Marquette Law Review

Volume 71
Issue 1 *Fall 1987*

Article 8

Constitutional Law - Schultz v. Frisby, 807 F.2d 1339 (7th Cir. 1986)

Hugh J. O'Halloran

NOTE

CONSTITUTIONAL LAW—Balancing First Amendment Rights to Freedom of Expression Against the Rights of an Individual to Privacy in the Home. *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986).

The first amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."[1] In *Schultz v. Frisby*,[2] the United States Court of Appeals for the Seventh Circuit held that a town ordinance[3] prohibiting all picketing in residential areas[4] was an overly-broad restriction[5] on protected speech[6] in a public forum[7] and therefore violated the rights guaranteed by the first amendment.[8]

The court of appeals, in a two-to-one decision,[9] held that peaceful picketing in residential streets qualified as protected speech in a public forum under the first amendment, and that the ordinance under scrutiny[10] failed to allow picketers access to adequate alternative outlets in which to express themselves.[11] The court acknowledged that the government had a significant interest in protecting the privacy of its citizens in

---

1. The first amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The first amendment was extended to the states in Gitlow v. New York, 268 U.S. 652 (1925), through the due process clause of the fourteenth amendment. City ordinances also are covered by the first amendment. Lovell v. City of Griffin, 303 U.S. 444 (1938).

2. 807 F.2d 1339 (7th Cir. 1986).

3. TOWN OF BROOKFIELD, WIS., GEN. CODE § 9.17 (1985).

4. *Schultz*, 807 F.2d at 1342.

5. *Id.* at 1350.

6. *Id.* at 1343-44.

7. *Id.* at 1347.

8. *Id.* at 1355.

9. Senior Circuit Judge Swygert delivered the majority opinion and was joined by Circuit Judge Wood. Circuit Judge Coffey filed a dissenting opinion. *Id.*

10. TOWN OF BROOKFIELD, WIS., GEN. CODE § 9.17 (1985).

11. *Schultz*, 807 F.2d at 1348.

their homes,[12] but it affirmed the district court's[13] granting of a preliminary injunction against enforcing the ordinance because it did not address precisely the privacy concern that motivated its passage.[14]

This Note begins with a brief synopsis of the facts in *Schultz*. A discussion of the pertinent first amendment issues and tests of constitutionality will follow. An analysis of the decision of the court of appeals will then be presented, and this Note will conclude with an assessment of the ruling and its impact on first amendment law generally.

I. STATEMENT OF THE CASE

On April 20, 1985, the Milwaukee Coalition for Life[15] sponsored the first of several protests[16] at the residence of Benjamin Victoria, M.D.,[17] in the Town of Brookfield, Wisconsin.[18] The group was protesting Dr. Victoria's performance of abortions in his medical practice.[19] For the most part, the demonstrations were conducted in a peaceable and orderly fashion.[20]

---

12. *Id.* at 1350.

13. *Id.* at 1343, *aff'g*, 619 F. Supp. 792 (E.D. Wis. 1985).

14. *Schultz*, 807 F.2d at 1355.

15. The named plaintiffs-appellees, Sandra C. Schultz and Robert C. Braun, are members of the Milwaukee Coalition for Life. Schultz v. Frisby, 807 F.2d 1339 (7th Cir. 1986).

16. The group picketed the residence in question on at least six occasions between April 20 and May 20, 1985. The number of picketers varied but was never less than 10 nor more than 50. *Id.*

17. Neither Dr. Victoria nor any member of his family was a party to this action. The named defendants-appellants in the case were the Supervisors of the Town Board, the Chairman of the Town Board, the Chief of Police, the Town Attorney and the Town of Brookfield. *Id.* at 1342.

18. The Town of Brookfield is made up primarily of residential subdivisions, with only one commercial thoroughfare, and it is located near Milwaukee. *Id.* at 1340.

19. The plaintiffs stated that picketing the Victoria residence, rather than abortion clinics, was necessary in order to inform Victoria's neighbors of his activities. They also asserted that the picketing of the Victoria home allowed the group to reach an audience it might not otherwise reach if it protested elsewhere. The group also pointed out that it did not want to interfere with its sidewalk counselors outside of abortion clinics. *Id.* at 1341-42. There is no indication why Dr. Victoria was singled out as the subject of this expressive activity.

20. *Id.* at 1341 (quoting Schultz v. Frisby, 619 F. Supp. 792, 795 (E.D. Wis. 1985)). The parties disagreed upon the nature of the picketers' conduct. The Town submitted sworn affidavits stating that the picketers had tied red ribbons to the bushes and to the door of the home. *Id.* at 1340. Another affidavit stated the picketers were observed

After the picketing began, the Town of Brookfield enacted an ordinance stating that "[i]t is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield."[21] The Town asserted that its purposes in passing the ordinance were to protect the privacy of its residents as well as to prevent the obstruction of vehicular and pedestrian traffic.[22] No picketing occurred after the effective date of the ordinance.[23]

The picketers filed suit in the District Court of the Eastern District of Wisconsin,[24] seeking declaratory and injunctive relief from enforcement of the ordinance. The complaint alleged that the breadth of the restriction resulted in a deprivation of the plaintiffs' rights as guaranteed under the first and fourteenth amendments of the United States Constitution.[25] Finding them likely to prevail on the merits,[26] the district

---

singing "God Bless America" and carrying signs that read "baby killer." *Id.* Neighbors complained that the picketers had made statements to their six year old daughter to the effect that Dr. Victoria killed babies, causing the child to become frightened and forcing the parents to explain abortion to her. *Id.* at 1341. The Victorias also complained of abusive language and of picketers blocking their exit from their home. *Id.*

The plaintiffs, however, submitted affidavits stating that the picketing was entirely peaceful. They claimed that picketers confined themselves to the streets and avoided blocking traffic or causing excessive noise. *Id.*

21. *Id.* at 1342 (quoting TOWN OF BROOKFIELD, WIS., GEN. CODE § 9.17 (1985)). Previously, on May 7, 1985, the Town had enacted an ordinance that prohibited picketing before or about the residence or dwelling of any individual, except for picketing during a labor dispute of the place of employment involved in the labor dispute. *Id.* However, the Town Attorney, convinced that the ordinance violated the first amendment rights of picketers under the Supreme Court's ruling in Carey v. Brown, 447 U.S. 455 (1980), instructed the Town Chief of Police to withhold enforcement. The Town then repealed the old ordinance and substituted the one being challenged in this case. *Schultz*, 807 F.2d at 1342.

22. *Id.*

23. *Id.*

24. Schultz v. Frisby, 619 F. Supp. 792 (E.D. Wis. 1985).

25. *Id.* at 793. An action under the first amendment is coupled with an action under the fourteenth amendment in order to bring the acts of state and municipal governments within the purview of the first amendment. *See supra* note 1.

26. The Seventh Circuit Court of Appeals, in ON/TV of Chicago v. Julien, 763 F.2d 839 (7th Cir. 1985), laid out four tests which must be met in order to obtain a preliminary injunction.

> [A] plaintiff must show: (1) that he had no adequate remedy at law or will suffer irreparable harm if the injunction is denied; (2) that the harm he will suffer is greater than the harm the defendant will suffer if the injunction is granted; (3) that the plaintiff has a reasonable likelihood of success on the merits; and (4) that the injunction will not harm the public interest.

court granted the picketers a preliminary injunction.[27] The district court reasoned that the ordinance was not narrowly tailored enough to advance the Town's stated interests without unduly infringing upon the picketers' first amendment rights.[28] The defendants appealed.

The Court of Appeals for the Seventh Circuit held that the streets in question, despite their location in a residential area, were public forums[29] and that the ordinance therefore unduly restricted expressive activities in the area.[30] The court thus found that the district court did not abuse its discretion in granting the preliminary injunction on the grounds that the ordinance was an unconstitutional restriction of first amendment rights.[31]

II. THE FIRST AMENDMENT-BACKGROUND AND ISSUES: PROTECTED SPEECH, TYPES OF FORUMS AND TESTS OF CONSTITUTIONALITY

A. Protected Speech

The first amendment prohibits the government from "abridging the freedom of speech" or "the right of the people peaceably to assemble."[32] However, not all speech is protected by the first amendment,[33] and not all "speech" involves the spoken word.[34] Although the Supreme Court has not defined what constitutes protected speech, it has said that "[a]ll ideas having even the slightest redeeming social importance

---

Id. at 842 (citing Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985)). A decision to grant or to deny a preliminary injunction is within the discretion of the trial court. *See, e.g.*, Maxim's Ltd. v. Badonsky, 772 F.2d 388, 390 (7th Cir. 1985).

27. The preliminary injunction was to become permanent, absent an appeal or request for a trial, within sixty days. *Schultz*, 619 F. Supp. at 798.

28. *Id.* at 797.

29. *Schultz*, 807 F.2d at 1347.

30. *Id.* at 1355.

31. *Id.* at 1343.

32. U.S. CONST. amend. I.

33. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity).

34. *See generally* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (solicitation of contributions); United States v. Grace, 461 U.S. 171 (1983) (picketing and leafletting); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (use of an interschool mail system); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (handing out of leaflets); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (wearing of armbands).

— unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of first amendment guarantees, unless excludable because they encroach upon the limited area of more important interests."[35]

The Supreme Court has acknowledged that picketing is actually a mixture of "speech" and "conduct."[36] In addition, the Court has consistently held that "[t]here is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the [f]irst [a]mendment."[37]

B. Types of Forums

The fact that an expressive activity is protected under the first amendment does not give one the right to engage in that activity at any time and in any place.[38] Such activity is subject to reasonable regulation in the interest of society.[39]

The amount of permissible governmental regulation on expressive activity will depend upon the type of area, or "forum," in which the activity takes place.[40] The Supreme Court has recognized three types of forums which are differentiated according to the access afforded them for expressive activity.[41] Those forums are the traditional public forum, the designated public forum and the nonpublic forum.[42]

The traditional public forum, known for allowing the most freedom of expression,[43] historically has been defined in terms of its geographic qualities.[44] Describing this forum, the

---

35. Roth v. United States, 354 U.S. 476, 484 (1957).

36. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969). Whether conduct may be considered within the area of protected expressive activity depends on whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405. 411 (1974).

37. *Grace*, 461 U.S. at 176.

38. *See Heffron*, 452 U.S. at 647.

39. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

40. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

41. *Id.* at 45-46. *See also Heffron*, 452 U.S. at 650-51; *Grace*, 461 U.S. at 177-80.

42. *Perry*, 460 U.S. at 45-46.

43. *Id.* at 45.

44. *See id. See also* Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

The lower federal courts, however, have expanded the definition of the traditional public forum due to the creation of new areas particularly suitable for expressive activ-

Supreme Court has stated that "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."[45] The Court has said that streets and parks, having always been available for the purposes of communication of thoughts and discussion of public questions, are public forums.[46]

The second type of forum the Court recognizes is the designated public forum.[47] This includes government-owned property that is not traditionally open for free expression but which the state has made available to the public for use as a place for expressive activity.[48] Once the government opens an area as a designated public forum, that area takes on the same qualities as the traditional public forum,[49] but the state is not required to keep a designated public forum open indefinitely and can close it again under some circumstances.[50]

The nonpublic forum is the third type of forum that the Court recognizes.[51] A nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication."[52] The government may impose greater re-

---

ity. The courts now look for areas that resemble the geographically determined traditional public forums in their openness and accessability—their "street-like character," as one court put it. Fernandes v. Limmer, 663 F.2d 619, 627 (5th Cir. 1981). The seventh circuit has joined this trend by applying this concept to airport terminals. *See* Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975).

The trend toward an access-oriented definition of the traditional public forum, however, has been confined to the lower courts. The Supreme Court declined to address the topic, although it granted certiorari on a case presenting the issue, in Board of Airport Comm'rs v. Jews for Jesus, Inc., 107 S. Ct. 2568 (1987). The access-oriented definition of the public forum is inapplicable in *Schultz* because the forum was determined by its geographic qualities.

45. *Perry*, 460 U.S. at 45.

46. *Hague*, 307 U.S. at 515.

47. *Perry*, 460 U.S. at 45-46.

48. *Id. See generally* Widmar v. Vincent, 454 U.S. 263 (1981) (state university holding its meeting facilities open to registered student groups); City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (school board opening its meetings to direct citizen involvement); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (city's municipal theater dedicated to expressive activities).

49. *Perry*, 460 U.S. at 46.

50. *Id.*

51. *Id.*

52. *Id.*

strictions on expressive activities in these areas.[53] In deciding whether an area is a nonpublic forum or some other type of forum, the courts consider whether the dedicated purpose of the area will be disturbed by opening it up to expressive activity;[54] if permitting expressive activity will disrupt the dedicated purpose of the forum, then the area stands a good chance of being classified as a nonpublic forum.

C. *Tests of Constitutionality*

The type of forum will dictate the standards by which any government restrictions on expressive activity will be tested in order to determine their constitutionality.[55] If a court decides an area is either a traditional or a designated public forum — both of which are governed by the same standards as long as the government allows the designated public forum to remain open — the government is given the right to impose upon speech in those forums certain content-based restrictions[56] and certain regulations of time, place and manner.[57] In a traditional or designated public forum, the government may enforce restrictions on the time, place and manner of the expressive activity which (1) are content-neutral,[58] (2) are nar-

---

53. *Id. See generally* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (government employee fund raising drive); *Perry*, 460 U.S. 37 (interschool mail system); Greer v. Spock, 424 U.S. 828 (1976) (military base); Adderley v. Florida, 385 U.S. 39 (1966) (jailhouse grounds).

54. *See, e.g., Cornelius*, 473 U.S. at 804.

55. *Perry*, 460 U.S. at 45-46.

56. *Id.* The Supreme Court has said that "[f]or 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." *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

However, in *Grace*, the Court held a complete ban on certain types of expressive conduct, as is the case with the Town of Brookfield ordinance in question, to be facially content neutral. 461 U.S. 171, 181 n.10. Thus, this examination will concentrate on the time, place and manner restrictions.

57. *Perry*, 460 U.S. at 45-46.

58. *Id.* at 45. As previously mentioned, the Court has held absolute prohibitions on certain types of expression, namely picketing and leafletting, to be facially content neutral. *See supra* note 56.

In Carey v. Brown, 447 U.S. 461 (1980), the Court held that an ordinance which prohibited all picketing except "peaceful picketing of a place of employment involved in a labor dispute" discriminated between lawful and unlawful conduct based upon the content of the demonstrators' communication. *Id.* at 460. "On its face, the Act accords preferential treatment to the expression of views on one particular subject . . . . The permissibility of residential picketing under the . . . statute is thus dependent solely on

rowly tailored[59] (3) to serve a significant public interest,[60] and (4) leave open ample alternative channels of communication.[61]

---

the nature of the message being conveyed." *Id.* at 460-61. Such a distinction was found to be content-based and led to the *Carey* ordinance being held unconstitutional.

59. *Perry*, 460 U.S. at 45. The federal courts are split on the standard to be applied in determining whether a restriction is narrowly tailored. Some courts hold that a restriction on expressive activity, to qualify as narrowly tailored, must be the least restrictive means available to protect the government interest involved. *See* Cox v. Louisiana, 379 U.S. 559, 562 (1965); City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1554 (7th Cir. 1986), *aff'd*, 107 S. Ct. 919, 920 (1987); Association of Community Orgs. for Reform v. City of Frontenac, 714 F.2d 813, 818 (8th Cir. 1983); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 926 (7th Cir. 1975). Thus, in order to have the restriction upheld as constitutional under this test, the government bears the burden of showing that its purported interests could not be protected by a less restrictive ordinance.

Other courts, however, merely require that the restriction, in order to withstand constitutional scrutiny, must be narrowly tailored enough so that it does not unduly infringe upon constitutional rights. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984).

Subsequent to the disposition of *Schultz* by the court of appeals, the Supreme Court appeared to settle this dispute by affirming without opinion a case appealed to the Court which applied the requirement that the ordinance be the least restrictive means available. *City of Watseka*, 107 S. Ct. 919 (1987), *aff'g*, 796 F.2d 1554 (7th Cir. 1986). However, the dissent, in which three justices took part, showed a possible basis for future decisions by stating "[we] have not imposed the requirement that the restriction be the least restrictive means available." *City of Watseka*, 107 S. Ct. at 920, (White, J., dissenting).

60. *Perry*, 460 U.S. at 45. The significant governmental interest can vary greatly, depending upon the area in which the expressive activity takes place. *See generally* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 652 (1981) (traffic flow on the state fair grounds); *Carey*, 447 U.S. at 464 (privacy in the home); *Association of Community Orgs. for Reform Now*, 798 F.2d 1260, 1268-69 (9th Cir. 1986) (flow of vehicular traffic in city streets as well as safety of pedestrians and distracted motorists); *Chicago Area Military Project*, 508 F.2d at 924 (interference with airport activities as well as littering).

One of the more interesting "governmental interests" the Supreme Court has had to analyze arose in United States v. Grace, 461 U.S. 171 (1983). In *Grace*, the Court had to determine whether a restriction banning picketing in its own Supreme Court building and on its adjoining grounds protected a significant interest. The government's purported interests included maintaining the appearance of objectivity of the Court "as well as the maintenance of proper order and decorum." *Id.* at 182-83. The Court found that the government's justification for the ban on picketing was "insufficient" to uphold the prohibition. *Id.* at 183.

61. *Perry*, 460 U.S. at 45. "[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).

The fact that a restriction prohibits only some, and not all, expressive activity has been considered by the Court in determining if adequate alternative channels remain. *See, e.g.*, *Grace*, 461 U.S. at 181 n.10. Accordingly, this implies that a prohibition

If a nonpublic forum is at issue, the State is given greater latitude to regulate speech in the area; the State has the right to place restrictions on expressive activity as long as they are "reasonable"[62] and are viewpoint neutral.[63]

III. THE *SCHULTZ* OPINIONS

A. The Swygert Majority

Senior Circuit Judge Swygert, writing for the majority in *Schultz v. Frisby*,[64] acknowledged that the picketing in question, because it involved conduct as an element of its expressive activity,[65] was not an instance of "pure speech."[66] However, he pointed out that the Supreme Court has given peaceful picketing first amendment protection in the past.[67]

---

which bans all expressive activity would necessarily fail to provide adequate alternative channels.

Circuit Judge Swygert points out the possibility that the adequacy of the alternative will hinge not on the number of alternatives available but on the quality of those alternatives. He cites *Taxpayers for Vincent*, 466 U.S. at 812, in support of this proposition. This approach, however, has never been expressly considered by the Supreme Court and appears to have been brought to Judge Swygert's attention by the trial court in *Schultz*, 619 F. Supp. 792, 797 (E.D. Wis. 1985).

62. *Perry*, 460 U.S. at 46. "The reasonableness of the government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 809 (1985).

Under most circumstances, the government's goal of preserving the property for its dedicated purpose is seen as reasonable, and the presence of alternative channels of communication will support the reasonableness of the restriction. *See, e.g.*, *Perry*, 460 U.S. at 50-53.

Some proponents of first amendment rights, however, have advocated a stricter test which would require that a restriction be struck down unless freedom of expression was incompatible with the dedicated purpose of the area. *Cornelius*, 473 U.S. at 819-21 (Blackmun, J., dissenting).

63. *Perry*, 460 U.S. at 46. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49. Although the State may make these distinctions in a nonpublic forum, it is not allowed to impose a restriction which is "an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 131 n.7 (1981)). Therefore, once the government allows a particular topic to be discussed in the nonpublic forum, it will not be justified in restricting discussion of one particular ideology on that subject.

64. 807 F.2d 1339 (7th Cir. 1986).

65. *Id.* at 1343.

66. *Id.*

67. *Id.* at 1343-44 (citing United States v. Grace, 461 U.S. 171, 176 (1983)). *See supra* note 37 and accompanying text.

Thus, the majority held that the activity in question constituted protected speech.[68]

The majority decision went on to hold that the street on which the picketing occurred was a public forum, despite its location in a residential neighborhood.[69] Having established this, the court proceeded to analyze the ordinance according to the tests applicable to a regulation of protected speech in a public forum.[70]

The court first determined that the ordinance did not leave open ample alternative channels of communication for the picketers.[71] In so holding, the court found that the restriction of picketing to nonresidential areas significantly affected the quality and character of the picketers' message,[72] thereby making ineffective any alternatives that were available.[73]

The majority next turned its attention to whether the ordinance was narrowly tailored[74] to protect a significant government interest.[75] In deciding that the ordinance was not

---

68. *Schultz*, 807 F.2d at 1344.

69. *Id.* at 1347. For a discussion of the Court's analysis, see *id.* at 1345-47, in which the majority decided that streets are generally public forums. The Court readdressed the issue from the standpoint of whether the residential situs affects a street's status as a public forum. *See id.* at 1351.

70. *See id.* at 1347-55. *See also supra* notes 56-61 and accompanying text.

71. *Schultz*, 807 F.2d at 1348.

72. *Id.* at 1348. The Court stated that to limit the picketers' activities to nonresidential areas would be "in effect, to force them to engage in an entirely different form of expressive activity." *Id.*

73. *Id.* Since the Town of Brookfield had only one commercial thoroughfare, the restriction of picketers to nonresidential areas would have protected all but one street of the town from that form of expressive activity. *Id.* at 1340.

74. The court cited the following as its standard: "The requirement that a legislative enactment affecting expressive activity be narrowly tailored means simply that the questioned regulation 'may extend only as far as the interest it serves.' " *Id.* at 1349 (quoting Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 565 (1980)).

75. It is interesting to note the court's analysis at this point. The elements of being narrowly tailored and protecting a significant governmental interest, although constituting two separate prongs of a test, necessarily are intertwined. In order to know whether a restriction is narrowly tailored to protect a governmental interest, one must first know what interest is being protected, since different interests require different levels of protection. However, the *Schultz* court first addresses the issue of being narrowly tailored before determining exactly what interest the restriction protects. Presumably, this order of analysis occurs because of the order in which the tests are normally stated. But common sense and sound reasoning dictate that the order in which the court addressed the two issues should have been reversed.

narrowly tailored,[76] the court retained the requirement it had used in earlier decisions[77] that the government must show that its objectives will not be served by any less restrictive means.[78] Because the ordinance brought within its scope several potentially non-disruptive activities,[79] the court found that it was not narrowly tailored.

Finally, the court acknowledged that the Town of Brookfield had a significant interest in protecting the privacy of its residents in their homes.[80] However, the court held that in a public-forum setting, the first amendment rights of a group of picketers to exercise their freedom of speech outweighed the interests of the municipality in protecting the privacy of its citizens.[81] Thus, an attempt to prohibit all such expressive activity was unconstitutional.[82] The court also noted that the Town already had enacted laws that would adequately safeguard its interests.[83]

B. The Coffey Dissent

Circuit Judge Coffey, in his dissent, claimed the court had inaccurately characterized the case as an attempt by the Town to deprive the picketers of their right to be heard.[84] Judge Coffey asserted that several forms of communication were in fact available to the picketers,[85] and that the Town did not foreclose their ability to communicate through those channels.

The dissent further stated that in addition to their right to express themselves, the picketers had an obligation to respect the rights of others, "especially those foreign to the contro-

---

76. *Schultz*, 807 F.2d at 1350.

77. *See* cases cited *supra* note 59.

78. *Schultz*, 807 F.2d at 1349 (citing Association of Community Orgs. for Reform Now v. Frontenac, 714 F.2d 813, 818 (8th Cir. 1983)).

79. The court points out that "[p]icketing is not by its very nature an activity inherently disruptive of the coherency of an American neighborhood." *Id.* at 1350.

80. The court stated that of the two justifications the Town claimed for enacting the ordinance, the protection of privacy was a more important justification than traffic regulation. It said that "[t]he stated interest of the Town in protecting the privacy of its residents is clearly a significant governmental interest." *Id.*

81. *Id.* at 1354.

82. *Id.*

83. *Id.* at 1355.

84. *Id.* at 1355-56 (Coffey, J., dissenting).

85. The media to which Judge Coffey refers include direct mail, radio, television, newspapers and telephone. *Id.* at 1356.

versy . . . who also have a right to enjoy the privacy, peace and tranquility of their own homes."[86] Judge Coffey justified the ordinance as merely a balancing of these conflicting rights for the good of all.[87]

The dissent also disputed the majority's contention that in order to have a valid restriction, the government must prove that its ordinance is the least restrictive means of protecting the interest involved.[88] Instead, Judge Coffey intimated that the standard should be that the restriction merely avoids infringing upon expressive activities in a way that unduly burdens an individual's rights.[89] Judge Coffey would have held that the ordinance, although imperfect, was nonetheless constitutional.

Finally, the dissent found that the Town's interest in protecting the flow of vehicular traffic was indeed a legitimate concern[90] and that the picketing was incompatible with the normal use of the streets involved.[91] Thus the Town's ordinance was justified by compelling state interests in both protecting the privacy of residents and in regulating vehicular and pedestrian traffic.[92]

V. ANALYSIS

While the *Schultz v. Frisby*[93] court's ultimate holding that the ordinance was unconstitutional follows the modern trend in first amendment law,[94] the decision brings into focus several problems relating to the tests of constitutionality applied to

86. *Id.*

87. *Id.*

88. *Id.* at 1369. *See also supra* notes 77-78 and accompanying text.

89. *Schultz*, 807 F.2d at 1369. Judge Coffey states: "Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech . . . . The validity of such regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests." *Id.* at 1368 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

90. *Schultz*, 807 F.2d at 1361.

91. *Id.* at 1366.

92. *Id.*

93. 807 F.2d 1339 (7th Cir. 1986).

94. The Court's reasoning in United States v. Grace, 461 U.S. 171 (1983), seems applicable to the question of whether a residential street is a traditional public forum. In *Grace*, the Court held that the sidewalks around the Supreme Court building were as much traditional public forums as all other sidewalks in Washington, D.C., despite their

such restrictions. Specifically, the decision highlights the difficulties in determining whether a restriction is (A) narrowly tailored (B) serves a significant government interest, and (C) leaves open ample alternative channels.[95]

A. How Narrowly Tailored Must a Restriction Be?

The *Schultz* majority adopted the standard that in order to be constitutional, a regulation on speech must be the least restrictive means available for protecting the interest involved.[96] However, subsequent Supreme Court action on this issue[97] and the assertions made in Judge Coffey's dissent draw the correctness of this standard into question.

The first amendment requires that no law infringe upon the public's freedom of speech. There is no qualification on the level of governmental infringement allowed.[98] Thus, the question of how narrowly tailored a restriction must be — the most narrow possible or merely narrow enough[99] — becomes a question of the intent of the Framers of the Constitution. If the Framers had intended to allow the government some leeway in its regulation of speech, they might have written "Congress shall make no law . . . [*unduly*] abridging the freedom of speech . . . ." The failure to include this phrasing indicates the importance the Framers placed on individual liberty and a free interchange of ideas.

As the Court stated in 1957: "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes de-

---

location. This was because the courthouse sidewalks were indistinguishable from the rest of the sidewalks in the city. *Id.* at 183.

That situation is analogous to a street in a residential neighborhood; since a street in a residential neighborhood is indistinguishable from other streets in the city, it should be treated in the same manner — as a traditional public forum. Indeed, the *Schultz* court acknowledges that "[a] holding that streets located in residential areas are not public forums would represent a radical departure from the general direction of first amendment jurisprudence." *Schultz*, 807 F.2d at 1347.

95. The court appears to treat the issue of content-neutrality, the fourth prong of the test laid out in *Perry*, as a given and does not address it in the majority decision.

96. *See supra* notes 76-78 and accompanying text.

97. *See supra* note 59.

98. Of course the first amendment's scope has been construed over the years to depend upon the type of speech involved and the forum in which the expressive activity takes place. *See supra* notes and accompanying text.

99. *See supra* note 59.

sired by the people."[100] Logically, in order to facilitate the political and social evolution intended, the government cannot be allowed to burden the activity that seeks to bring it about. Failure to uphold this "least restrictive means" requirement would blur the distinction between democracy and tyranny.

Thus, the court's adoption of the more strict requirement that the ordinance be the least restrictive means available is necessary, despite the disagreement within the Court,[101] in order to uphold the original purpose of the first amendment.[102]

B. How Significant an Interest is the Privacy of an Individual?

By stating that the Town of Brookfield had a significant interest in protecting the privacy of its citizens in their homes, the *Schultz* court was in a position to balance a constitutionally guaranteed right against the desire to retain the sanctity of the one place in which we all expect our personal privacy to be respected. The court was correct in ruling that privacy is a significant interest, and that interest is worthy of governmental protection in order to preserve the places of individual refuge in our society.

But as the majority points out, the Town already had in place ordinances that would protect the privacy of its citizens in their homes.[103] Those ordinances would protect the residents of the Town from such problems as obstruction of streets and sidewalks, loud and unnecessary noise, destruction of property, criminal trespass, and disorderly conduct.[104]

---

100. Roth v. United States, 354 U.S. 476, 484 (1957).

101. *See* City of Watseka v. Illinois Pub. Action Council, 107 S. Ct. 919, 920 (1987) (Rehnquist, C.J., White, O'Connor, JJ., dissenting).

102. As a means of "narrowly tailoring" the ordinance in order to make it constitutional, one might reasonably consider adding to the prohibition on picketing the term "disruptive," so as to ban only activities that would interfere with the dedicated purpose of the forum involved. This, however, would leave the definition of "disruptive" to the parties enforcing the ordinance. Such a situation would in no way alleviate the "chilling effect" of the restriction on expressive activities, since picketers would have little idea whether they were likely to be arrested for stepping beyond the bounds of what officials believed to be "disruptive."

103. *Schultz*, 807 F.2d at 1355.

104. *Id.* The court completely ignored the applicability of these ordinances in claiming that a "householder cannot draw the blinds to shield herself from an unwelcome visage or turn up the stereo to drown out an unpleasant voice" when confronted

With this in mind, it appears that Dr. Victoria's problem was not the picketing before his house but was the inadequate enforcement of the valid ordinances already in place. This does not justify a prohibition on picketing in the area: "To an extent, disruption is the price of living in a free society."[105]

C. *What Makes an Alternative Channel of Communication "Ample?"*

The *Schultz* court found that the Town of Brookfield ordinance left open only alternative channels which significantly altered the quality and character of the picketers' message. Thus, the court stated, they were not "ample" alternatives.[106]

But a problem arises with the court's consideration of the quality and character of the picketers' message. The court fails to recognize that all forms of communication are unique and carry with them their own special qualities and characteristics.[107] If a mere change in the character of the message being sent is sufficient to classify an alternative channel as not being ample, then no prohibition on a desired form of communication could ever be upheld as constitutional.[108]

Alternatively, the dissent's free-handed approach to the definition of ample alternatives is also inadequate. Judge Coffey points out that such alternatives as newspapers, radio and television are available.[109] However, consideration of the cost involved in using alternative channels is important in assessing their adequacy.[110] The extra cost involved in using these alternatives may be prohibitive for underfinanced groups,

---

with door-to-door solicitation. *Id.* at 1354. It is unlikely that these ordinances would be any less protective against intrusion by solicitors than against intrusion by picketers.

105. *Id.* at 1353.

106. *Id.* at 1348.

107. The courts have recognized that printed media, such as leaflets and picket signs, are most appropriate for complex messages. On the other hand, simple messages are better communicated during a face-to-face conversation. *See, e.g.*, National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 726-27 (7th Cir. 1984).

108. In fact, the Court has upheld such a restriction. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). In *Heffron* the form of communication banned and the form which was allowed had different characters, thus failing the test used by the *Schultz* court, yet the restriction was upheld because the state's interest in the flow of traffic was great enough.

109. *Schultz*, 807 F.2d at 1356 (Coffey, J., dissenting).

110. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (Door to door distribution of circulars is essential to the poorly financed causes of little people.).

and alternatives which are not feasible can hardly be considered "ample."

A solution to the problem would be three - pronged, considering (1) the number of alternatives, (2) the character of the message the alternatives would allow, and (3) the cost of those alternatives. Under this approach, a change in the character of the message being sent would not necessarily make the alternatives inadequate; rather, their adequacy would depend on the nature of the message in conjunction with the other two factors, possibly allowing one factor to compensate for another.[111] Had the *Schultz* court applied this standard, it might have still found the alternatives to be inadequate, since each one mentioned in Judge Coffey's dissent was probably too expensive for many groups.

VI. CONCLUSION AND IMPACT OF THE CASE

Schultz v. Frisby[112] presented the Seventh Circuit Court of Appeals with a case that forced it to address the issue of balancing the privacy rights of citizens in their homes against the rights of others to engage in expressive activity. By applying standard tests of first amendment law, the court reached an equitable resolution of the problem, allowing the balance to tip toward a constitutionally protected right. No new constitutional trails were blazed; the court merely enforced already existing first amendment principles. But the majority decision, in conjunction with the dissent and splits of opinion among the federal courts, brought to light some of the problems in this area for possible resolution in the future.

HUGH J. O'HALLORAN

111. This approach, however, must be applied carefully to avoid possible discriminatory enforcement of restrictions, allowing application of more repressive regulations against some groups simply because they are able to financially afford the alternatives. Instead, the standard would have to be whether the underfinanced groups could afford the alternatives, even if a well-financed group was challenging the ordinance.

112. 807 F.2d 1339 (7th Cir. 1986).