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TOO NARROW OF A HOLDING? HOW—AND PERHAPS WHY—CHIEF JUSTICE JOHN ROBERTS TURNED *SNYDER V. PHELPS* INTO AN EASY CASE

CLAY CALVERT*

Abstract

This article analyzes the United States Supreme Court's March 2011 decision in *Snyder v. Phelps*. Specifically, it demonstrates the narrow nature of the holding, and argues that while narrow framing, in the tradition of judicial minimalism, may have been a strategic move by Chief Justice John Roberts to obtain a decisive eight-justice majority, the resulting opinion failed to advance First Amendment jurisprudence significantly. Instead, the outcome simply—even predictably—fell in line with an established order of decisions. This article examines four tactics employed by the Chief Justice to narrow the case in such a way that its outcome was essentially predetermined. This article relies on the works of Professors Frederick Schauer and Cass Sunstein, among others, in its analysis of issues related to Roberts' judicial minimalism in *Snyder*.

Introduction

When the United States Supreme Court handed down its March 2011 ruling in the Westboro Baptist Church (WBC) funeral-protest case of

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Snyder v. Phelps,¹ Chief Justice John Roberts aptly characterized the holding by the eight-justice majority as “narrow.”² Only Justice Samuel Alito declined to join the eight-justice majority.³ Likewise, in the preceding term, Justice Alito was the sole dissenter in the First Amendment⁴ case of *United States v. Stevens*,⁵ which centered on a federal statute⁶ targeting so-called “crush videos.”⁷

Having relegated Alito to the role of free-speech squelcher, Chief Justice Roberts, who also authored the majority opinion in *Stevens*, proved once again in *Snyder* to be capable of fashioning a nearly-unanimous decision protecting distasteful expression.⁸ This article argues, however, that Chief Justice Roberts avoided multiple interesting and complex issues in *Snyder*. The result oversimplified the case, making the outcome, in layperson’s terms, a no-brainer⁹ which merely followed in a long line of other cases

1. 131 S. Ct. 1207 (2011).

2. *Id.* at 1220.

3. Alito’s dissent in *Snyder* has been described in the news media as “blistering.” Robert Knight, *High Cost of Free Speech*, WASH. TIMES, Mar. 7, 2011, at B1. It also has been called “passionate.” Peter St. Onge, *Court Protects Right to Remain Hateful*, CHARLOTTE OBSERVER, Mar. 6, 2011, at B1. Finally, it has been characterized as “muscular.” Robert Barnes, *Alito Stands Alone on Supreme Court First Amendment Cases*, WASH. POST, Mar. 4, 2011, at A2. In brief, Justice Alito did not go down meekly.

For instance, Justice Alito opened his dissent by asserting that “[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.” *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting). He contended that of the multiple justifications the majority gave for protecting the speech of the WBC members, “none is sound.” *Id.* at 1226. He concluded his dissent by opining that “the Court now compounds” the injuries sustained by petitioner Albert Snyder and that “[i]n order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.” *Id.* at 1229.

4. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated eighty-six years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties which apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

5. 130 S. Ct. 1577 (2010).

6. 18 U.S.C. § 48 (2006 & Supp. IV 2010).

7. *Stevens*, 130 S. Ct. at 1583 (explaining that crush videos often “feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters” by women in high-heeled shoes).

8. In *Stevens*, Justice John Paul Stevens joined Chief Justice Roberts’ majority opinion. *Id.* at 1582. After Justice Stevens retired, he was replaced by Justice Elena Kagan, who joined Chief Justice Roberts’ opinion in *Snyder*. *Snyder*, 131 S. Ct. at 1212.

9. As one newspaper editor characterized it, “in terms of law, *the case is easy*, or at

protecting offensive expression about matters of public concern.¹⁰ As Erwin Chemerinsky, Dean of the University of California, Irvine School of Law, told the *Wall Street Journal* shortly after the *Snyder* opinion was issued, “the core of the First Amendment has always been that speech can’t be punished or held liable because it is offensive. Had the court come out the other way, it would have dramatically changed First Amendment law.”¹¹

In other words, the *Snyder* opinion did little to advance First Amendment jurisprudence and the result was no surprise to First Amendment scholars.¹² Viewed cynically, the opinion merely provided the members of the Westboro Baptist Church with yet another opportunity to gain more of the media attention that they crave.¹³ Was the “narrow”¹⁴ holding in *Snyder* thus too narrow? Did the Court squander an opportunity to examine critical issues in its delivery of a victory for free speech? This article addresses these questions.

least eight justices thought so.” Marc Charisse, *Nothing to Fear From Phelps and Gang*, EVENING SUN (Hanover, Pa.), Mar. 5, 2011, at Opinion.

10. See *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding the First Amendment right of citizens to burn the American flag at a public venue as a form of symbolic political expression against the policies of the Reagan administration); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (protecting the First Amendment right to mock public figures’ religious beliefs and sexual practices with parodic, rhetorical hyperbole in the face of a cause of action for intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15, 17 (1971) (protecting the right to wear a jacket emblazoned with the words “Fuck the Draft” in a public courthouse in order to criticize the draft and the war in Vietnam).

11. Brent Kendall, *First Amendment Protects “Hurtful” Speech, Court Says*, WALL ST. J., Mar. 3, 2011, at A1.

12. See Nina Totenberg, *High Court Rules for Anti-Gay Protestors at Funerals* (Nat’l Pub. Radio broadcast Mar. 2, 2011), available at <http://www.npr.org/2011/03/02/134194491/high-court-rules-for-military-funeral-protesters> (stating that the Court’s “8-to-1 ruling came as no surprise to First Amendment scholars, both right and left. They note that the decision is in line with many court decisions protecting the rights of fringe groups—from Nazis marching in Skokie, Ill., to flag burners at a Republican convention in Texas,” and adding that “University of Chicago law professor Geoffrey Stone notes that Wednesday’s ruling fits neatly into that tradition, calling it a ‘classic case.’ *The only surprise, maintained Stone, was that anyone dissented.*” (emphasis added)).

13. See Jeff Brumley, *Court Backs ‘Offensive’ Protests at G.I. Funerals*, FLA. TIMES-UNION (Jacksonville), Mar. 3, 2011, at A-1 (quoting WBC member and attorney Margie Phelps as responding to the Supreme Court’s ruling by stating “[o]ur reaction is thank God and praise his name. He has a message for this nation, and from the Pentagon on down, you’re not going to be able to fight it,” and quoting her as thanking Albert Snyder for “putting a megaphone to the mouth of this little church”).

14. *Snyder*, 131 S. Ct. at 1220.

Part I provides a brief overview of the facts and lower court decisions leading to *Snyder v. Phelps*. Part II illustrates four ways in which the majority opinion in *Snyder* avoided issues that it might have addressed but for the goal of narrowly framing the issue before it. Part III argues that Chief Justice Roberts may have squandered an opportunity to develop First Amendment jurisprudence in order to obtain an eight-justice majority. In its pursuit of judicial minimalism, the Court failed to provide guidance to lower courts on issues that are likely to arise again in the near future, such as personal, Internet-posted attacks targeting private figures that give rise to tort causes of action. Part III also briefly examines Justice Alito's dissenting opinions in *Snyder* and *Stevens*, and contrasts them with his earlier majority opinion at the U.S. Court of Appeals for the Third Circuit in another case involving offensive expression. This article concludes with part IV.

*I. Pitting Free Speech Against Emotional Tranquility and Privacy:
An Overview of Snyder v. Phelps*

The Westboro Baptist Church “is a 75-member congregation comprised largely of the family members of the church’s founder, Fred Phelps.”¹⁵ Although it is small, the Kansas-based WBC had garnered widespread media attention due to its members’ controversial beliefs and actions long before the Supreme Court ruled in *Snyder*.¹⁶

In her initial brief filed with the U.S. Supreme Court on behalf of the WBC, attorney Margie J. Phelps succinctly explained the WBC’s fringe

15. Byron Williams, *Court Got Ruling Right, Even Though Results Are Disgusting*, CONTRA COSTA TIMES (Cal.), Mar. 5, 2011, at Opinion 1.

16. For instance, several years prior to the Supreme Court’s 2011 ruling in *Snyder*, the Westboro Baptist Church’s beliefs and actions were covered by major newspapers in the United States. See, e.g., Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, Apr. 17, 2006, at A14 (describing the WBC as “a tiny fundamentalist splinter group” and noting that its members have “been showing up at the funerals of soldiers with their telltale placards, chants and tattered American flags. The protests, viewed by many as cruel and unpatriotic, have set off a wave of grass-roots outrage and a flurry of laws seeking to restrict demonstrations at funerals and burials”); Kari Lydersen, *5 States Consider Bans On Protests at Funerals*, WASH. POST, Jan. 30, 2006, at A9 (observing in the lead paragraph that the WBC’s members “have been protesting at funerals of Iraq war casualties because they say the deaths are God’s punishment for U.S. tolerance toward gays”); Jim Herron Zamora, *Anti-Gay Protesters Opposed by 20 Times as Many Locals*, S.F. CHRON., June 12, 2005, at A18 (describing how members of the WBC “travel around the nation to picket events and denounce gays”).

beliefs and practice of exploiting the funerals of American soldiers killed in Iraq and Afghanistan:

[G]iven the very public nature of the soldiers' funerals, and the vast dialogue held in connection with their lives and deaths; and given the strong religious belief held by respondents that the soldiers were dying for the sins of America; in June 2005 respondents and other members of Westboro Baptist Church (WBC) began picketing in proximity to these funerals and memorial services. WBC's picketing has spanned nearly twenty years, starting in early 1991, and has addressed the morality of this nation and the consequences of proud institutionalized sin, including homosexuality (including same-sex marriage), fornication, adultery (including divorce and remarriage, called adultery by the Lord Jesus Christ), murder (especially of unborn babies), greed, and idolatry.¹⁷

The expression of these beliefs and tactics near the March 2006 funeral in Westminster, Maryland for Lance Corporal Matthew Snyder, who was killed in Iraq earlier that month, gave rise to a civil lawsuit filed by the deceased's father, Albert Snyder.¹⁸ The lawsuit sought monetary damages against members of the WBC on several tort causes of action.¹⁹ The case soon caught the attention of the mainstream news media.²⁰

Seven members of the WBC were present near the Snyder funeral. As described in the Supreme Court's opinion:

The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and

17. Brief in Opposition to Petition for Writ of Certiorari at 4, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-7512).

18. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571-73 (D. Md. 2006) (setting forth the underlying facts that gave rise to the case).

19. *Id.*

20. See, e.g., Rob Hotakainen, *Court Case Tests Limits of Free Speech for Phelps Family*, KAN. CITY STAR, Oct. 30, 2007, at A1 (reporting on the lawsuit); Melody Simmons, *Marine's Father Sues Church for Cheering Son's Death*, N.Y. TIMES, Oct. 26, 2007, at A18 (reporting on the lawsuit).

recited Bible verses. None of the picketers entered church property or went to the cemetery.²¹

The signs carried that day by members of the WBC conveyed messages such as “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” and “You’re Going to Hell.”²²

In October 2007, a jury found for Albert Snyder on causes of action for intentional infliction of emotional distress (IIED)²³ and intrusion into seclusion.²⁴ Mr. Snyder was awarded a combined \$10.9 million in compensatory and punitive damages.²⁵ In February 2008, U.S. District Judge Richard D. Bennett affirmed the jury’s verdict, but reduced the amount of punitive damages from \$8 million to \$2.1 million.²⁶ In September 2009, the United States Court of Appeals for the Fourth Circuit overturned the verdict, holding that “the judgment attaches tort liability to constitutionally protected speech.”²⁷

The Supreme Court granted a petition for a writ of certiorari in March 2010,²⁸ and heard oral argument in October 2010.²⁹ The Court issued its decision in March 2011, nearly five years after the date of Matthew Snyder’s funeral.³⁰

21. *Snyder*, 131 S. Ct. at 1213 (citations omitted).

22. *Id.*

23. Intentional infliction of emotional distress typically “consists of four elements: (1) the defendant’s conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant’s conduct must cause the plaintiff emotional distress and (4) the distress must be severe.” Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL’Y 469, 476 (2000).

24. See generally JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 373-75 (4th ed. 2010) (providing a concise overview of the intrusion tort).

25. Rob Hotakainen, *Jurors Award Father Nearly \$11 Million in Suit Against Phelps*, KAN. CITY STAR, Nov. 1, 2007, at A1.

26. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 573 (D. Md. 2008), *rev’d*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

27. *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009).

28. *Snyder v. Phelps*, 130 S. Ct. 1737 (2010).

29. See Tricia Bishop, *Protest’s Boundaries: Westboro Case Presents Court with Issues of Speech, Religion, Decency*, BALT. SUN, Oct. 7, 2010, at 1A (reporting on the oral argument in *Snyder*).

30. *Snyder*, 131 S. Ct. at 1207.

II. Eliminating Ambiguity, Focusing Narrowly: Four Ways the Roberts' Majority Stripped Away or Avoided Complex Issues in Snyder

The Court's narrow holding in *Snyder* avoided the consideration of a quartet of difficult issues. They include: 1) the underlying tort claims; 2) the offensive material posted on WBC's website; 3) the private figure status of the plaintiff; and 4) an undue emphasis on the public content of the speech. While perfectly permissible, the Court's narrowing tactics eviscerated the case and crafted an opinion that failed to break any new ground.

In addition to the four points described below, the Court also did not address the constitutionality of an increasing number of buffer-zone statutes enacted by government entities across the country to keep protestors a specified distance away from the location of a funeral.³¹ The Court's decision not to address such statutes, however, is understandable because *Snyder* focused on a different issue, namely tort causes of action seeking monetary compensation for the emotional harm allegedly caused by the WBC. Furthermore, Maryland did not have a buffer-zone statute at the time of the Matthew Snyder funeral protest.³² Thus, to the extent that WBC attorney Margie Phelps views the *Snyder* decision as an indication that such time, place, and manner regulations are also unconstitutional,³³ she may be misguided. As UCLA law professor and constitutional scholar Eugene Volokh put it, "That's a little too optimistic from her perspective."³⁴

This article now turns to four ways in which the *Snyder* opinion either eliminated or avoided other important issues.

A. Focusing Only on the First Amendment, Not the Underlying Torts

The Thomas Jefferson Center for the Protection of Free Expression in Charlottesville, Virginia, along with several other free-speech organizations, filed amicus briefs urging the Supreme Court to resolve the

31. *See id.* at 1218 (noting that forty-four states, including Maryland and the federal government, have adopted such statutes, and observing that "[t]o the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case").

32. *See id.* (noting that "Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional").

33. *See* Andy Marso, *Funeral Protestors Vow to Fight Picketing Curbs*, BALT. SUN, Mar. 5, 2011, at 7A (describing how Margie Phelps believes the Supreme Court's ruling will help the WBC in its legal attacks on such funeral buffer-zone statutes).

34. Jeff Frantz, *Unpopular Victory for Free Speech*, PATRIOT-NEWS (Harrisburg, Pa.), Mar. 3, 2011, at A1.

case in favor of the WBC solely on the underlying tort claims.³⁵ In particular, attorney Joshua Wheeler asserted, on behalf of the Thomas Jefferson Center, that Albert Snyder could not, given the facts of the case, prove or otherwise satisfy the necessary elements of the two torts—intentional infliction of emotional distress and intrusion into seclusion—on which he had prevailed before a Maryland jury:

This elemental absence provides grounds for resolving the case without addressing whether the Phelps' expression is protected under the First Amendment. In such circumstances, this Court adheres to a self-imposed doctrine of judicial restraint by avoiding the adjudication of constitutional questions—even if properly presented by the record—if another ground exists to decide the case.³⁶

In short, Wheeler argued that “the doctrine of constitutional avoidance counsels that this case be resolved exclusively on the basis of Maryland tort law.”³⁷ This argument was not pulled out of thin air; it was derived from Judge Dennis Shedd's concurrence in the Fourth Circuit's September 2009 opinion in favor of the WBC defendants.³⁸ Judge Shedd opined:

Although I agree with the majority that the judgment below must be reversed, I would do so on different grounds. As I explain below, I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims. Because the appeal can be decided on this nonconstitutional basis, I would not reach the First Amendment issue addressed by the majority.³⁹

On the intrusion cause of action, Shedd noted that “[t]he Phelps [sic] never intruded upon a private place because their protest occurred at all times in a public place that was designated by the police and located approximately 1,000 feet from the funeral. Further, the Phelps never confronted Snyder, and Snyder admits he could not see the protest.”⁴⁰ As

35. Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression et al. in Support of Respondents at 39, *Snyder v. Phelps*, 131 S. Ct. 1207 (2010) (No. 09-751).

36. *Id.* at 3.

37. *Id.*

38. *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) (Shedd, J., concurring), *aff'd*, 131 S. Ct. 1207 (2011).

39. *Id.* at 227.

40. *Id.* at 230.

for the so-called “epic” posted by the WBC on its website, Shedd observed that Albert Snyder “learned of the ‘epic’ during an Internet search, and upon finding it he chose to read it. By doing so, any interference with Snyder’s purported interest in seclusion was caused by Snyder himself rather than the Phelps.”⁴¹ With regard to the cause of action for IIED, Judge Shedd would have held that the conduct of the WBC defendants did not rise to the level of extreme and outrageous behavior necessary to prove the IIED tort.⁴²

Justice Roberts, however, deftly dodged any analysis of the two underlying torts in *Snyder*. He offered the following footnote by way of explanation:

One judge concurred in the judgment on the ground that Snyder had failed to introduce sufficient evidence at trial to support a jury verdict on any of his tort claims. The Court of Appeals majority determined that the picketers had “voluntarily waived” any such contention on appeal. Like the court below, we proceed on the unexamined premise that respondents’ speech was tortious.⁴³

This footnote made it clear that the Supreme Court’s decision would turn solely on First Amendment grounds and forgo any consideration of the tort claims that gave rise to the First Amendment issues in the first place. The limited nature of the opinion was also clear in Chief Justice Roberts’ framing of the issue in the first paragraph: “[t]he question presented is whether the First Amendment shields the church members from tort

41. *Id.* at 231.

42. *See id.* at 232. Judge Shedd explained:

Snyder asserts that the protest was extreme and outrageous because the funeral was disrupted by having the procession re-routed; his grieving process was disrupted by his having to worry about his daughters observing the Phelps’ protest; and the Phelps’ messages on their protest signs were focused on his family. As earlier noted, the protest was confined to a public area under supervision and regulation of local law enforcement and did not disrupt the church service. Although reasonable people may disagree about the appropriateness of the Phelps’ protest, this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law. Further, to the extent Snyder asserts the “epic” as a basis for this tort, I would find the “epic,” which the district court found to be non-defamatory as a matter of law, is not sufficient to support a finding of extreme and outrageous conduct.

Id.

43. *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 n.2 (citation omitted).

liability for their speech in this case.”⁴⁴

Close observers of the Court will note that this rather generic framing of the issue deviates from the three official questions the Supreme Court established when it granted certiorari.⁴⁵ In other words, the Chief Justice re-framed and distilled multiple issues down to a single one—a lone question that ultimately was resolved in uniform fashion by eight of the nine justices.

B. Eliminating the “Epic” from the Analysis

The *Snyder* case involved two different speech components: 1) the actual protest involving signs hoisted by members of the WBC near the funeral for Matthew Snyder; and 2) the Internet-posted “epic” on the WBC’s website. Chief Justice Roberts and the majority, however, focused exclusively on the former, dismissing the latter with a single footnote:

A few weeks after the funeral, one of the picketers posted a message on Westboro’s Web site discussing the picketing and containing religiously oriented denunciations of the Snyders, interspersed among lengthy Bible quotations. Snyder discovered the posting, referred to by the parties as the “epic,” during an Internet search for his son’s name. The epic is not properly before us and does not factor in our analysis. Although the epic was submitted to the jury and discussed in the courts below, Snyder never mentioned it in his petition for certiorari.⁴⁶

Although Chief Justice Roberts cited Rule 14.1(g) of the Rules of the Supreme Court of the United States to support the Court’s decision to ignore the “epic,”⁴⁷ the fact is that discussion of the “epic” was raised and

44. *Id.* at 1213.

45. As stated on the U.S. Supreme Court’s official website:

Three questions are presented: 1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter? 2. Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly? 3. Does an individual attending a family member’s funeral constitute a captive audience who is entitled to state protection from unwanted communication?

Question Presented, *Snyder v. Phelps*, No. 09-751, <http://www.supremecourt.gov/qp/09-00751qp.pdf>.

46. *Snyder*, 131 S. Ct. at 1214 n.1.

47. See SUP. CT. R. 14.1(g), available at <http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf> (requiring that a petition for a writ of certiorari contain “[a] concise statement of the case setting out the facts material to consideration of the questions presented”).

addressed at oral argument on October 6, 2010.⁴⁸ In response to questioning by Justice Antonin Scalia, Snyder's attorney Sean Summers explained that the "epic" "was essentially a recap of the funeral protest itself."⁴⁹ He added that "we focused on the personal, targeted comments in the epic when we presented our evidence."⁵⁰ Summers stated that the "epic" would have supported a cause of action, *even if there had not been a funeral protest*, because of "the personal, targeted epithets directed at the Snyder family."⁵¹

Consideration of the "epic" clearly would have complicated the Court's analysis. As suggested above in attorney Summers' response to Justice Scalia, while none of the signs carried by members of the WBC near the funeral mentioned either Albert or Matthew Snyder personally, but merely offered what might best be characterized as generic hate-speech such as "God Hates Fags"⁵² and "Thank God for Dead Soldiers,"⁵³ the "epic" was a much more personal attack for several reasons. First, it was entitled "The Burden of Marine Lance Cpl. Matthew Snyder."⁵⁴ Second, as described by U.S. District Judge Richard D. Bennett, quoting WBC member Shirley L. Phelps-Roper, the "epic" stated "that Albert Snyder and his ex-wife 'taught Matthew to defy his creator,' 'raised him for the devil,' and 'taught him that God was a liar.'"⁵⁵ Such attacks on a private-figure plaintiff (private, at least, in the mind of Justice Alito⁵⁶) would have raised a much closer question on the IIED tort, given that the Supreme Court's 1988 ruling in *Hustler Magazine, Inc. v. Falwell* applied only to public figures and public officials.⁵⁷

48. Oral Argument at 3-5, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-751.pdf.

49. *Id.* at 4.

50. *Id.*

51. *Id.* at 5.

52. *Id.* at 2.

53. *Id.*

54. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

55. *Id.*

56. *See infra* Part II.C (addressing the Court's analysis, or lack thereof, of the private-figure status of Albert Snyder).

57. *See* 485 U.S. 46, 56 (1988) (concluding that "*public figures* and *public officials* may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'" (emphasis added)).

Justice Alito objected to the majority's elimination of the "epic" from its consideration. The "epic," Alito wrote in dissent, "is not a distinct claim but a piece of evidence that the jury considered in imposing liability for the claims now before this Court. The protest and the epic are parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress."⁵⁸ In a stinging rebuke, Alito added that "the Court's refusal to consider the 'epic' contrasts sharply with its willingness to take notice of Westboro's protest activities at other times and locations."⁵⁹ That said, of course, focusing judicial attention on a single speech incident—namely, the funeral protest itself—provides for doctrinal clarity rather than the possible ambiguity that might have been rendered by the convolution of two distinct speech incidents.

In a separate concurrence, Justice Stephen Breyer emphasized that the Court's opinion does not "say anything about Internet postings."⁶⁰ One is left to wonder whether Justice Breyer might have joined Justice Alito's dissent had the Court addressed the "epic". Breyer wrote that "[w]hile I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point."⁶¹ Citing Justice Alito's dissent, Justice Breyer observed:

The dissent requires us to ask whether our holding unreasonably limits liability for intentional infliction of emotional distress—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm. *Does our decision leave the State powerless to protect the individual against invasions of, e.g., personal privacy, even in the most horrendous of such circumstances?*⁶²

As described earlier in this section, the "epic" certainly falls much more in line with such a direct verbal assault than do the signs carried by members of the WBC. Breyer's posing of the question above, coupled with his emphasis of the fact that the Court's opinion never examined the "epic," may indicate that he would have viewed the "epic" quite differently from

58. *Snyder*, 131 S. Ct. at 1226 n.15 (Alito, J., dissenting).

59. *Id.*

60. *Id.* at 1221 (Breyer, J., concurring).

61. *Id.*

62. *Id.* (emphasis added).

the protest near the funeral had the Court actually addressed it. One cannot be certain, but the fact that Justice Breyer wrote a concurrence that specifically gave rhetorical cover to Justice Alito's dissent, would seem to make such a possibility more than purely speculative.

C. Avoiding Analysis of the Status of Albert Snyder as a Private Figure

Although Justice Alito opened his dissent by emphasizing that “Albert Snyder is not a public figure,”⁶³ the status of the plaintiff as either a private or public figure apparently made little or no difference to the majority. The majority instead emphasized the nature of the speech over the status of the plaintiff: “Whether the First Amendment prohibits holding Westboro liable for its speech in this case *turns largely on whether that speech is of public or private concern*, as determined by all the circumstances of the case.”⁶⁴

In declining to address the status of Albert Snyder as a private or public figure, the majority ignored the call of some legal scholars who had analyzed the lower-court rulings in *Snyder*. Most notably, perhaps, Professor W. Wat Hopkins of Virginia Tech University argued in a 2010 article that:

The distinction has been made between public and private persons in libel law, and private persons—even when involved in matters of public concern—do not face a heightened burden of proof in order to prevail in libel actions. The same buffer should apply in cases involving intentional infliction of emotional distress. It does not advance the cause of free expression to allow outrageous attacks on private persons who have not entered the fray of public debate.⁶⁵

Hopkins contended that Albert Snyder was a private figure and that the Supreme Court should take advantage of the *Snyder* case as a propitious opportunity to cabin and confine the Court's 1988 holding in *Hustler Magazine, Inc. v. Falwell*⁶⁶ to only those IIED cases involving public figures.⁶⁷ As Hopkins eloquently put it: “Albert Snyder was not embroiled

63. *Id.* at 1222 (Alito, J., dissenting).

64. *Id.* at 1215 (majority opinion) (emphasis added).

65. W. Wat Hopkins, *Snyder v. Phelps, Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMEND. L. REV. 149, 191 (2010).

66. 485 U.S. 46 (1988).

67. In *Falwell*, the Supreme Court protected an advertisement parody published in the November 1983 issue of *Hustler* magazine suggesting that the Rev. Jerry Falwell, the head of the Moral Majority, lost his virginity during an incestuous encounter with his mother in an

in debate over a matter of public concern when attacked by the Westboro Baptist Church—he was a mourning father doing no more than attempting to bury his son in peace.”⁶⁸ Hopkins thus concluded that “[t]he boundaries of intentional infliction cases should be narrowly drawn, but the Snyder case falls into even the most narrow of those boundaries, and the Supreme Court should say so.”⁶⁹ Unfortunately for Hopkins and those who agree with his viewpoint, only Justice Alito did say so.

Justice Alito stressed in his dissent that Albert Snyder was a private figure and that this designation should directly influence the outcome of the case. He wrote that although members of the WBC “may picket peacefully in countless locations . . . [i]t does not follow . . . that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.”⁷⁰

Noting the Court’s 1988 decision in *Hustler Magazine, Inc. v. Falwell*, Justice Alito emphasized that while that case “did involve an IIED claim . . . the plaintiff there was a public figure, and the Court did not suggest that its holding would also apply in a case involving a *private figure*.”⁷¹ He added that “[u]nless a caricature of a public figure can reasonably be interpreted as stating facts that may be proved to be wrong, the caricature does not have the same potential to wound as a personal verbal assault on a *vulnerable private figure*.”⁷²

Thus, for Alito, the status of the plaintiff as a private person played a pivotal role in the outcome of the case.

D. Focusing Only on the Public Aspects of the Speech and Its Location

Although the majority declined to address the status of the plaintiff, it clearly emphasized what it concluded were two very “public” factual

outhouse and that he got drunk before preaching. *Id.* at 48. In ruling for *Hustler* and its pornographic publisher, Larry Flynt, in the face of Falwell’s successful IIED claim before a home-state Virginia jury, Chief Justice William Rehnquist wrote for the Court that

[p]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with “actual malice,” *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 56.

68. Hopkins, *supra* note 65, at 192.

69. *Id.*

70. Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

71. *Id.* at 1228 (emphasis added).

72. *Id.* (emphasis added).

aspects of the case: the *content* of the speech and the *location* in which it took place. Chief Justice Roberts, who early in the opinion took pains to make it clear that the WBC members, acting in compliance with police instructions, were standing on a small patch of public land next to a public street and about 1000 feet away from the church where the funeral for Matthew Snyder was being held,⁷³ wrote that “[g]iven that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.”⁷⁴

With both the content and location of the speech deemed public, the outcome of *Snyder* was, in the parlance of our times, a done deal. All that was left for Chief Justice Roberts to do was to insert the often-quoted, almost obligatory maxim from another offensive-speech case, *Texas v. Johnson*,⁷⁵ that “[i]f 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.”⁷⁶ Like *Cohen v. California*⁷⁷ forty years earlier, *Snyder* became just another routine case about offensive speech regarding a matter of public concern, conveyed in a public location from which an individual could easily exercise the constitutionally adequate self-help remedy of looking away.⁷⁸ Indeed, Chief Justice Roberts quoted *Cohen* in support of the proposition that, given the 1000-foot distance in a public location that separated Albert Snyder from the speech of the WBC members, the *Snyder* case did *not* involve a captive audience scenario.⁷⁹

Although this article thus far has intimated criticism of Chief Justice Roberts for too narrowly confining the issue in *Snyder*, Roberts should be praised for laying out three criteria which will allow future courts a degree of certainty in deciding whether the content of speech involves a matter of

73. *Id.* at 1213 (majority opinion).

74. *Id.* at 1219.

75. 491 U.S. 397 (1989).

76. *Snyder*, 131 S. Ct. at 1219 (quoting *Johnson*, 491 U.S. at 414).

77. 403 U.S. 15 (1971).

78. The high court wrote in *Cohen* that “[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes” away from Paul Robert Cohen’s jacket bearing the written message, “Fuck the Draft.” *Id.* at 21.

79. *Snyder*, 131 S. Ct. at 1220 (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

public concern. Roberts wrote that *content*, *context*, and *form* are instrumental in determining, when viewing the record as a whole, if the speech at issue centers on a matter of public concern.⁸⁰ Applying those factors to the speech at issue in *Snyder*, Roberts wrote:

The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” . . . While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed . . . to reach as broad a public audience as possible.⁸¹

As for the context of the speech, the fact that it took place at a funeral did not instantly transform it into a matter of private concern.⁸² Roberts wrote that “Westboro’s signs, displayed on public land next to a public street, reflect the fact that the church [the WBC] finds much to condemn in modern society. . . . and the funeral setting does not alter that conclusion.”⁸³ Therefore, although a funeral often is a private event that is conducted near public spaces like streets and sidewalks, the Court avoided a comprehensive explanation of why the privacy of a funeral is trumped by the ‘public concern’ content of WBC’s speech.

In summary, once the IIED and intrusion tort questions were discarded, once the “epic” was rendered irrelevant, and once the status of the plaintiff was ignored, the focus of the *Snyder* case was confined solely to the First Amendment rights of WBC to engage in speech about matters of public concern in a public location.

80. *Id.* at 1217.

81. *Id.* at 1216-17.

82. *Id.*

83. *Id.* at 1217.

III. Analysis

Snyder v. Phelps proved to be a classic First Amendment precipice case in which the rights of free speech are pushed to the very edge of the cliff of censorship⁸⁴ before the Court, as it has done multiple times before in cases like *Cohen*, *Johnson*, and *Falwell*, sweeps in to save the day for even the most offensive expression. The *Snyder* decision, as First Amendment attorney Lloyd Lunceford put it, thus merely fell in order with “an established line of cases that ‘gives a very high degree of First Amendment protection to speech on matters of public concern.’”⁸⁵

A. Judicial Minimalism

With the facts and issues so constrained by Chief Justice Roberts,⁸⁶ the result in *Snyder* was “inescapable.”⁸⁷ The result was a good example of what constitutional scholar Cass Sunstein calls “judicial minimalism,” under which the guiding philosophy is that “judges should take narrow, theoretically unambitious steps, at least when they lack the experience or the information to rule broadly or ambitiously.”⁸⁸

This is not, of course, to say the narrow decision in *Snyder* was either wrong or bad. In fact the opposite is true. The decision’s closing paragraph reinforced the notion that a majoritarian heckler’s veto, be it in the form of tort causes of action (as in *Snyder*) or government censorship, is anathema to the First Amendment.⁸⁹ Roberts wrote that speech

84. Cf. David Savage, *Justices Side with Funeral Picketers*, L.A. TIMES, Mar. 3, 2011, at A9 (observing that the case “pressed the outer limits of free speech”).

85. Joe Gyan, Jr., *Analysts Agree Law Protects Protests*, ADVOCATE (Baton Rouge, La.), Mar. 5, 2011, at A1.

86. See *supra* Part II (describing four different ways in which the Court arguably narrowed the facts and issue on which it had to focus).

87. Editorial, *The Hard Facts of Freedom*, COLUMBUS LEDGER-ENQUIRER (Ga.), Mar. 6, 2011, at C4.

88. Cass R. Sunstein, *Second-Order Perfectionism*, 75 *FORDHAM L. REV.* 2867, 2868 (2007).

89. As one federal appellate court recently encapsulated the doctrine of a heckler’s veto: Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker’s opponents’ mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response.

Zamecnick v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 879 (7th Cir. 2011); see *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (observing that “[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked

[c]an stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. *On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.* That choice requires that we shield Westboro from tort liability for its picketing in this case.⁹⁰

In other words, just as a federal appellate court upheld the First Amendment right of a group of Nazis to march during the 1970s in Holocaust-survivor laden Skokie, Illinois,⁹¹ so too does it now protect the right of the WBC to protest in a public place, without fear that the audience's reaction to its offensive message will be allowed to squelch it.

The decision also reinforces retired Justice Sandra Day O'Connor's admonition in the cross-burning case of *Virginia v. Black* that “the hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomfiting.”⁹²

Furthermore, the outcome in *Snyder* should be lauded to the extent that it embraces First Amendment scholar Lee Bollinger's notion of a “tolerant society.”⁹³ For instance, for Bollinger, protecting the expression of Nazi beliefs is pivotal because it reinforces American society's commitment to tolerance.⁹⁴ As Bollinger writes, “free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”⁹⁵

The question posed, however, in this article—whether the Court in *Snyder* rendered too narrow of holding—taps into the issue of whether, in

except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence”).

90. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (emphasis added).

91. *See Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978) (concluding that “[t]he result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises” (emphasis added)).

92. 538 U.S. 343, 358 (2003) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

93. *See* LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

94. *See* Lee C. Bollinger, *The Skokie Legacy: Reflections on an “Easy Case” and Free Speech Theory*, 80 MICH. L. REV. 617, 629-31 (1982).

95. BOLLINGER, *supra* note 93, at 10.

the process of rendering a clear and yet somewhat simplistic victory for freedom of expression, the majority gave short shrift to other important issues?

For instance, one of the three official questions presented for analysis by the Supreme Court in *Snyder* was: “Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?”⁹⁶ The opinion of the Court, however, never squarely states either that *Falwell* extends or does not extend to a private person. The majority, although certainly not Justice Samuel Alito in dissent,⁹⁷ simply never addressed this issue in straightforward fashion.

Likewise, the Court could have dealt with a topic that will continue to arise in the future—personally abusive postings on the Internet targeting private individuals. Instead, it chose to forego any consideration of the so-called online “epic.”⁹⁸ The issue is exceedingly complex, involving speech in a relatively new medium: speech which an individual, like Albert Snyder, must seek out or have called to his attention before being exposed to it. But the Court provided no guidance to lower courts on this issue.⁹⁹

There is nothing inherently wrong with a narrow holding, especially when an area of law is nascent. For instance, in its 2010 opinion in *City of Ontario v. Quon*, involving the assertion by a government employer of the right to read text messages sent and received on an employer-owned pager issued to an employee,¹⁰⁰ Justice Anthony Kennedy defended the narrow holding in that case by explaining that the “Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer.”¹⁰¹ Given “[r]apid changes in the dynamics of communication and information transmission,” Kennedy cautioned that “[i]t is not so clear that courts at present are on so sure a ground. Prudence counsels caution

96. See *supra* note 45 and accompanying text (setting forth the three official questions the Supreme Court stated that it would address when it granted the petition for a writ of certiorari in *Snyder*).

97. *Supra* Part II.C.

98. See *supra* Part II.B.

99. This scenario seems particularly likely to arise in cases involving minors who create websites or other online platforms that mock, disparage or otherwise attack other minors. Schools are now addressing this problem involving off-campus postings by students that attack other students. See, e.g., *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011) (involving a minor who created a MySpace.com page that “was largely dedicated to ridiculing a fellow student”).

100. 130 S. Ct. 2619, 2624 (2010).

101. *Id.* at 2629.

before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.”¹⁰²

Perhaps Justice Kennedy’s argument helps explain why the majority in *Snyder* was, beyond the Rules of Court issue noted earlier,¹⁰³ reticent to address the Internet-based issue posed by the WBC’s “epic”. But, unlike privacy rights on emerging technologies, basic principles of tort law and First Amendment free-speech jurisprudence are much more established and the Court could have broadened its focus to examine the “epic” and whether or not its holding in the IIED case of *Falwell* extends to private-figure plaintiffs.

B. Consensus Building by Chief Justice Roberts

Obviously, the simpler the issue, the easier it is to address, but the less, in turn, the end result accomplishes in terms of advancing the law or in giving guidance to lower courts. Until the current justices’ notes and papers are released, we will not know for certain whether any brokering went on to reach the result in *Snyder v. Phelps*. Did Roberts need to strip away other issues in order to bring seven other members of the Court along with him?

A recent article in the *Yale Law Journal* observed that “[c]ritics have charged that the Roberts Court’s emphasis on narrow holdings limited to specific factual circumstances undermines the Court’s guidance function for lower courts and legislators alike.”¹⁰⁴ This has proven particularly true in the area of First Amendment jurisprudence. Using the Supreme Court’s 2007 ruling in the student-speech case of *Morse v. Frederick*¹⁰⁵ as an example, Professor Frederick Schauer asserts that

we have seen an increase in narrow and fact-specific rulings, rulings that may in theory produce the right outcome for the particular case before the Court, but which in practice gain little if anything in accuracy but nevertheless entail the cost of providing virtually no assistance for lower courts expected to

102. *Id.*

103. *See supra* Part II.B.

104. William J. Rinner, *Roberts Court Jurisprudence and Legislative Enactment Costs*, 118 *YALE L.J. POCKET PART* 177 (2009), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/roberts-court-jurisprudence-and-legislative-enactment-costs>.

105. 551 U.S. 393 (2007).

make their decisions in light of what the Supreme Court has said, and for officials and citizens desiring to know what the law is as they plan their actions.¹⁰⁶

Criticizing Chief Justice Roberts in *Morse*, Professor Schauer argues that when

[f]aced with an opportunity to say something helpful to and for those in the trenches, the Court not only selected a highly unrepresentative case for its first foray into the area in nineteen years, but it also decided the case on narrow grounds, and in doing so focused on those dimensions of the case least likely to be found in the conflicts that bedevil school administrators and lower courts on almost a daily basis.¹⁰⁷

Thus, while the result in *Snyder* frustrates those members of the general public, including Albert Snyder,¹⁰⁸ who find it hard to believe that such offensive speech should be allowed to trump the tranquility and solemnity of a funeral,¹⁰⁹ perhaps it is First Amendment scholars who should be the most frustrated by a decision that could have broken much new legal ground and offered guidance to lower courts but was, instead, framed so narrowly as to leave First Amendment jurisprudence all but untouched. While the phrase “cop out” quickly comes to the mind of this author, he nonetheless must acknowledge that, from a pro-free speech perspective, the Court neither reversed nor overruled a significant body of precedent in favor of erring on the side of free speech. In other words, perhaps the

106. Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 207.

107. *Id.* at 209-10.

108. Mr. Snyder stated that, upon learning of the Supreme Court’s ruling, “[m]y first thought was that eight justices didn’t have the common sense that God gave a goat.” Andrew Shaw, *Marine’s Father Responds to Supreme Court Decision on Westboro Baptist*, YORK DISPATCH (Pa.), Mar. 3, 2011.

109. As Kansas Attorney General Derek Schmidt put it in a statement released shortly after the opinion was rendered, “Today’s decision is a disappointment for Kansans who have endured for so long the embarrassment brought upon our state by the shameful conduct of the Westboro Baptist Church. Our hearts go out to the Snyder family whose pain and distress were at issue in this case.” News Release, *Statement of Attorney General Derek Schmidt on Supreme Court Decision in Snyder v. Phelps* (Mar. 2, 2011), available at <http://ag.ks.gov/media-center/news-releases/2011/09/29/statement-of-attorney-general-derek-schmidt-on-supreme-court-decision-in-em-snyder-v.-phelps-em->; see also Fred Mann, *Ruling Dismays Vets’ Supporters, Kan. Lawmakers*, WICHITA EAGLE, Mar. 3, 2011, at A1 (describing angry reaction to the decision).

holding needed to be whittled down to fit within a *public-speech-in-a-public-place* paradigm so as to guarantee a First Amendment victory.

When Chief Justice Roberts brought seven other Justices on board with him in the previous term to deliver another First Amendment victory in the crush-video case of *United States v. Stevens*,¹¹⁰ he again made it clear that the ruling in question was narrow: “We therefore *need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional*. We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.”¹¹¹ Applying the overbreadth doctrine to invalidate the crush-video statute on its face helped avoid what might otherwise have been a more complex as-applied challenge requiring the application of the strict scrutiny doctrine¹¹² to examine a law that was drafted to target crush videos but was applied in *Stevens* to prosecute a person for selling dog-fight videos. As in *Snyder*, where disregarding facts about the “epic” allowed Chief Justice Roberts to set aside the issue implicated by it,¹¹³ the Chief Justice, in *Stevens*, reached for procedural problems and reasoned—over the objection of Justice Alito in dissent—that “here no as-applied claim has been preserved. Neither court below construed *Stevens*’ briefs as adequately developing a separate attack on a defined subset of the statute’s applications (say, dogfighting videos).”¹¹⁴ Justice Alito objected to the use of the overbreadth doctrine to resolve the issue because, as he noted, overbreadth is generally used “only as a last resort.”¹¹⁵

C. Justice Alito’s Dissent

Justice Alito’s dissents in both *Stevens* and *Snyder* proved to be somewhat of a harbinger of things to come when the Supreme Court in June 2011 ruled on the violent video game case of *Brown v. Entertainment*

110. See *supra* notes 5-7 and accompanying text (discussing *Stevens*).

111. *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010).

112. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (writing that a “content-based speech restriction” is permissible “only if it satisfies strict scrutiny,” which requires that the law in question “be narrowly tailored to promote a compelling Government interest”); *Sable Comm. Cal, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (writing that the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”).

113. See *supra* Part II.B.

114. *Stevens*, 130 S. Ct. at 1587 n.3.

115. *Id.* at 1594 (Alito, J., dissenting).

Merchants Association.¹¹⁶ During oral argument in that case in November 2010, Justice Alito sounded incredulous when he queried Paul Smith, counsel for the video game industry: “Your argument is that there is nothing that a State can do to limit minors’ access to the most violent, sadistic, graphic video game that can be developed. That’s your argument?”¹¹⁷ Ultimately, Justice Alito issued a concurring opinion in *Brown* that agreed with majority’s decision to strike down California’s violent video game law,¹¹⁸ but he did so only because he found the law too vague and certainly not because he was enamored of the speech in question.¹¹⁹ Alito made it evident that he objected to the speech California sought to regulate,¹²⁰ and he lauded California’s effort to control it as “pioneering.”¹²¹

Lest one think that Justice Alito, given his dissents in both *Stevens* and *Snyder*, will always rule against the right to engage in what some might consider to be offensive speech, one need only look back to his 2001 Third Circuit opinion in *Saxe v. State College Area School District*.¹²² In that case, Justice Alito—perhaps ironically, given his statements above in *Stevens* about overbreadth challenges—used the overbreadth doctrine to strike down the speech code of a public high school district. The purpose of the code was to target “unsolicited derogatory remarks, jokes, demeaning

116. 131 S. Ct. 2729 (2011).

117. Oral Argument at 48, *Schwarzenegger v. Entm’t Merch. Ass’n*, Nov. 2, 2010 (No. 08-1448), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx.

118. *Brown*, 131 S. Ct. at 2742 (Alito, J., concurring) (writing that “[a]lthough the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained”).

119. *Id.* at 2746 (concluding that the law “fails to provide the fair notice that the Constitution requires”).

120. For instance, Justice Alito seemed to go to great lengths to make it clear the speech was, at least to him, exceedingly graphic:

In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

Id. at 2749.

121. *Id.* at 2742.

122. 240 F.3d 200 (3d Cir. 2001).

comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.”¹²³ Adding further irony is the fact that the plaintiffs in *Saxe* were somewhat similar, at least in their beliefs, to the members of the WBC. Alito noted that the plaintiffs “believe, and their religion teaches, that homosexuality is a sin. Plaintiffs further believe that they have a right to speak out about the sinful nature and harmful effects of homosexuality. Plaintiffs also feel compelled by their religion to speak out on other topics, especially moral issues.”¹²⁴

Ultimately, as Professor Cass Sunstein observes:

The choice between narrow and wide rulings must itself be made on a case-by-case basis; no rule is adequate to the task. Where the Court’s decision must be applied in many contexts, and when the issue frequently recurs, the argument for width may well be irresistible. But where the issue arises infrequently, and when the Court lacks the information that would enable it to produce a wide rule in which it has much confidence, the argument for narrowness is quite strong.¹²⁵

IV. Conclusion

Given the likelihood that the WBC will engage in future personal attacks on private figures on its website, as it did with the “epic,” and given that the Internet is now littered with personal attacks against private individuals, the argument for narrowness in *Snyder* was misguided. The Court needs to address the First Amendment limitations on IIED claims premised on Internet-posted expression that attacks private figures and also blends those attacks with speech on matters of public concern. This will not be nearly as easy of an issue to resolve as was the narrowly framed question in *Snyder*.

123. *Id.* at 203.

124. *Id.*

125. Cass Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1917 (2006).