fallen Heroes Act is a constitutionally valid restriction on free speech because it is a permissible time, place, and manner restriction. The Act is both facially content-neutral, in that it does not define impermissible speech on the basis of content, and it was enacted for the content-neutral purpose of protecting the privacy interests of grieving families. The Act furthers the significant interests of honoring America’s gallant dead, protecting the mental and emotional well being of American citizens, and securing the privacy interests of a grieving family during a funeral service. Further, the Act is narrowly tailored because it only restricts speech that actually interferes with the service or will imminently interfere with the service. The Act is not substantially overbroad and the government’s significant interests would be achieved less effectively absent the restriction. The Act also leaves open ample alternatives of communication because of its limited time and distance restrictions, and because the type of speech the Act seeks to restrict does not have any special or unique characteristics that would indicate alternate forms of communication would be inherently inadequate.

As Congress urged, every individual state should pass similar legislation. While states have additional obstacles to overcome in drafting adequate protections, grieving family members need protection from emotional abuse at funerals. Every family deserves the opportunity to peacefully mourn the death of a loved one without being subjected to unwanted speech of any kind. The Constitution should not be used as a weapon to inflict suffering upon family members during a funeral and the Constitution does not demand tolerance of such inappropriate behavior. It is truly unfortunate that the need arose to create The Respect for America’s Fallen Heroes Act, but Congress should be applauded for doing the right thing and each state should follow its lead.

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* J.D. Candidate, May 2008, Northern Illinois University College of Law; B.S., United States Air Force Academy, Class of 2002. Thank you to my wife, Rachel, and my son, Wes, for your unconditional love and enduring patience. Thank you to my family for always being supportive. Thank you to the law review staff for your dedication to the review and your efforts throughout the editing process. Finally, thank you to all of America’s fighting forces, especially to you who are deployed. The daily sacrifices you make protecting this country and its citizens are appreciated more than you know.