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Free Choice and the First Amendment or Would You Read This If I Held it in Your Face and Refused to Leave ?

Anne D. Lederman

COMMENTS

FREE CHOICE AND THE FIRST AMENDMENT OR WOULD YOU READ THIS IF I HELD IT IN YOUR FACE AND REFUSED TO LEAVE?

I. INTRODUCTION

The First Amendment protects the right of every citizen "to reach the minds of willing listeners and to do so there must be opportunity to win their attention."[1] As a summary of the First Amendment's scope, however, this statement is incomplete. In most circumstances, the First Amendment also protects the right of citizens to reach the minds of unwilling listeners, even those who may respond violently to the objectionable speech. Supreme Court precedent firmly upholds the right of speakers to express views that provoke and anger audiences even to the point of inciting riot; the state may restrict such speech only if it poses a clear and present danger of producing imminent lawless action.[2] When confronted by speech that is any less offensive, audiences must attempt to avoid the speech.[3]

Because the First Amendment protects the opportunity to reach unwilling listeners, targeted protests constitute protected activity. Targeted protests, those conducted directly before the audience whose views or behavior the protesters oppose, represent a paradigm of First Amendment activity. Reflecting a "profound national commitment to the principle that debate on public issues should be

1. Kovacs v. Cooper, 336 U.S. 77, 87 (1949).
2. Brandenburg v. Ohio, 385 U.S. 444 (1969).
3. *See* Cohen v. California, 403 U.S. 15, 21 (1971).

uninhibited, robust, and wide-open,"[4] any restriction on such protests receives careful scrutiny.[5] Targeting the location of a protest may enhance its eloquence and power. The import of the numerous marches on Washington throughout American history ensued not simply from their magnitude, but from the symbolic meaning of marching before the various institutions of power—the White House, the Capitol, and the memorials of the great presidents. Conducting the protest at the site of the subject of the protest may also contribute to the message itself: the views of black civil rights activists who sat at lunch counters reserved for whites were unmistakable. Although selecting the site of the speech may be characterized as conduct rather than pure speech, protecting citizens' right to target their protests may be particularly valuable.

Beyond the enhanced symbolic and communicative effect of a targeted protest, the impact on the citizens whose activities the protesters oppose and hope to influence will be particularly acute. If the protest fulfills its ultimate goal, the targeted audience will alter its behavior to comport with the protesters' views. While guarding the right of citizens to attempt to influence public policy through the exercise of speech is, arguably, the underlying purpose of the First Amendment, the Supreme Court has recognized that certain interests of the targeted audience may deserve and require the protection of the state against infringement by such protests. Preserving the audience's freedom from coercion tempers the protection afforded the protesters' persuasive activities.

This Comment surveys audience-related interests recognized by the Supreme Court as potentially compelling to justify restricting protesters in their exercise of First Amendment rights. Part II summarizes the constitutional doctrines regarding offensive speech and speech before a captive audience. These principles reflect the Supreme Court's willingness to protect audiences from invasions of privacy by speech that intolerably disturb their environments. Reviewing cases in which the Supreme Court balanced the First Amendment rights of protesters who targeted their audience and the interests of the targets themselves, Part III investigates the Court's concern that the audience's privacy may be invaded in another manner. The decisions suggest that protesters' First Amendment rights may be restricted if their expressive activity has a coercive

4. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
5. Frisby v. Schultz, 487 U.S. 474, 479 (1988).

effect upon the targeted audience, intolerably interfering in the audience's decisions in matters related to the protests. This Comment concludes that a decision to protect the audience from such coercive interference finds support in First Amendment theory.

II. PRIVACY OF ENVIRONMENT

A. *Protection of Offensive Speech*

As a general rule, the Constitution offers citizens little governmental protection against speech that might offend them, even if the speaker intends the offense. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[6] Objectionable speech, whether or not itself constituting truth, must compete in the marketplace of ideas to advance the pursuit of truth.[7] The equal status of offensive expression among ideas is a necessary component of the process of self-governance. "Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered . . . ."[8] Exposure to offensive speech also advances tolerance among the populace.[9] By responding as rational agents to an offensive expression, citizens promote their own self-respect and autonomy.[10] Finally, to

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6. Texas v. Johnson, 491 U.S. 397, 414 (1989).

7. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

8. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

9. *See* Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 629 (1982) ("The free speech principle is grounded as much in a desire to avoid being the slaves of our own intolerant impulses as it is in a desire to preserve an unshackled freedom to speak one's mind as one wishes.").

10. *See* David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 61-62 (1974) (asserting that the value placed on the freedom of ideas "derives from the notion of self respect that comes from a mature person's full and untrammeled exercise of capacities central to human rationality").

allow the government to assume a protective role against offensive speech forfeits that individual autonomy,[11] and carries with it the threat of government censorship.[12]

Despite the numerous theories constraining the state's interference in the marketplace of ideas, the Supreme Court has upheld the right of the government to protect citizens from certain categories of objectionable speech. Pursuant to the state's power to protect public safety and order, it may prevent a speaker from intentionally provoking a given group to a hostile or unlawful reaction that presents a clear and present danger to the public.[13] Personal insults directed to a specific individual may also be banned or punished, for the words "by their very utterance inflict injury . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[14] The state may also prohibit speech that offends the audience because it is obscene, both because it is offensive and because it lacks value in the pursuit of truth.[15] Beyond these traditional exceptions, the First Amendment jurisprudence prohibits the government from restricting speech due to its objectionable effect on the audience.

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11. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL & PUB. AFF. 204, 213-18 (1972) (arguing that citizens who are autonomous could not accept the judgment of others as to what they should believe or do, and could not concede to the state the right to have its decrees obeyed without deliberation).

12. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978) ("it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas"); Cohen v. California, 403 U.S. 15, 26 (1971) (noting with apprehension the correlation of government's censorship of modes of expression with its censorship of unpopular viewpoints).

13. Feiner v. New York, 340 U.S. 315 (1951). While the speech would present no danger if the expression were not offensive to the audience, the rationale for the "hostile audience" doctrine is not the protection of the audience from the objectionable expression, but the protection of citizens in general from the hostile reaction of those who take offense. "'When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.'" *Id.* at 320 (citing Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)).

14. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The "fighting words" doctrine also protects society from speech that, when viewed objectively, tends to incite an immediate breach of peace. *Id.*

15. *See* Miller v. California, 413 U.S. 15, 24 (1973) (articulating the basic guidelines for establishing obscenity).

B. *Intolerable Invasions of the Environment*

Rather than allowing the government to regulate offensive speech, the Supreme Court suggests the burden rests upon the individual as a responsibility attendant to democracy.

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry, and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[16]

Thus, as a rule, the primary obligation to protect citizens from offensive speech belongs to each citizen herself. The state's protective role is strictly limited: "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[17]

Constitutional doctrines balancing a speaker's First Amendment rights against the interests of listening audiences recognize a view of privacy that reflects the listener's right not to be disturbed within a particular environment.[18] In *Cohen v. California*,[19] the Court

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16. *Cohen*, 403 U.S. at 24.

17. *Id.* at 21. In developing this rule of *Cohen*, this Comment concerns "privacy" involving unwanted exposure to objectionable speech, as distinguished from "privacy" involving the unwanted disclosure of personal, nonpublic information. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (refusing to sanction the press for publishing a deceased rape victim's name as the information had appeared in public court documents).

18. The following discussion of how the context, primarily the location, of the communication influences the Supreme Court's perspective on relevant audience interests is not entirely detached from the modern "public forum" analysis, under which the Court adjusts the protection afforded First Amendment activity based on whether the speech occurs in a traditional public forum, a public forum created by government designation, and a nonpublic forum. *See generally* Frisby v. Schultz, 487 U.S. 474 (1988). According to the Court, however, both "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1974).

reversed the conviction of a man who appeared in the Los Angeles Municipal Court wearing a jacket emblazoned with the words "Fuck the Draft."[20] Responding to the argument that the state acted legitimately to protect sensitive citizens from the man's "crude form of protest,"[21] the Court charged those in the Los Angeles courthouse who wished to "avoid further bombardment of their sensibilities simply [to] avert[] their eyes."[22] Within the courthouse environment, the visual presence of the offensive words was not an intolerable privacy invasion as it easily could be excluded.

The *Cohen* Court noted a greater interest in privacy within the courthouse than in a public park or street.[23] In these open, public areas, the audience's burden to avoid the speech may be greater. Even large displays of potentially offensive expression in these spaces, such as the exhibition of motion pictures containing nudity on a drive-in movie screen visible from a public street,[24] are not essentially intolerable privacy invasions. Unwilling audiences remain responsible for averting their eyes to avoid continued exposure to the speech.[25] Where the location does not prevent the listener from protecting himself, privacy interests abate and a listener able to avoid offensive speech is expected to take action.

C. The Home as a Protected Environment

The home constitutes a special realm in which a listener's interest in not being disturbed attains the status of a right, justifying a diminished obligation to tolerate offensive speech. Within the confines of the home, an "individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[26] Thus, the Court upheld a ban against broadcasting indecent or profane lan-

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This Comment assumes the location of the speech may inform both inquiries: the public or nonpublic nature of the forum as well as the conflicting interests involved.

19. 403 U.S. 15 (1971).

20. *Id.* at 16. The Court established that the expression was not obscene, nor a direct personal insult so as to constitute "fighting words," nor an intentional provocation of a group to a hostile reaction. *Id.* at 20.

21. *Id.* at 21. The wearer of the jacket testified that the jacket expressed to the public the depth of his feelings against the Vietnam War and the draft. *Id.* at 16.

22. *Id.* at 21.

23. *Id.*

24. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

25. *Id.* at 212.

26. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

guage, for the offensive material confronted citizens not only in public but within the home. Although a homeowner could avoid further offense by turning off the radio when he hears the offensive speech, privacy interests supersede the speaker's First Amendment rights; "the home [is] the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds."[27]

Beyond offensive content, speech may intolerably invade a private environment due to the means of its communication. Homeowners need not sacrifice "the[ir] quiet and tranquility . . . at the mercy of advocates."[28] Thus, the Court has condoned regulation of the use of sound amplification equipment in residential areas[29] and parks surrounding them,[30] the right of a homeowner to stop the flow of unwanted mail into the home,[31] and has acknowledged the right of homeowners to control the occurrence of door-to-door leafletting or solicitation.[32]

Confronting a direct conflict between the First Amendment rights of protesters and the residential privacy interests of a targeted audience, the Supreme Court upheld the state's interest in protecting the home from disturbances of a physical or environmental nature. In *Frisby v. Schultz*,[33] the suburb of Brookfield, Wisconsin experienced some peaceful picketing[34] that occurred on a public

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27. *Id.* at 759 (Powell, J., concurring). The majority compared requiring a homeowner to avoid the material by turning off the radio to saying that the remedy for an assault is to run away after the first blow. *Id.* at 749-50. The nature of broadcast material also implicated the Court's concern for children who could easily hear the offensive speech. *Id.*

In *Pacifica*, the offensiveness of the speech was undisputed. *See id.* at 747. Where the offensiveness of speech was disputed, the Court promoted the homeowner's control over the flow of speech into the home; "[W]e have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983) (invalidating a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives).

28. Kovacs v. Cooper, 336 U.S. 77, 87 (1949). The need for tranquility to carry out the function of a particular building extends to "courts, libraries, schools, and hospitals." Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring).

29. *See Kovacs*, 336 U.S. at 89.

30. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

31. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970).

32. *See* Martin v. City of Struthers, 319 U.S. 141, 148-49 (1943). While *Martin* invalidated a speech restriction, the Court asserted the rights of householders to indicate that they are unwilling to be disturbed by door-to-door distribution of literature. *Id.*

33. 487 U.S. 474 (1988).

34. The Court stated that the town never had occasion to invoke any of its ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct

street outside the personal residence of a doctor who performed abortions at clinics in neighboring towns. Following controversy, the town enacted an ordinance that banned all residential picketing.[35] Threatened with arrest, the picketers sought declaratory and injunctive relief in federal court under 42 U.S.C. § 1983, charging that the ordinance violated the First Amendment.[36]

Ultimately concluding that the ban was sufficiently narrowly tailored to advance the state's ends,[37] the Court emphasized the conflict between residential protesters' First Amendment rights and the basic principle of the home's sanctity. The ordinance itself recited its primary purpose: "the protection and preservation of the home [through assurance that] members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy."[38] Citing two earlier cases involving residential picketing,[39] the Court stressed that "'[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an

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against the picketers. *Id.* at 476. The existence of the ordinances, and the fact that any environmental disturbance created by the residential picketing was insufficient to trigger the ordinances, supports that the drafters of the subsequent ban on picketing at issue in *Frisby* intended to protect the targeted homeowner from other offensive effects. The Court's willingness to uphold the ban confirms the legitimacy of the statutory propose. *See infra* notes 130-58 and accompanying text.

35. *Id.* at 476-77. The ordinance prohibited any person from engaging in "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *See id.* at 477.

36. *Id.*

37. The Court imposed a narrowing construction upon the ordinance and found that the ordinance targeted only picketing of a single residence. *Id.* at 483. Only in light of this restrictive construction, did the ordinance allow protesters, alone or in groups, to enter residential neighborhoods and proselytize door-to-door. *Id.* at 484. Because of these ample alternatives to the focused picketing proscribed by the ordinance, the ordinance withstood constitutional challenge. *Id.* at 488. Justice White's concurring opinion noted that the language could easily be construed to reach also picketing that would deliver the desired message about a particular residence to the neighbors, as well as picketing that is directed at the residences which are located in entire blocks or in larger residential areas. *Id.* at 489 (White, J., concurring).

38. Frisby v. Schultz, 487 U.S. 474, 477 (1988). The Town Board believed a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants." *Id.* The Town also expressed concern that picketing obstructs and interferes with the free use of public sidewalks and ways of travel. *Id.*

39. The Court relied upon Gregory v. City of Chicago, 394 U.S. 111 (1969), and Carey v. Brown, 447 U.S. 455 (1980), for the proposition that the home's sanctity supports limitations on speakers' First Amendment rights. *Frisby*, 487 U.S. at 484.

important value.'"[40] Within this protected realm, the Court asserted, "[t]here simply is no right to force speech into the home of an unwilling listener."[41] The homeowners had a preexisting right to exclude unwanted speech from intruding; the First Amendment did not enable protesters to force unwanted speech into the enclave of the home.[42]

D. The Captive Audience Doctrine

The homeowner's captivity in *Frisby* exacerbated the offensiveness of the speech's intrusion. The speech was unavoidable; "[t]he resident [wa]s figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing [wa]s left with no ready means of avoiding the unwanted speech."[43] The Court shields the home from invasion by offensive speech not simply because of its sanctity, but because the homeowner cannot easily relocate as a means of avoiding the speech.

Protecting captive listeners from forced exposure to speech within a physically confined environment constitutes a recognized exception to the general free speech principle. The captive audience doctrine mediates between a speaker's right to free expression and the rights of an unwilling audience whose choice to avoid the speech is compromised by the circumstances of the communication.[44] Because the listener cannot escape the disturbance by leaving the environment, the speech invades her privacy interests in an essentially intolerable manner, justifying a restriction upon the speaker's First Amendment rights.[45]

The audience's physical confinement is the prominent characteristic of the captive audience doctrine. As in *Frisby*,[46] a homeowner's captivity within her home supports restrictions on

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40. *Frisby*, 487 U.S. at 484 (quoting *Carey*, 447 U.S. at 471).

41. *Id.* at 485. The Court contrasted the listener within the home to those on the street, citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975), or in a public building, citing Cohen v. California, 403 U.S. 15, 21-22 (1971). In either of these locations the listener did not enjoy the "special benefit of privacy all citizens enjoy within their own walls." *Frisby*, 487 U.S. at 484.

42. *Frisby*, 487 U.S. at 484-85.

43. *Id.* at 487.

44. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

45. *Id.* at 304.

46. *See supra* text accompanying note 43.

speech which invades the home.[47] Yet "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[48] Thus the captive audience doctrine asserts citizens' rights to be free from forced exposure to objectionable speech outside the home as well.

Confinement within a rapid transit car typifies the captive audience. In *Lehman v. City of Shaker Heights*,[49] the city sold advertising space on car cards in the vehicles of its public rapid transit system. The city and the company that managed the advertising space agreed that political advertising would not appear in or upon any of the cars of the rapid transit system.[50]

A candidate for public office attempted to purchase advertising space on rapid transit cars for the months preceding the election.[51] The city refused to permit his advertisements.[52] Upholding the city's decision, the Supreme Court emphasized that "'[t]he streetcar audience is a captive audience.'"[53] Since the audience rode the streetcar "as a matter of necessity, not of choice,"[54] the riders had

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47. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970) ("In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.").

48. *Id.* at 738.

49. 418 U.S. 298 (1974).

50. Metromedia had a written advertising policy establishing the following criteria:

> (1) Metro Transit Advertising will not display advertising copy that is false, misleading, deceptive and/or offensive to the moral standards of the community, or contrary to good taste. Copy which might be contrary tho the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable.
>
> (2) Metro Transit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair . . . .
>
> (10) Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmstead—Euclid, Ohio.

Id. at 300 n.1.

51. The petitioner's proposed copy read as follows:

"HARRY J. LEHMAN IS OLDFASHIONED! ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT. State Representative—District 56 [X] Harry J. Lehman."

The advertisement also contained the petitioner's picture. *Id.* at 299.

52. *Id.* at 301.

53. *Id.* at 301-02 (quoting Public Utilities Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J. dissenting)).

54. Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (quoting Packer

no choice whether to observe the advertising. Because circumstances inhibited the audience's freedom to avoid the speech, the Court subordinated the First Amendment rights of the speaker.[55] Justice Douglas' concurrence unequivocally asserted the privacy rights of the captive audience:

> In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters . . . . In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.[56]

The Justices disagreed on the issue of the intolerable nature of

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Corp. v. Utah, 285 U.S. 105, 110 (1932)).

55. *Id.* at 304. Despite the importance of political speech in the history of the free speech guarantee, *see, e.g.*, ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 18-20 (1941) (describing the framers' fear of the danger to political writers and speakers posed by rigorous and repeated prosecutions for seditious libel); MEIKLEJOHN, *supra* note 8, at 24-28 (describing the theoretical foundation of the free speech guarantee as a means of contributing to and enhancing the process of self-government), the political nature of the speech reinforced the danger of forcing riders' exposure to it. "Users would be subjected to the blare of political propaganda . . . . In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Lehman*, 418 U.S. at 304. Justice Douglas' concurrence expressly characterized "the content of the message as irrelevant both to the petitioner's right to express it or to the commuters' right to be free from it. "Commercial advertisements may be as offensive and intrusive to captive audiences as any political message." *Id.* at 308 (Douglas, J., concurring). In addition to the interests of the captive audience itself, the Court also weighed the interests of the city: "There could be lurking doubts about favoritism, and sticky administrative problems mights arise in parceling out limited space to eager politicians." *Id.* at 304.

56. *Lehman*, 418 U.S. at 307 (Douglas, J., concurring). Interestingly, travelers continue to capture the sympathy of several Justices. In International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2709 (1992), the Court invalidated a ban on the distribution of literature in port authority airport terminals. While the Court held that a ban on solicitation adequately redressed the inconveniences to passengers and the burdens on terminal officials, the dissent would allow a ban on distribution.

> The weary, harried, or hurried traveler may have no less desire and need to avoid the delays generated by having literature foisted upon him than he does to avoid delays from a financial solicitation. And while a busy passenger perhaps may succeed in fending off a leafletter with minimal disruption to himself by agreeing simply to take the proffered material, this does not completely ameliorate the dangers of congestion flowing from such leafletting.

Id. at 2710 (Rehnquist, J., dissenting).

the privacy invasion. Dissenting, Justice Brennan denied that the audience was powerless to avoid the speech. Because the advertisements were written, not broadcast over loudspeakers on the transit cars, the passengers' privacy was not "dependent upon their ability 'to sit and to try not to listen.'"[57] Asserting that offended passengers could just as easily avert their eyes as the Court directed in *Cohen*,[58] the dissent characterized the "minor inconvenience . . . a small price to pay for the continued preservation of so precious a liberty as free speech."[59]

The captive audience cases are a subset of cases in which the Court defends the privacy interests of audiences from intolerable invasions by a speaker's First Amendment activity. In most circumstances, an audience that wishes to enjoy a particular environment without invasion by offensive speech must usually assume responsibility for avoiding the speech.[60] Under established doctrines, permissible governmental restrictions shield audiences from speech within a specially protected realm[61] or where the audience cannot elect to leave the environment.[62]

When mediating among the interests of speakers who conduct a targeted protest, and the interests of their targeted audiences, the Court relies on principles from the offensive speech and captive audience cases. The speech, expressed to communicate the speaker's opposition to the audience's policy or behavior, may be offensive simply by being contrary or challenging to the audience's position, or it may actually contain objectionable language to emphasize the speaker's opposing viewpoint. The Court considers whether, within the environment in which the speech occurs, the First Amendment rights of the protesters impose upon the audience the burden of avoiding the speech, or whether the speech disturbs the captive audience's environment in an essentially intolerable manner. Throughout the Supreme Court's decisions involving targeted protests, however, it recognizes another component of an audience's privacy interests that may be intolerably invaded by speech, the freedom from coercion in decisions related to the pro-

57. *Lehman*, 418 U.S. at 320 (Brennan, J., dissenting) (emphasis omitted) (quoting Public Utilities Comm'n v. Pollak, 343 U.S. 451, 469 (1952)).

58. *See supra* note 22 and accompanying text.

59. *Lehman*, 418 U.S. at 320-21.

60. *See supra* notes 16-25 and accompanying text.

61. *See supra* notes 26-42 and accompanying text.

62. *See supra* notes 43-59 and accompanying text.

test.

III. PRIVACY OF CHOICE

Targeted protests may interfere improperly with the audience's privacy interest in making independent decisions on the very issues involved in the protest. The First Amendment protects protesters' rights to inform audiences of their view and to persuade them to adopt the protesters' viewpoint on public issues.[63] Yet the circumstances of a targeted protest may create pressures upon the audience which coerce its acceptance of the protesters, views for reasons entirely unrelated to the audience's rational, conscientious, or autonomous capacity—the manner of decisionmaking underlying the First Amendment guarantee of free speech.[64]

The Supreme Court has expressed concern about the coercive effect of targeted protests. Noting several ways in which the coercive effect arises, this Section explores the Court's concern in cases involving protests at numerous locations directly before the targeted audiences. While the Court does not always assert openly the audience's interest in free and independent choice, its willingness to shield audiences from coercion is overt where targeted protests occur in the labor relations setting.

A. The Example Found in the Labor Relations Setting

In the labor relations setting, the Supreme Court has upheld statutory restrictions on speech intended to persuade a targeted audience to conform its behavior with the speaker's views. While the presence of federal statutes distinguishes the labor cases from unregulated arenas in which other targeted protests may occur, the Court's validation of the statutory restrictions evidences its recognition of the coercive potential of persuasive speech. By removing First Amendment protection from speech that coerces the audience's compliance with the speaker's views, the Court upholds the audience's interest in retaining free choice in decisions related to the subject of the speech.

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63. *See supra* notes 4-5 and accompanying text.

64. *See supra* notes 7-12 and accompanying text.

A federal statute mediates between employers' free speech right to communicate their views to employees and the dangers inherent in their attempts to resist unionization.[65] Defining unfair labor practices, the statute explicitly restricts an employer's First Amendment right to express certain views due to the coercive effect of threatened reprisals or promised benefits on the employee.[66] An employer's anti-union efforts constitute First Amendment activity which, like picketing, directly targets the audience with the intent to effect its compliance with the speaker's views. An employer's threats or promises contained in these expressions constitute unlawful interference, restraint, or coercion of employees in the exercise of their right to self-organization.[67]

In *NLRB v. Gissel Packing Co.*,[68] the Supreme Court explained the need to subordinate the employer's First Amendment rights. The petitioner, a Massachusetts producer of wire products, faced a union campaign after a twelve-year lapse in union representation of the company employees.[69] Petitioner's president spoke with all of his employees in an effort to dissuade them from joining the union. Emphasizing that a previous strike had "almost put [the] company out of business,"[70] the president informed employees that the company was on "'thin ice' financially, that the Union's 'only weapon [wa]s to strike,' and that a strike 'could lead to the closing of the plant.'"[71] The president also averred that employees would have difficulty finding reemployment if they lost their jobs due to their age and the limited usefulness of their skills.[72]

To determine the proper scope of employer expression, the Court asserted the need to consider the particular vulnerability of employees in the labor relations setting.[73] Balancing the employer's free speech rights with the employees' constitutional and statutory rights "must take into account the economic dependence of the employees on their employers, and the necessary

65. 29 U.S.C. § 158(a)(1) (1988) prohibits interference, restraint, or coercion of employees in the exercise of the right to self-organization.

66. *Id.* § 158(c).

67. *Id.*

68. 395 U.S. 575 (1969).

69. *Id.* at 587.

70. *Id.* at 587-88.

71. *Id.* at 588.

72. *Id.* at 588-89.

73. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[74] Thus, as codified by Congress, an employer's communications to his employees could contain no "threat of reprisal or force or promise of benefit."[75] Speech that exploited the employer's economic leverage to control employees' choice in the labor dispute was impermissible.

As employees were especially vulnerable to the coercive potential of an employer's speech, the Court also imposed a requirement, unusual in First Amendment doctrine,[76] that the employer's expression be objectively truthful.[77] Whereas an employer was free to communicate to employees any general views about unionization or even specific opinions about a particular union, any predictions the employer offered regarding the effects of unionization on the company were rigorously circumscribed. "[T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."[78] Absent a truthful factual basis,[79] the expression was a "threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment."[80]

Due to their own economic vulnerability to the effects of targeted protests, third parties to labor disputes also garnered the Court's protection against the coercive effects of targeted protests. In *NLRB v. Retail Store Employees Local 1001*,[81] union protesters directed their activity toward neutral third parties to a labor dispute. Safeco, an underwriter of real estate title insurance, maintained business relationships with five local title companies that derived over ninety percent of their gross incomes from the sale of

74. *Id.*

75. *Id.* at 618.

76. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker." New York Times v. Sullivan, 376 U.S. 254, 271 (1964). Regulating against false speech thwarts the theory that the marketplace best tests for truth, *id.* at 270-71, dampens the vigor of public debate, *id.* at 271-72, and presents the danger of self-censorship, *id.* at 279.

77. *Gissel Packing*, 395 U.S. at 618.

78. *Id.*

79. *Id.* at 618-20.

80. *Id.* at 618.

81. 447 U.S. 607 (1980).

Safeco policies.[82] After contract negotiations with management reached an impasse, Safeco's employees went on strike and picketed the premises of each title company. Carrying signs declaring that Safeco had no contract with the union, the picketers distributed handbills asking consumers to support the strike by cancelling their Safeco policies.[83]

Safeco and one of the title companies complained to the National Labor Relations Board, which ordered the union to cease picketing.[84] The Board's decision rested upon § 8(b)(4)(ii)(B) of the National Labor Relations Act, which makes it an unfair labor practice "'to threaten, coerce, or restrain' a person not party to a labor dispute 'where . . . an object thereof is . . . forcing or requiring [him] to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person.'"[85]

The Supreme Court denied that the statutory ban on coercion of neutrals, as applied to the union's picketing, violated the protesters' First Amendment rights.[86] The Court asserted that when a union's interest in picketing a primary employer at a "one product"[87] site directly conflicted with the need to protect neutral employers from the labor disputes of others, "the neutrals' interest should prevail."[88] Because the sale of Safeco policies accounted for substantially all of the title companies' business, the Court agreed that the union's action was "'reasonably calculated to induce customers not to patronize the neutral parties at all.'"[89] It reasoned that continued picketing would force the title companies to choose "between their survival and the severance of their ties with Safeco."[90] The Court condemned the union's tactics as effectively coercing the title companies to pressure Safeco into yielding to the union's demands. Where picketing so constrained the

82. *Id.* at 609.
83. *Id.* at 609-10.
84. *Id.* at 610.
85. *Id.* at 611 (citing 29 U.S.C. § 158(b)(4)(ii)(B) (1959)).
86. NLRB v. Retail Store Employees Local 1001, 447 U.S. 607, 616 (1980).
87. In contrast to where a product picketed is "but one item among many that made up the retailer's trade," *id.* at 613, the title companies in this case sold only Safeco's products. *Id.*
88. *Id.* at 612-13.
89. *Id.* at 610 (quoting Retail Store Employees Union Local 1001, 226 N.L.R.B. 754, 757 (1976)).
90. *Id.* at 615.

companies' choice, the First Amendment did not protect the speech.[91]

Unlike the employer-employee relationship which afforded the employer's speech its coercive effect in *Gissel*, the speakers here lacked any official or contractual authority over their targeted audience. The Court's validation of the speech restriction recognizes the relationship between the location of persuasive speech, and the coercive pressure that may arise from its presence within a certain environment. Speech that exploited this pressure to coerce the targeted audience's conformity with the speaker's viewpoint did not obtain first Amendment protection.

B. Coercion in Targeted Protests

The Supreme Court's overt protection of audiences from coercion in the labor relations setting supports the extension of the principle to protect other audiences of targeted protests. In numerous circumstances outside the labor context in which the Court addresses the conflicting interests of protesters and their targeted audiences, the Court evidences concern for the speech's coercive potential. Where protests target courthouses, embassies, election sites, residences, clinics, and schools, particular characteristics of the audiences shape the Court's response to the scope of the protesters' First Amendment rights. The cases suggest the Court's protection of an audience's privacy interest in making decisions free from coercion in matters related to the protesters' activity.

1. Targeted Protests Affecting Protected Processes

a. Independence of the Judiciary

The audience's particular need for independent decision making has influenced the Supreme Court's perspective outside the labor context. When protesters target a courthouse, and the officials located therein, their First Amendment rights conflict with the state's interests in protecting the judicial system. Potential harm to the system stems both from wrongful influence and from reputational injury based on the appearance of that wrongful influ-

91. NLRB v. Retail Store Employees Local 1001, 447 U.S. 607, 616 (1980).

ence that arise out of the citizens' exercise of their First Amendment rights. The Supreme Court has acknowledged the legitimacy of both these audience-related interests.

In *Cox v. Louisiana*,[92] a minister active in the civil rights movement and approximately 2000 black students had convened upon the courthouse grounds to protest the recent arrest of twenty-three black students who had picketed stores with segregated lunch counters.[93] The twenty-three students were confined within the courthouse jail.[94] The minister was convicted of violating a state statute prohibiting picketing or parading "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty . . . in or near a building housing a court of the State of Louisiana."[95]

While the Court overturned the conviction on technical grounds, dictum suggested the statute was constitutional both on its face and as applied. "There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create . . . . [This statute does not] infringe upon the constitutionally protected rights of free speech and free assembly."[96] *Cox* protected the state's legitimate interest in insulating those responsible for the impartial administration of justice from the effects of protesters' exercise of First Amendment rights, despite the activity's relation to an important public issue.

A comparison of *Cox* with *Bridges v. California*,[97] an earlier case involving the impact of criticism of the judiciary on the administration of justice, reveals the significance of the protest's location at the courthouse itself. In *Bridges*, the Court refused to assume that publications of criticism of judicial decisions actually

92. 379 U.S. 536 (1965).

93. *Id.* at 538-39.

94. *Id.* at 539.

95. *Id.* at 560 (citing LA. REV. STAT. § 14:401 (Cum. Supp. 1962)).

96. *Id.* at 562-63. In a subsequent case, the Court struck down a federal prohibition against expressive displays showing affiliation with any organization on the grounds of the United States Supreme Court. *See* United States v. Grace, 461 U.S. 171, 183 (1983). The Court did not explicitly address whether the dictum of *Cox* survived this ruling. The *Cox* statute may be distinguished as it specifically prohibited expressive activity intended to interfere with the administration of justice, while the *Grace* statute proscribed all expressions of affiliation. *See infra* notes 109-17 and accompanying text.

97. 314 U.S. 252 (1941).

threatened the impartial nature of legal trials.[98] The Court then considered whether and to what degree the particular publication in question[99] presented the substantive evil of unfair administration of justice.[100] As ascribing to the publication any "substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor,"[101] the Court refused to restrict the speech.[102]

In contrast, where the critical speech occurred at the courthouse itself, the *Cox* Court required no evidence of improper influence upon the judicial process. "The legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial."[103]

According to the Court, even the appearance of coercive effect upon the judicial process could justify the subordination of protesters' First Amendment rights. The Court hypothetically questioned the effect of a judge's dismissal of an indictment that had generated substantial picketing calling for its dismissal.[104] "A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow from the fair and orderly working of the judicial process."[105] Unlike the published speech protected in *Bridges*, the targeted protest inherently threatened the administration of justice.

The opinion merely suggests why the Court perceived greater coercive potential in the targeted protests. First, the Court distinguished the courthouse protests from "such a pure form of expression as newspaper comment or a telegram by a citizen to a public

98. *Id.* at 271.

99. The speech in question was the publication of several editorials that urged a particular result in an ongoing labor controversy, *id.* at 271-72, and a telegram sent by an officer of a union party, *id.* at 275. The telegram described a judge's decision on a particular dispute as "outrageous" and suggested that if the decision were enforced the union would call a strike affecting the entire Pacific Coast. *Id.* at 275-76. The publisher and union officer were found guilty of contempt of court. *Id.* at 258.

100. *Id.* at 271.

101. *Id.* at 273.

102. Bridges v. California, 314 U.S. 252, 278 (1941). The Court reversed the convictions.

103. Cox v. Louisiana, 379 U.S. 559, 565 (1965).

104. *Id.*

105. *Id.*

official,"[106] as was protected in *Bridges*. The mix of pure expression and conduct implicated the Court's concern for the speech's effect upon others.[107] Second, the Court noted that the judges responsible for ruling upon the legality of the students' arrest were in the building during the protests.[108] Both the conduct element of the speech, as well as its immediacy to its target, contributed to its coercive potential.

In a subsequent decision, the Supreme Court affirmed the importance of ensuring both the independence of its own decision making process from targeted protests, as well as the appearance of improper influence. In *United States v. Grace*,[109] the Supreme Court heard a First Amendment challenge to a federal law prohibiting "the 'display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement' in the United Supreme Court building and on its grounds."[110] Addressing only the proscriptions as applied to the public sidewalks along the perimeter of the Supreme Court grounds,[111] the Court acknowledged the statute's general purpose of protecting the building and grounds and the persons and property therein, as well as maintaining proper order and decorum.[112]

As in *Cox*, the Court approved of the state's interest in promoting the independence of the judiciary from attempts, external to the legal process, to influence its decisions.[113] The federal courts represent an independent branch of the government; courts "are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picket-

106. *Id.* at 564.

107. The Court's distinction may be read as simply alluding to the lower scrutiny of speech that mixes expression with conduct. "The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." Texas v. Johnson, 491 U.S. 397, 406 (1989). However, restrictions on picketing involving public issues have never been accorded lower scrutiny; in fact, they obtain very careful scrutiny. *See supra* note 5.

108. Cox v. Louisiana, 379 U.S. 559, 565 (1965).

109. 461 U.S. 171 (1983).

110. *Id.* at 172-73 (quoting 40 U.S.C. § 13k).

111. The individuals threatened with arrest under the statute had appeared individually on the public sidewalks to engage in expressive activity; the Court limited the scope of its analysis accordingly. *Id.* at 175.

112. *Id.* at 182.

113. *Id.* at 183.

ing or pressure groups."[114]

Moreover, as in *Cox*, the Court endorsed the state's interest in the appearance of the judiciary's freedom from improper influence in rendering decisions. "Neither . . . should it *appear* to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court."[115] Although it concluded the statute did not sufficiently serve these interests,[116] the Court refused to discount the special need to preserve the existence and appearance of the judiciary's independence from concerted, external efforts to influence its decisions.[117]

b. Independence of Government Diplomats

The Court has also overtly promoted the interest of government diplomats in remaining free from coercion in decisionmaking, although it has been less enthusiastic about restricting speech that merely injures the diplomats' reputation. In *Boos v. Barry*,[118] three individuals who wished to carry signs critical of foreign governments challenged a District of Columbia regulation restricting expressive activity within 500 feet of a foreign embassy.[119] The Court condoned the protection of diplomats from expressive acts or attempts to intimidate, coerce, or harass them, which were punishable under an existing criminal statute.[120] However, the

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114. United States v. Grace, 461 U.S. 171, 183 (1983).

115. *Id.*

116. *Id.*; *see supra* note 96.

117. *Id.*

118. 485 U.S. 312 (1988).

119. The relevant portion of the statute read as follows:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or resentatives as an embassy, legation, consulate, or for other official purposes . . . or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of said District.

Id. at 316 (quoting D.C. CODE ANN. § 22-1115 (1981)).

120. The Court compared the ordinance to an analogous federal statute which imposed criminal punishment for willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of

Court questioned whether protecting the dignity of foreign officials also constituted a compelling government interest.

According to the Court, the First Amendment requires American citizens to tolerate insulting and even outrageous speech in public debate; the Court was unpersuaded that any differences between foreign officials and American citizens required deviation from this principle.[121] At the same time, the Court noted the United States' obligations under international law to protect the premises of foreign emissaries against intrusion and the impairment of the officials' dignity,[122] as well as the nation's self-interest in protecting the dignitaries as an essential component of its own international relations.[123] Because the less speech-restrictive criminal provision already protected the diplomats from coercion or harassment, the Court declined to resolve whether the state's interest in the officials' dignity were compelling.[124] The Court perceived no special need of diplomats, unlike the judiciary, to preserve their reputation for independent decisionmaking that justified additional protection.

c. *Independence of the Electorate*

The Court recently evidenced its willingness to protect voters from intimidation and coercion in the election process. In *Burson v. Freeman*,[125] the Court upheld a Tennessee law prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling site.[126] The "campaign free zone"[127] served a compelling government interest in "protecting the rights of . . . citizens to vote freely for the candidates of their choice [and in protecting] the right to vote in an election conducted with integrity and reliability."[128] The evil of

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his duties." *Id.* at 324-25 (citing 18 U.S.C. § 112(b)(2)). Categorizing the federal statute as a less restrictive alternative to the District of Columbia ordinance, the Court accepted the argument that prevention of coercion may justify restrictions upon First Amendment freedoms. *Id.* at 325-26.

121. *Id.* at 326-27.

122. *Id.*

123. Boos v. Barry, 485 U.S. 312, 326-27 (1988).

124. *Id.* at 329.

125. 112 S. Ct. 1846 (1992).

126. *Id.* at 1848.

127. *Id.*

128. *Id.* at 1851.

voter intimidation, combined with the state's interest in preventing election fraud, withstood the Court's strict scrutiny to justify a complete ban on expressive activity within the zone.[129] Presumably, the proximity of the persuasive speech to its targeted audience increased its potential to influence improperly voters' independent decisionmaking.

2. Targeted Protests Affecting Protected Environments

Compared to the overt protection of the audiences' interest in retaining independent choice in the labor relations, courthouse, and electioneering settings, the Court's concern for the coercive effect of a protest targeting a residence, clinic, or school is less obvious. Its presence, however, can be seen throughout the Court's opinions, and may help explain the outcome in cases in which protesters challenge restrictions of their activities on First Amendment grounds.

a. Residences

In *Frisby v. Schultz*, the home constituted a sanctified realm, the tranquility and privacy of which supported a ban on residential picketing.[130] Due to the inherently private nature of the home, an audience's interest in being free from forced exposure to objectionable speech was particularly acute when the audience was captive within the home.[131] Reviewing cases in which a homeowner confronted protests targeted against him, however, exposes the Court's concern not simply for the harm implicit in the invasion itself, but for the coercive potential of the speech due to the disruptive effect of its intrusion.

The sanctity of the home does not automatically mandate against protests located there. In *Gregory v. City of Chicago*,[132] the defendant was convicted of disorderly conduct for leading a march of approximately eighty-five protesters before the home of Chicago Mayor Richard Daley. Protesting segregation in the city's

129. *Id.* at 1857-58. The dissent sharply criticized the "broad, antiseptic sweep" of the zone, which encompassed at least 30,000 square feet. *Id.* at 1861 (Stevens, J., dissenting.).

130. *See supra* notes 33-42 and accompanying text.

131. *See supra* note 43 and accompanying text.

132. 394 U.S. 111 (1969).

public schools, the protestors arrived at the mayor's home in the evening and marched continuously around the block. While 100 police stood by, the protesters sang civil rights songs and chanted criticism of the mayor. After half an hour, the protesters quieted but continued to march carrying critical signs.[133]

An hour later, a crowd of about 1000 white spectators became unruly, throwing rocks and eggs and threatening the marchers. Police requested that the protesters disperse. The defendant refused to end the demonstration, resulting in the protesters' arrest.[134] Finding no evidence of the protesters' disorderly conduct, the Supreme Court unanimously overturned their convictions and held their actions protected by the First Amendment.[135]

While the decision of the Court declined to address the privacy issue explicitly, Justice Black confronted the potential conflict between the protesters' choice of locale and the state's interest in protecting those affected:

> No mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people . . . for homes, wherein they can escape the hurly-burly of the outside business and political world.[136]

Because the home constituted a sanctified escape from the stresses of every day life, the Constitution reserved the state's right to shield it from invasive speech.

A decade later, the Chicago mayor's home was the site of another demonstration involving the segregation of the public schools. In *Carey v. Brown*,[137] the city convicted the protesters under an Illinois statute that prohibited picketing before a residence or dwelling unless the dwelling were used as a place of business, or the protester were the homeowner.[138] While the Supreme Court

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133. *Id.*

134. *Id.* at 112.

135. *Id.* at 113.

136. *Id.* at 118 (Black, J., concurring). Justice Black noted that occupants of other buildings similarly require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals. *Id.* To mediate among the conflicting interests, Justice Black encouraged the drafting of narrowly drawn time, place, or manner restrictions designed to regulate certain kinds of picketing. *Id.*

137. 447 U.S. 455 (1980).

138. The applicable statute provided:

reversed the conviction on the grounds that the statute impermissibly distinguished between peaceful labor picketing and other peaceful picketing,[139] the Court affirmed the countervailing legitimacy of residential privacy interests against a speaker's First Amendment rights. According to the Court, the "State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[140] Moreover, the Court's opinion suggested that homeowners' privacy interests persist even if their own expressive initiatives seem to invite response.[141] However, the Court maintained that the residential privacy interest was not absolute.[142] As evidenced by *Gregory* and *Carey*, in which the Court perceived no threat of coercion from the speakers, the simple presence of unwanted speech at the home did not rise to an essentially intolerable invasion.

Frisby, in which the Court upheld a ban on residential picketing,[143] offers insight into what rendered the Brookfield protests an intolerable privacy invasion. Beyond the disturbance of the tranquil environment, the Court perceived something else threatening in the protests' narrow targeting of the household. The intrusive means of communication had a particularly offensive effect. "'To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s]. . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquil-

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> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

Id. at 457 (citing ILL. REV. STAT., ch. 38, ¶ 21.1-2 (1977)).

139. *Id.* at 455.

140. *Id.* at 471.

141. The state's attorney defended the statute's exception for labor-related picketing by arguing that a homeowner, by converting his dwelling into a place of employment, "dilutes" or "waives" his entitlement to privacy. *Id.* at 468. The Court attacked the argument by describing numerous other circumstances in which it might then be argued that a homeowner vitiates his right to residential privacy. *Id.* at 469.

142. Carey v. Brown, 447 U.S. 455, 465 (1980) ("Standing alone, then, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute.").

143. *See supra* notes 32-43 and accompanying text.

ity.'"[144] By acknowledging the psychological pressures, the Court recognized the coercive potential that arises from the presence of the speech in and around the protected environment of the home, and the danger that the intrusion may induce the audience's compliance with the protesters' viewpoint.

The majority explicitly considered the protesters' intent to use offensive speech to effect the doctor's compliance with their views:

> The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way . . . . In this case, for example, [the picketers] subjected the doctor and his family to the presence of a relatively large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions.[145]

Despite the protest's role in public debate, the Court perceived something "disturbing"[146] in the protesters' presence at the doctor's home as a means of persuasion. Suggesting that residential privacy included protection against the discomfort of "knowing that a stranger lurks outside [the] home,"[147] the majority concluded that "'the very presence of an unwelcome visitor at the home'"[148] was a legitimate "evil"[149] against which the government could regulate.[150]

The dissent more explicitly propounded the coercive potential of the targeted protest. Noting that the "the mere fact that speech takes place in a residential neighborhood does not automatically implicate a residential privacy interest,"[151] the dissent concluded that it was "the intrusion of speech into the home or the unduly coercive nature of a particular manner of speech around the home that is subject to more exacting regulation."[152] Speech that exhibited either one of these characteristics was subject to regulation.[153]

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144. Frisby v. Schultz, 487 U.S. 474, 486 (1988) (quoting *Carey*, 447 U.S. at 478 (Rehnquist, J., dissenting)).

145. *Id.* at 486-87.

146. *Id.* at 487.

147. *Id.* (quoting *Carey*, 447 U.S. at 478-79 (Rehnquist, J., dissenting)).

148. *Id.* (quoting *Carey*, 447 U.S. at 478 (Rehnquist, J., dissenting)).

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

150. *Id.* at 487-88.

151. *Id.* at 492 (Brennan, J., dissenting).

152. *Id.* at 492-93 (Brennan, J., dissenting).

153. *Id.* at 493 (Brennan, J., dissenting) ("But so long as the speech remains outside the

The dissent specified certain aspects of the picketers' expressive activity that exhibited coerciveness. Attendance at the protests regularly reached up to forty people.[154] In addition to carrying signs and shouting slogans, the protesters "warned young children not to go near the house because [the doctor] was a 'baby killer.'"[155] Groups of protesters repeatedly trespassed onto the doctor's property and at least once blocked the exits to his home.[156] As expressive and persuasive as they were, such activities were "intrusive and coercive abuses"[157] of the First Amendment guarantee of free speech. While the dissent denied that the prohibition was sufficiently tailored to prevent only coercive speech, it unquestionably accepted the government's constitutional ability to prevent or neutralize the coercive elements through regulation.[158]

The absence of tailoring to control only the coercive potential of a residential protest explains the Court's invalidation of a similar restriction on residential picketing in *Madsen v. Women's Health Center, Inc.*[159] Respondents in the action operated several abortion clinics throughout central Florida. Petitioners engaged in picketing and demonstrations near the site of one of respondents' clinics located in the town of Melbourne. An initial injunction forbade the protesters from blocking or interfering with public access to the abortion clinic and from physically abusing persons entering or leaving the clinic.

While this injunction was in effect, groups protested in front of

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home and does not unduly coerce the occupant, the government's heightened interest in protecting residential privacy is not implicated.").

154. Frisby v. Schultz, 487 U.S. 474, 494 (1988) (Brennan, J., dissenting).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* ("Surely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses.").

The willingness of a majority of the Court to protect a homeowner against the coercive effects of a protest targeted against him or her appears in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), in which the Court recognized the speech's potential to drive a homeowner out of his home. In *R.A.V.*, a teenager burned a cross on a black family's lawn and was charged under an ordinance prohibiting such conduct. *Id.* at 2541. Though the Court found the ordinance to be unconstitutionally discriminatory on the basis of content, the Court affirmed the compelling nature of the interest advanced by the ordinance: "to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." *Id.* at 2549.

159. 114 S. Ct. 2516, 2521 (1994).

clinic employees' residences, shouting at passersby, ringing neighbors' doorbells offering literature that identified the employees as baby killers, and occasionally confronting the minor children of clinic employees who were home alone.[160] In response to this and other activity continuing at the abortion clinic, the state court broadened the injunction to include a prohibition against protesting within a 300-foot buffer zone of staff residences.[161] Protesters challenged the constitutionality of the amended injunction in both state and federal courts.[162]

Although every Justice concluded that the injunction against picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of an abortion clinic's staff was insufficiently tailored to justify the restriction of the protesters' First Amendment freedom, the majority cited *Frisby* in recognition of the state's interest in protecting the "well-being, tranquility, and privacy of the home."[163] However, no opinion further developed the Justices' perspectives on the nature of residential privacy.[164]

As its only justification for the different outcome, the majority distinguished between the *Frisby* ordinance's prohibition against focused picketing taking place solely in front of a particular residence,[165] and the 300-foot buffer zone. The Court noted that the buffer zone encompassed streets that provided the sole access to streets on which staff residences were located, and concluded that the zone would impermissibly ban marching through residential

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160. *Id.* at 2521.

161. *Id.* at 2522. The relevant portion of the injunction proscribed the following activity:

> At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [clinic's] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [clinic's] employees, staff, owners or agents. The [protesters] and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

Id.

162. *Id.* at 2523.

163. *Id.* at 2530.

164. *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2530-31 (1994) (Souter, J., concurring); *id.* at 2531-34 (Stevens, J., concurring in part and dissenting in part); *id.* at 2534-50 (Scalia, J., concurring in the judgment in part and dissenting in part).

165. *Id.* at 2530 (quoting *Frisby*, 487 U.S. at 477). *See supra* note 37.

neighborhoods or blocks of houses as well.[166]

The Court's emphasis on tailoring the residential picketing prohibition to restrict only speech directed toward the targeted individual substantiates the hypothesis that its underlying concern, in both *Frisby* and *Madsen*, was the coercive effect of the speech rather than a more general willingness to protect homeowners against unwanted intrusions into the sanctity of the home.[167] All homeowners, not simply the targeted doctor, possess the right to enjoy a tranquil home environment. A 300-foot buffer zone would protect each resident from environmental invasions by the speech, yet the *Madsen* court condemned the restriction's coverage of First Amendment activity not targeted against one particular homeowner. While antiabortion protesters may picket an abortion doctor's home to communicate their stance to the doctor's neighbors and to any citizens who learn of the activity, they presumably seek to obtain behavioral conformity from the targeted abortion doctor. A ban on picketing a single residence, as upheld in *Frisby*, might not protect homeowners' rights to enjoy tranquil home environments,[168] but may reduce the coercive effect of the protest upon the target's choice to continue performing abortions.

The similar needs of the audiences and detrimental effects of environmental invasions that pique the Court's concern for the coercive effects of residential picketing also appear in protests that target clinics and schools.[169] In addressing the competing interests of speaker and audience in such environments, the Court does not explicitly relate the effect of the speech upon the audience's

166. *Id.* at 2529-30.

167. *See supra* note 34. A difference in scrutiny might explain the divergent results between *Frisby* and *Madsen*. The injunction in *Madsen*, according to the majority, obtained stricter scrutiny than the Court would apply to a generally applicable statute that similarly restricted the speech. For such an ordinance, the Court would inquire whether the "time, place and manner regulations were narrowly tailored to serve a significant governmental interest." *Id.* at 2524 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). In contrast, the *Madsen* majority asked whether the injunction "burden[ed] no more speech than necessary to serve a significant government interest." *Id.* at 2525. However, without the narrowing construction imposed by the majority which enabled it to find the ordinance prohibited only picketing before a single residence, a construction not reached by either lower court, the *Frisby* ban is at least as broad as the *Madsen* restriction. The Court's imposition of this construction belies its assertion of heightened scrutiny.

168. Marching through residential neighborhoods or blocks of houses could intolerably invade many homes' peaceful environments, at least as much as a protest targeted at a single residence. Moreover, such environmental invasions may trigger the existing public safety ordinances mentioned in *Frisby*. *See supra* note 34.

169. *See supra* note 28 and accompanying text.

choice. However, its emphasis on the audience-related harms imposed by the disruption of these special environments suggests the relevance of the speech's coercive potential in influencing its opinions.

b. Clinics

In *Madsen v. Women's Health Center, Inc.*,[170] the Supreme Court addressed the conflict between the First Amendment rights of protesters who directed their expressive activities against an abortion clinic, and the interests of the targeted, captive audience, the clinic's patients and staff.[171] The Court considered the constitutionality of several provisions of a state court injunction restricting First Amendment activity around the clinic:[172] 1) a thirty-six-foot buffer zone around the clinic's property, within which the protesters were barred from activity; 2) a restriction on excessive noise levels during the clinic's operating hours; 3) the use of images observable to patients inside the clinic; and 4) a prohibition against protesters physically approaching those seeking the clinic's services who did not consent to talk.[173] The Court's analysis detailed several audience-related interests that the state could legitimately protect through limitations upon the protesters' First Amendment rights. In determining whether the various provisions of the injunction were narrowly tailored to advance these interests, the Court articulated what expressive activity intolerably intruded upon the audience, versus what it regarded was an acceptable burden upon the audience to avoid the objectionable speech.

The Court accepted as significant two general audience-related interests protected by the injunction. First, it noted patients' freedom to seek lawful medical or counseling services in connection with pregnancy.[174] Second, the Court analogized residential privacy to medical privacy: "[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident,

170. 114 S. Ct. 2516 (1994).

171. The Court found that the picketing was directed primarily at patients and staff of the clinic. *Id.* at 2527.

172. As already discussed, the injunction also contained a provision for a 300-foot buffer zone around the residences of clinic staff. *See supra* notes 161-66 and accompanying text.

173. *See Madsen*, 114 S. Ct. at 2521-30.

174. *Id.* at 2526 (citing Roe v. Wade, 410 U.S. 113 (1973)).

targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance."[175] In combination with ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, and protecting citizens' property rights, the Court concluded, the state's interest in protecting these rights of the targeted audience was sufficient to justify an appropriately tailored restriction on protesters' expressive activity.[176]

Assessing the constitutionality of the thirty-six-foot buffer zone,[177] the Court acknowledged the restriction's purpose of protecting unfettered ingress to and egress from the clinic.[178] Comparing the experience of attempting to enter the clinic to "[run]ning . . . a gauntlet,"[179] the Court emphasized the adverse impact of the protests upon patients. According to testimony given in the lower court, patients exhibited a higher level of anxiety and hypertension, resulting in the need for higher levels of sedation during the surgical procedures, thereby increasing the risk associated with such procedures.[180] Moreover, scheduled patients who did not enter the clinic because of the crowd and returned later increased their health risks by delaying treatment.[181]

While the Court distinctly asserted the state's strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, it did not assert the predominance of female patients' rights to access the building. Rather, in agreeing to restrict the protesters' expressive activity around the clinic entrances and driveway, the Court considered the fact that protesters had repeatedly interfered with free access of

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

176. *Id.*

177. The relevant provisions of the injunction prohibited the protesters from engaging in the following acts:

> (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.
>
> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [36] feet of the property line of the Clinic . . . .

Id. at 2521-22.

178. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2527 (1994).

179. *Id.* at 2521.

180. *Id.*

181. *Id.*

both patients and staff.[182] By including in its analysis the staff's interest in accessing the building, the Court implied that it was not only the protests' direct interference with an identifiable constitutional right—the patients' right to medical and counseling services regarding pregnancy—that supported the restriction. Interfering in the daily, required activities of staff members contributed to the Court's willingness to limit the protesters' First Amendment rights.[183]

The Court also elucidated the audience's interests protected by a restriction on noise levels around the clinic during its operating hours.[184] Beyond its recognition of the captivity imposed by medical circumstances,[185] the Court considered the special vulnerability and needs of individuals in hospital environments.

> "Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere."[186]

Weighing evidence that confronting the noise inside the clinic impaired patients' well-being,[187] the Court refused to place the burden of avoiding the objectionable noise upon patients. "The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[188] Patients' health and well-being was legitimately pro-

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182. *Id.* at 2526.

183. Conversely, absent interference with accessing the building or otherwise interfering with the clinic's operation, the protesters' First Amendment activities could not be restricted within the thirty-six foot buffer zone. *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2528 (1994).

184. "During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, [the injunction prohibited the protesters from] singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds . . . within earshot of the patients inside the clinic." *Id.* at 2522.

185. *See supra* note 175 and accompanying text.

186. *Madsen*, 114 S. Ct. at 2528 (quoting NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-84 (1979)).

187. The Court cited testimony given in lower court that noise produced by the protesters and heard within the clinic caused stress in patients both during surgical procedures and while recuperating in recovery rooms. *Id.* at 2521.

188. *Id.* at 2528.

tected through a noise restriction.[189]

In contrast, avoiding objectionable "images observable"[190] to patients inside the clinic was an acceptable burden. "[I]t is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic."[191] While the state could legitimately prohibit the display of signs that could be interpreted as threats, the First Amendment rights of the protesters to display signs outweighed the state's interest in reducing the anxiety of patients inside the clinic.

Preventing the audience's intimidation by the protesters was also a significant state interest. The injunction prevented protesters within 300 feet of the clinic from physically approaching any person seeking the services of the clinic "unless such person indicate[d] a desire to communicate."[192] Based on findings that throughout the protests "sidewalk counselors"[193] approached vehicles heading toward the clinic, attempting to give occupants antiabortion literature, and that protesters had physically abused persons entering or leaving the clinic, the state court sought "to prevent clinic patients and staff from being 'stalked' or 'shadowed' by protesters."[194] Comparing the confrontation between the antiabortion protesters and those seeking the clinic's services to "skillful, and unprincipled, solicitor[s']"[195] face-to-face contact with particularly vulnerable and captive targets, the Court suggested that the risks of duress may justify regulation.[196] However, the First Amendment protected the protesters' opportunity to reach even the unwilling audience. Absent evidence that protesters' speech contained direct threats, which would render it otherwise proscribable, the Court insisted that the audience either tolerate the protected speech or assume the burden of avoiding it.[197]

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189. *Id.* at 2528.

190. The injunction also banned all "images observable to . . . the patients inside the Clinic." *Id.* at 2522.

191. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994).

192. *Id.*

193. *Id.* at 2521.

194. *Id.* at 2529.

195. *Id.* (quoting International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2708 (1992)).

196. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994).

197. *Id.* at 2529.

c. Schools

When protesters directed their activities toward a school, similar special needs of the targeted audience have justified limitations on the protesters' First Amendment rights. In *Grayned v. City of Rockford*,[198] approximately 200 students, family and friends convened next to the grounds of a senior high school. The demonstration followed unsuccessful attempts to resolve racial grievances with school administrators.[199] Carrying signs advocating black equality among the student body and school staff and raising their fists in the 'power to the people' sign, the protesters marched within 100 feet of the school building.[200] Disputed testimony complained of chanting and other noise that was audible in the school, of students lining classroom windows to watch the demonstration or leaving class to join the protest, of uncontrolled lateness for classes due to students watching the demonstration, and of general disruptions in orderly school procedures.[201]

Following a warning, police arrested forty demonstrators, including the appellant. The appellant was convicted under two ordinances, one prohibiting picketing or demonstrating within 150 feet of a school building during school hours,[202] and one prohibiting making noise or diversion which disturbs the order of a school session.[203] While the Court reversed the antipicketing conviction on equal protection grounds, the Court allowed the restriction upon

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198. 408 U.S. 104 (1972).

199. *Id.* at 105.

200. *Id.*

201. *Id.*

202. The antipicketing ordinance provided that:

> A person commits disorderly conduct when he knowingly:
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . .

Id. at 107 (citing Code of Ordinances, c. 28 § 18.1(i)).

203. The relevant portion of the antinoise ordinance is as follows:

> [N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . . .

Grayned v. City of Rockford, 408 U.S. 104, 107-08 (1972) (citing Code of Ordinances, c.28 § 19.2(a)).

First Amendment activities that disrupted normal school order.

The "'special characteristics of the school environment'"[204] influenced the Court's analysis. The Court acknowledged the importance of public schools as community institutions and often the focus of significant grievances.[205] Further, it noted the effectiveness of daytime picketing on public grounds near schools.[206] Thus, the Court suggested, quiet, unintrusive picketing could not be proscribed.[207] However, recognizing the interests of the "student/faculty 'audience,'"[208] the Court refused to require schools to tolerate "boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse."[209]

The state's compelling interest in having undisrupted school sessions conducive to students' learning justified the restriction on protesters' First Amendment rights.[210] Similar to antiabortion protests at clinics and staff residences designed to induce the targets' conformity with protesters' views, school protests gain persuasive strength from the disruptive effects upon the school's operation. The Court's concern for the student and faculty audience in *Grayned* suggests that responsible administrators may face similar pressures to conform school policies to the protesters' viewpoints in order to maintain the school's order and tranquil environment.

IV. CONCLUSION

The Supreme Court's approach to determining when a targeted protest intolerably invades the privacy interests of the targeted audience is not easily articulated. While it relies on the principles of the offensive speech and captive audience cases to assess the magnitude of the environmental disturbance created by the speech, the Court has expressed concern for the facet of the audience's privacy that involves freedom from the coercive effect of the

204. *Id.* at 117 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

205. *Id.* at 118.

206. *Id.* at 119.

207. *Id.*

208. Grayned v. City of Rockford, 408 U.S. 104, 120 (1972).

209. *Id.* at 119.

210. *Id.* Because the ordinance punished only conduct that disrupted or was about to disrupt normal school activities, the Court found the ordinance narrowly tailored to the state's legitimate interest. *Id.*

speech on the audience's decisionmaking. The Court's opposition to speech that contains direct threats is apparent, particularly in the labor relations setting,[211] and is suggested in the residential and abortion protest contexts. Yet the Court also exhibits concern that the disturbance created by the protests can impose coercive pressure upon the targets. Targeted doctors whose families and patients must endure the protests may feel this pressure,[212] as may neutral parties to labor disputes whose customers are diverted by protests[213] or school administrators whose students suffer from the disruption of their activities.[214] When the protest targets a courthouse, the Court seems to fear the coercive effect the protest's very presence may have upon the targeted audience; the appearance, before the public, of improper influence is a concurrent danger.[215]

Regulating speech according to its persuasiveness directly conflicts with the First Amendment's glorification of the marketplace of ideas as a mechanism for ascertaining truth.[216] The Supreme Court has affirmed in unambiguous terms the First Amendment right to use objectionable or challenging speech to change or even to coerce behavior. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[217] However, the targeted protest cases substantiate the fact that coercive speech may be a potentially intolerable invasion of the target's privacy interests in retaining free choice in matters related to the protesters' activity.

Under several First Amendment theories, the coerciveness of speech may be a valid factor in balancing the interests of speaker and audience. For example, the Court's concern regarding the overly intrusive and coercive nature of residential picketing conforms with First Amendment theories promoting rational self-government, individual autonomy, and tolerance.[218] The general hostility to forcing a captive audience's exposure to offensive speech is exacerbated by the symbolic and practical[219] entrenchment of the home-

211. *See supra* notes 66-80 and accompanying text.
212. *See supra* notes 144-58 and accompanying text.
213. *See supra* notes 81-91 and accompanying text.
214. *See supra* notes 198-210 and accompanying text.
215. *See supra* notes 92-117 and accompanying text.
216. *See supra* notes 7-8 and accompanying text.
217. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).
218. *See supra* notes 8-12 and accompanying text.
219. *See supra* notes 27-43 and accompanying text.

owner within the home. Because of this entrenchment, the invasion by the speech poses a particularly severe psychological threat.[220] Additionally, the picketing may disrupt the home's functioning; protests may include noise invasions that threaten tranquility, interference with residents' and neighbors' comings and goings, and even contact with children that violates a sense of the home's security.

Should the target change her view or behavior to match the protester's, her decision is not likely a rational or even conscientious choice to conform to an ideology she now perceives as true in the marketplace of ideas. Rather, only by conforming could she be relieved of the intrusions and disruption. While the practical entrenchment and security concerns may be greatest in the residential context, targeted protests in other contexts may impose equally stringent pressures. A decision based on such coercive pressures does not further intelligent self-government, individual autonomy, or tolerance.

ANNE D. LEDERMAN

220. *See supra* notes 38, 144-58 and accompanying text.