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## Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value

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# JUSTICE SAMUEL A. ALITO'S LONELY WAR AGAINST ABHORRENT, LOW-VALUE EXPRESSION: A MALLEABLE FIRST AMENDMENT PHILOSOPHY PRIVILEGING SUBJECTIVE NOTIONS OF MORALITY AND MERIT

*Clay Calvert\**

## I. INTRODUCTION

A trio of U.S. Supreme Court rulings during its most recent two terms demonstrates that Justice Samuel Anthony Alito, Jr. is no friend to expression that offends his personal sense of both morality and substantive merit. In fact, he might be the justice most prone to censor offensive speech on today's High Court.

In April 2010, the Supreme Court in *United States v. Stevens*<sup>1</sup> struck down on First Amendment<sup>2</sup> overbreadth<sup>3</sup> grounds a federal statute<sup>4</sup> targeting crush videos.<sup>5</sup> Although the content of such videos is

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1. 130 S. Ct. 1577 (2010).

2. The First Amendment to the U.S. 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 to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

3. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 943 (3d ed. 2006) ("A law is unconstitutionally overbroad, if it regulates substantially more speech than the Constitution allows to be regulated, and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others.").

4. 18 U.S.C. § 48 (2006), *amended by* Animal Crush Video Prohibition Act of 2010, 18

pruriently repugnant,<sup>6</sup> as they “typically show scantily dressed women stomping rats, mice, hamsters or insects,”<sup>7</sup> the High Court nonetheless declared the federal law unconstitutional.<sup>8</sup>

Justice Alito, however, found himself isolated in *Stevens* from his eight colleagues on the Court as the lone dissenting justice.<sup>9</sup> Justice Alito, in fact, would have gone so far as to carve out a new category of unprotected speech,<sup>10</sup> opining that “crush videos are not protected by the First Amendment.”<sup>11</sup>

Just eleven months later in *Snyder v. Phelps*,<sup>12</sup> Justice Alito again played the outlier role of solitary dissenter<sup>13</sup> in another free-speech controversy involving offensive expression, but this time of a different variety. *Snyder* involved a civil lawsuit for intentional infliction of

U.S.C. § 48 (Supp. IV 2011) (providing that “[w]hoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both,” but carving out an exception for “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value”).

5. See generally Jeremy Biles, *I, Insect, or Bataille and the Crush Freaks*, 7 JANUS HEAD 115, 116 (2004) (writing that “[a]t the cutting edge of the edgy world of sexual fetishistic practices, the crush freaks are notorious for their enthusiasm for witnessing the crushing death of insects and other, usually invertebrate, animals, such as arachnids, crustaceans, and worms”).

6. One New York detective describes crush videos as “a foot-fetish type of thing. They kill animals by stamping on them with their feet.” Dareh Gregorian & Mark Stamey, *Cops: L.I. Animal Killer Is ‘Sickest Ever,’* N.Y. POST, May 4, 1998, at 7 (quoting Detective Adam Gross of the Suffolk County, N.Y. SPCA).

7. Martin Kasindorf, *Authorities Out to Crush Animal Snuff Films*, USA TODAY, Aug. 27, 1999, at 4A.

8. *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (holding that the statute at issue is “substantially overbroad, and therefore invalid under the First Amendment”).

9. *Id.* at 1582.

10. Despite language that seems to provide complete and absolute protection for expression, the First Amendment does not safeguard all categories of speech. The Supreme Court has carved out multiple exceptions over the past century. For instance, the Court wrote nearly seventy years ago:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (footnotes omitted). See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002) (“As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does *not* embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” (emphasis added)); see also Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1138 (1994) (describing fighting words as “a category of expression historically unprotected by the First Amendment”).

11. *Stevens*, 130 S. Ct. at 1601 (Alito, J., dissenting).

12. 131 S. Ct. 1207 (2011).

13. *Id.* at 1212.

emotional distress<sup>14</sup> and intrusion upon seclusion<sup>15</sup> against several members of the Westboro Baptist Church (“WBC”) who had peacefully picketed near a funeral held for a U.S. soldier killed in Iraq.<sup>16</sup> While the majority ruled in favor of the First Amendment speech interests of WBC members to hoist signs emblazoned with decidedly offensive anti-gay, anti-church, and anti-military messages,<sup>17</sup> Justice Alito disagreed.<sup>18</sup> He reasoned, paraphrasing language from the High Court’s seminal defamation decision of *New York Times Co. v. Sullivan*,<sup>19</sup> 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.”<sup>20</sup>

In both *Stevens* and *Snyder*, Chief Justice John G. Roberts, Jr. wrote the majority opinion and was able to bring all of his colleagues on board, save for Justice Alito.<sup>21</sup> Justice Alito, who, like the current Chief Justice, was nominated to the Supreme Court by former Republican President

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14. 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).

15. “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS § 652B (1977).

16. *Snyder*, 131 S. Ct. at 1214. The lawsuit was filed by Albert Snyder, father of the deceased soldier, Matthew Snyder; the defendants, members of the WBC, were “approximately 1,000 feet from the church where the funeral [for Matthew Snyder] was held. Several buildings separated the picket site from the church.” *Id.* at 1213-14.

17. *See id.* at 1220. WBC members’ signs included messages such as “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.” *Id.* at 1213.

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

19. 376 U.S. 254 (1964). In holding that public officials who sue for defamation over speech relating to their official conduct must prove actual malice, the Court in *Sullivan* wrote that “we consider this case against the background of a *profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 270, 279-80, 283 (emphasis added).

20. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

21. In *Stevens*, Chief Justice John Roberts was joined, in order of seniority on the High Court, by Associate Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor. *United States v. Stevens*, 130 S. Ct. 1577, 1582 (2010). By the time *Snyder* reached the High Court, Justice Stevens had retired and was replaced by Elena Kagan, who joined Chief Justice Roberts’s majority opinion in that case. *Snyder*, 131 S. Ct. at 1212 (noting that Chief Justice Roberts delivered the opinion of the Court, in which Associate Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan joined). Justice Breyer wrote a separate concurring opinion in *Snyder*. *Id.*

George W. Bush,<sup>22</sup> took his seat on the Court in January 2006 after serving on the U.S. Court of Appeals for the Third Circuit since 1990.<sup>23</sup>

Typically, Chief Justice Roberts and Justice Alito, as *The Washington Times* recently reported, “have settled into roles as mainstays of the high court’s conservative wing and frequently find themselves in agreement on legal issues, much to the delight of conservative commentators and observers and the chagrin of their liberal counterparts.”<sup>24</sup> Indeed, during the Court’s most recent term, Chief Justice Roberts and Justice Alito disagreed with each other in only four percent of the cases.<sup>25</sup> Justice Alito, however, stood alone in *Stevens* and *Snyder* from all of his fellow justices—not just Chief Justice Roberts—regardless of whether they were nominated by a Republican or Democratic President and irrespective of their perceived political stripes.<sup>26</sup>

Finally, Justice Alito issued a very narrow concurrence in June 2011 in yet another First Amendment case involving an odious form of expression. In *Brown v. Entertainment Merchants Ass’n*,<sup>27</sup> formerly known as *Video Software Dealers Ass’n v. Schwarzenegger*,<sup>28</sup> a majority of the Court struck down a California law limiting minors’ access to purchase and rent violent video games and requiring the labeling of such games by the video game industry.<sup>29</sup>

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22. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 1, 2012) [hereinafter SUPREME COURT OF THE U.S.].

23. *Id.*

24. Ben Conery, *Roberts, Alito Leave Imprint on Rulings: Each Is Conservative Mainstay*, WASH. TIMES (Mar. 29, 2011), <http://www.washingtontimes.com/news/2011/mar/29/roberts-alito-leave-imprint-on-rulings/?page=all>.

25. Robert Barnes, *Justices Who Will Shape Court Future Pair Up*, WASH. POST, June 29, 2011, at A6 (“Justices Sonia Sotomayor and Elena Kagan[] agreed 94 percent of the time this term, according to statisticians at SCOTUSblog.com. The only pair that agreed more were Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. . . . who parted ways in only 4 percent of the court’s decisions.”).

26. *Snyder*, 131 S. Ct. at 1212; *Stevens*, 130 S. Ct. at 1582. The isolation contrasts with the expectations of some when Justice Alito joined the Court that Justice Alito would be part of a solid, four-justice conservative block. See Adam Liptak, *Alito Vote May Be Decisive In Marquee Cases This Term*, N.Y. TIMES, Feb. 1, 2006, at A1 (“[Alito] is expected to join the three justices considered conservative—Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Clarence Thomas—to form a voting bloc of four. Balancing that is a four-member liberal bloc made up of Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.”).

27. 131 S. Ct. 2729 (2011).

28. 556 F.3d 950 (9th Cir. 2009).

29. CAL. CIV. CODE §§ 1746–1746.5 (West 2009), *invalidated by* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

Rather than join the opinion of the Court authored by Justice Antonin Scalia<sup>30</sup>—an opinion that atypically found Republican appointees Justices Scalia and Anthony M. Kennedy joined by all three female justices (Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan)<sup>31</sup> who were nominated by Democrats<sup>32</sup>—Justice Alito wrote a concurring opinion that declared the law void for vagueness.<sup>33</sup> Justice Alito, significantly, completely dodged the more difficult First Amendment issue in *Brown* of whether the statute passed constitutional muster under the strict scrutiny standard of review—an issue that was thoroughly addressed and resolved against California by Justice Scalia in the opinion of the Court.<sup>34</sup> Justice Alito wrote:

I conclude that the California violent video game law fails to provide the fair notice that the Constitution requires. And I would go no further. I would not express any view on whether a properly drawn statute would or would not survive First Amendment scrutiny. We should address that question only if and when it is necessary to do so.<sup>35</sup>

Although refusing to wade into the First Amendment thicket, Justice Alito's utter revulsion with violent video games as a form of expression was palpable in *Brown*. He characterized the violence in video games as “astounding,”<sup>36</sup> emphasized that “[v]ictims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws,”<sup>37</sup> and added that it “appears that there is no antisocial theme too base for some in the video-game industry to exploit.”<sup>38</sup> He warned:

If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an

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30. *Brown*, 131 S. Ct. at 2732.

31. *Id.*

32. See SUPREME COURT OF THE U.S., *supra* note 22 (noting that both Justices Scalia and Kennedy were nominated to the Court by Ronald Reagan, while Justice Ginsburg was nominated by Bill Clinton, and Justices Sotomayor and Kagan were nominated by Barack Obama).

33. *Brown*, 131 S. Ct. at 2743 (Alito, J., concurring) (concluding that “the California law does not define ‘violent video games’ with the ‘narrow specificity’ that the Constitution demands”).

34. *Id.* at 2742-43; *cf. id.* at 2738 (majority opinion) (writing that “[b]ecause the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest,” and concluding that “California cannot meet that standard”).

35. *Id.* at 2746 (Alito, J., concurring).

36. *Id.* at 2749.

37. *Id.*

38. *Id.*

extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.<sup>39</sup>

Such descriptions and characterizations by Justice Alito drew an open rebuke from Justice Scalia, who wrote that “Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression.”<sup>40</sup> As if to pound home the constitutional point to Justice Alito that disgusting expression merits First Amendment protection, Justice Scalia responded in a footnote directly to Justice Alito’s assertion that Justice Scalia treated the problems posed by video games far too lightly.<sup>41</sup> Justice Scalia lectured Justice Alito that:

Perhaps [violent video games] do present a problem, and perhaps none of us would allow our own children to play them. But there are all sorts of “problems”—some of them surely more serious than this one—that cannot be addressed by governmental restriction of free expression: for example, the problem of encouraging anti-Semitism (*National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*)), the problem of spreading a political philosophy hostile to the Constitution (*Noto v. United States*, 367 U.S. 290 (1961)), or the problem of encouraging disrespect for the Nation’s flag (*Texas v. Johnson*, 491 U.S. 397 (1989)).<sup>42</sup>

In this author’s opinion, Justice Alito’s concurrence in *Brown* might be better characterized as a dissent-light. Much of his concurrence, in fact, was spent criticizing the opinion of the Court written by Justice Scalia,<sup>43</sup> and Justice Alito went so far as to express the sentiment that the dissents of Justices Stephen G. Breyer and Clarence Thomas “raise valid concerns.”<sup>44</sup> Indeed, at least one syndicated columnist who opined on the Court’s decision mistakenly stated that Justice Alito dissented,<sup>45</sup> while

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39. *Id.* at 2750.

40. *Id.* at 2738 (majority opinion).

41. *Id.* at 2739 n.8.

42. *Id.* (citations omitted).

43. Among other things, Justice Alito: (1) called Justice Scalia “wrong” for stating that the decision in *United States v. Stevens* controlled the case; (2) asserted that the Scalia-authored opinion “distorts the effect of the California law”; (3) lambasted the opinion of the Court as “far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before”; and (4) characterized the opinion of the Court as “untroubled” by the possibility that, in the future, violent video games “allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.” *Id.* at 2747–48, 2750 (Alito, J., concurring).

44. *Id.* at 2746–47.

45. See Suzanne Fields, *The Right Ruling on Video Games: Justices Rightly Wary of Censorship Slippery Slope*, WASH. TIMES (June 29, 2011), <http://www.washingtontimes.com/news/>

other newspaper articles noted how Justice Alito praised the efforts of California lawmakers and devoted most of his opinion to describing just how graphic violent video games are.<sup>46</sup>

This Article argues that Justice Alito's dissents in *Stevens* and *Snyder*, as well as his concurrence in *Brown*, when considered along with his prior opinions involving controversial forms of expression, demonstrate that he embraces a very subjective approach to First Amendment jurisprudence that privileges what he apparently considers to be decent speech of high value. The Article contends that this philosophy involves two key components:

- *A morality factor* (involving cultural-based judgments about decency, distaste, disgust, offense, and outrage); and
- *A substantive-merits factor* (involving intellectual judgments about the perceived political value and contribution of speech toward democracy).

Part II of this Article provides a brief primer on dissenting opinions, including their general purpose and some of the problems they pose for both the legal system and their authors. Then, Part III examines, in case-by-case fashion, Justice Alito's dissenting opinions in *Stevens* and *Snyder* and his concurrence in *Brown*. Next, Part IV compares and contrasts Justice Alito's opinions in these three cases with his prior decisions, whether they are from either Justice Alito's previous stint on the Third Circuit or his current tenure on the Supreme Court, in which he has ruled in favor of free-speech interests. Finally, the Article concludes in Part V by attempting to synthesize Justice Alito's opinions into a larger, coherent narrative through which he appears to view issues of freedom of expression.

## II. THE ART AND REASONING OF THE DISSENTING OPINION: A BRIEF PRIMER

This Part initially analyzes the purposes and goals served by dissenting opinions. It then describes the writing style of dissenting opinions and some of the substantive characteristics that make for powerful dissents. Finally, this Part addresses the drawbacks and problems sometimes created by dissenting opinions. Viewed collectively, then, the three sections in this Part help to provide a filter or

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2011/jun/29/supremes-equate-video-violence-with-fre-980915290/ ("Justice Samuel Anthony Alito Jr., in a dissenting opinion, cogently argued that society should keep a close eye on the developing technology and its impact on impressionable minors.").

46. See, e.g., David G. Savage, *State's Law on Video Games Voided*, L.A. TIMES, June 28, 2011, at A1 (reporting in this manner on Justice Alito's concurrence).



lens through which to evaluate Justice Alito's twin dissents in *Stevens* and *Snyder*, something this Article attempts to do in Part III.

*A. An Eye Toward the Future: Correction, Redemption, and Legal Advancement*

*"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."*<sup>47</sup>

So wrote former Chief Justice Charles Evans Hughes more than seventy-five years ago.<sup>48</sup> Echoing this sentiment regarding what might be called the long-view of the redemptive power of the dissent, the late Justice William Brennan observed, in a law journal article devoted solely to dissenting opinions, that "[i]n its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority's legal analysis. It is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case."<sup>49</sup> A well-written dissent can facilitate this process by informing "future litigants about alternative strategies, as well as innovative, even bold ways of reframing their goals, in the face of an unfavorable majority decision."<sup>50</sup>

Appellate court jurists at the state level concur with this corrective function. For instance, Carrington T. Marshall, former Chief Justice of the Ohio Supreme Court, wrote ninety years ago:

I conceive it to be the most laudable purpose of a dissenting opinion to record a protest against declarations of principles which are unsound, and to prevent such declarations from becoming firmly established precedents; to serve notice upon all present and future members of the court that a wrong has been committed and should and must be righted at the earliest opportunity.<sup>51</sup>

In brief, one of the fundamental purposes of a dissent is advancement of the law at a future time<sup>52</sup> by pointing out errors or

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47. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS* 68 (1928) (emphasis added).

48. *Id.*

49. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

50. Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 102 (2008).

51. *State ex rel. Durbin v. Smith*, 133 N.E. 457, 461-62 (Ohio 1921) (Marshall, C.J., dissenting).

52. See *R.C. Equity Grp. v. Zoning Comm'n*, 939 A.2d 1122, 1140 n.11 (Conn. 2008) (Norcott, J., dissenting) (writing that "one of the fundamental purposes of a dissenting opinion . . . is

weaknesses in the logic of a majority opinion.<sup>53</sup> The challenge to the majority's analysis brought by a dissent thus has been described as an "internal corrective function."<sup>54</sup> Viewed even more broadly, at the macro-level of free speech in a democratic society, the right to dissent, Justice Brennan added, "is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births."<sup>55</sup>

Perhaps, then, Justice Alito fancies his solo dissents in *Stevens* and *Snyder* as possessing a future corrective power, akin to that of the lone dissent by Justice John Marshall Harlan in the racial-segregation case of *Plessy v. Ferguson*<sup>56</sup>—a solo dissent with logic and reasoning that eventually carried the day in *Brown v. Board of Education*<sup>57</sup> more than a half-century after *Plessy*. Indeed, Justice Harlan's dissent in *Plessy*, which may have been influenced by the fact that he had a black half-brother,<sup>58</sup> has been dubbed "the paramount example for both eloquent dissent and the power of a single justice to shape future decisions while preserving the moral righteousness of the court."<sup>59</sup>

If Justice Alito, however, continues to follow a course of what Allison Orr Larsen, a one-time clerk for former Justice David H. Souter, calls the path of the "perpetual dissent"<sup>60</sup> in First Amendment cases

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to contribute to the subsequent development of the law, via legislation or judicial decision making").

53. See Leroy Rountree Hassell, Sr., Chief Justice of the Supreme Court of Va., Appellate Dissent: A Worthwhile Endeavor or an Exercise in Futility?, Address at the Clarence Clyde Ferguson, Jr. Lecture at Howard University School of Law (Oct. 9, 2003), in 47 HOW. L.J. 383, 388 (2004) ("The most important function of a dissent, in my view, is to expose the perceived error or weaknesses in the logic that the majority has chosen to employ in its decision.").

54. Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1337.

55. Brennan, *supra* note 49, at 438.

56. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). In dissenting from the majority's embrace of a separate-but-equal interpretation of the Fourteenth Amendment's Equal Protection Clause in *Plessy*, Justice Harlan wrote:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

*Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

57. 347 U.S. 483 (1954).

58. See Amelia Newcomb, *A Seminal Supreme Court Race Case Reverberates a Century Later: Did a Black Half-Brother Play a Role in Justice Harlan's 'Color Blind' Dissent?*, CHRISTIAN SCI. MONITOR, July 9, 1996, at 11 (describing Justice Harlan's relationship with his black half-brother, Robert Harlan, "a wealthy horse racer and politician who served in the Ohio legislature and in several Republican patronage appointments").

59. Randall T. Shepard, Perspectives, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 338 (2005).

60. Allison Orr Larsen, Essay, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447 (2008).

involving offensive expression, there are dangers inherent with such a position. Larsen reasons that “[l]ike the boy who cries wolf, a perpetual dissenter waters down the impact of his message when he ‘continues to adhere to his dissents’ on a regular basis and on a wide variety of subjects.”<sup>61</sup> She adds that “[w]hen a Justice repeats a dissenting view in a subsequent case just because he lost the first time around, he is—at least arguably—acting politically. Given the potential costs to this strategy, it should not become commonplace.”<sup>62</sup>

A course of constant and consistent dissents by a justice on a particular topic may, in fact, lay the groundwork for a judicial shift over the course of time.<sup>63</sup> Justice Alito seems, as addressed in Part III, to be starting just such a steady stream of dissents that might well provide the foundation, over time, for a shift away from the Supreme Court’s long-standing protection of offensive expression.<sup>64</sup>

### *B. Qualities of Important Dissenting Opinions: Emotion plus Reason*

In terms of writing style, lone dissenting opinions often feature what Northwestern University Professor Jon Waltz alliteratively calls “flashes of forensic force.”<sup>65</sup> That may be the case because, as Waltz contends, the individual dissenter “does not hope to change his associates’ current stance” and thus “is bound by fewer constraints.”<sup>66</sup> Indeed, Randall T. Shepard, Chief Justice of the Indiana Supreme Court, asserts that dissents are most commonly thought of “as moments of

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61. *Id.* at 476.

62. *Id.* at 477.

63. Professors Paul H. Edelman and Jim Chen wrote a decade ago:

The “Court record” that William H. Rehnquist may have set by filing fifty-four solo dissents as an Associate Justice arguably paved the way for the conservative landmarks established under his leadership. Then-Justice Rehnquist endured long enough to fulfill his “confident” prophecy in dissent that a robust view of federalism would “in time again command the support of a majority of [the] Court.”

Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131, 210-11 (2001) (footnote omitted).

64. See *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding the First Amendment right of citizens to burn the American flag in a public venue as a form of symbolic political expression against the policies of the Ronald 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 (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); see *infra* Part III.

65. Jon R. Waltz, *Advise and Dissent*, WASH. POST, Aug. 4, 1974, at 173 (reviewing ALAN BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSIDENTS IN THE SUPREME COURT* (1974)).

66. *Id.*

poetic protest, a moment when the losing side on appeal rises up in dudgeon to take pokes at the majority.”<sup>67</sup>

Beyond the poetics and rhetorical flourishes, however, dissents must be well reasoned and principled, rather than mere cathartic emotional exercises or swipes based on personal animus against a party,<sup>68</sup> in order to later carry the weight that Justice Harlan’s *Plessy* dissent did in *Brown*. As federal appellate court judge Frank X. Altimari explains:

A reasoned dissent is proof positive that the law is not an accumulation of worn concepts and beliefs. It is a living, vibrant, ambulatory repository of reason and logic, and it lives for all future generations to read and dwell upon. Hopefully, a dissent is that rare combination of mind and heart which, for a singular moment, are in total harmony with each other. Above all, a dissent should make common sense, for what common sense tells us, the law ought to ordain.<sup>69</sup>

Harvard Law School Professor Mark Tushnet thus identifies a trio of fundamental characteristics shared by great dissents: (1) they are vindicated by the future; (2) their words not only garner attention, but trigger new, imaginative thinking; and (3) they articulate “an account of democracy and self-government that cannot fail to move the reader.”<sup>70</sup>

### *C. Some Reasons to Avoid Writing Dissents: Burdens and Risks*

Dissents, despite the opportunity to turn a fine phrase and possibly influence the law down the road, are not necessarily something that appellate court judges enjoy writing. Robert G. Flanders, Jr., an associate justice of the Rhode Island Supreme Court, explained more than a decade ago:

Instead of having to prepare and file a dissent, they would much prefer to join the majority and thus be on the prevailing side of an appeal. If an appellate judge’s views about a case do not conform to those of his or her colleagues, then most such judges are amenable to reexamining their position to determine whether they should reconsider their initial

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67. Shepard, *supra* note 59, at 337.

68. See *Maguire v. Journal Sentinel, Inc.*, 605 N.W.2d 881, 893 n.6 (Wis. Ct. App. 1999) (asserting that “an appellate judge should file a separate opinion only in a case of conscientious difference on fundamental principles,” noting that a dissenting opinion should express reasons rather than feelings, and adding that “there is never an instance when an appellate decision should contain an attack on a party based upon an apparent grudge or personal opinion unsupported by the record”).

69. Frank X. Altimari, *Foreword: The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275, 277 (1993).

70. I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 98-99 (Mark Tushnet ed., 2008) [hereinafter Tushnet].

judgments in light of their colleagues' contrary opinions. Thus, joining the majority is the best way for an appellate judge to avoid having to take on the burden and the risk of writing a dissent that may not, after all, represent the best resolution to any given case.<sup>71</sup>

There are other reasons why dissents are not always favored. First, they can cause friction and rifts among members of a court when they take on a tone of personal attack against fellow jurists<sup>72</sup> and, in turn, harm the public image of the judiciary.<sup>73</sup> As U.S. Circuit Court Judge Kermit V. Lipez recently wrote, "[i]n the collegial world of appellate judging, where the dominant impulse is consensus, dissents depart from the norm. If their language is sharp, the dissents may offend colleagues and worry court watchers who expect consensus."<sup>74</sup>

Second, there is a major "concern that published dissents weaken the rule of law."<sup>75</sup> It is an apprehension so great that some countries make it a crime for a judge to publish a dissent.<sup>76</sup> Conversely, a unanimous opinion can carry greater force and bring enhanced respect for the Court. Justice Ginsburg observed in 2008:

No doubt, as Chief Justice Roberts suggested, the U.S. Supreme Court may attract greater deference, and provide clearer guidance, when it speaks with one voice. And I agree that a Justice, contemplating publication of a separate writing, should always ask herself: Is this dissent or concurrence really necessary? Consider the extra weight carried by the Court's unanimous opinion in *Brown v. Board of Education*. In that case, all nine Justices signed on to one opinion making it clear that the Constitution does not tolerate legally enforced segregation in our Nation's schools.<sup>77</sup>

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71. Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 401 (1999).

72. Deanell Reece Tacha, a federal appellate court judge, emphasized this problem in 1995, when she wrote:

We all recognize that the purpose of a dissent or concurrence is to illuminate more fully the substantive merits of an issue. But, in my opinion, they should never attempt to discredit the personal integrity or intellectual acumen of one's colleagues. It is distressing to sometimes perceive the lack of such mutual respect on other courts.

Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 590 (1995).

73. Shepard, *supra* note 59, at 338 (writing that "some scholars emphasize the darker side of dissents—damage to congeniality on courts, harms to the public image of the judiciary, and the jurisprudential confusion they sometimes breed").

74. Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313, 314 (2005).

75. Tushnet, *supra* note 70, at XIII.

76. *Id.*

77. Ruth Bader Ginsburg, *Dissent Is an 'Appeal' for the Future*, ALASKA B. RAG, Apr.-June 2008, at 1, 6 (emphasis added) (footnote omitted).

This raises the question, of course, when considering Justice Alito's dissents in *Stevens* and *Snyder* in Part III of this Article, whether they were, in fact, really necessary. More importantly, do they have the potential to change the High Court's First Amendment jurisprudence when speech that offends is the matter in dispute? That is a question to which only time—perhaps a very long time—will tell the answer.

### III. *STEVENS, SNYDER, AND BROWN*: AN ANALYSIS OF JUSTICE ALITO'S OPINIONS INVOLVING OFFENSIVE EXPRESSION IN A TRIO OF CASES

This Part analyzes Justice Alito's recent opinions in a trio of free-speech controversies, starting with the oldest case and ending with the most recent. This order for the three cases was chosen because it may reveal a trajectory or evolution—or, in contrast, a contradiction—in the reasoning of Justice Alito in First Amendment controversies pivoting on offensive expression. Each of the three sections begins with a brief overview of the majority opinion in the relevant case, followed by a more lengthy and detailed analysis of Justice Alito's separate opinion.

In analyzing the dissenting opinions in *Stevens* and *Snyder*, this Part identifies and distinguishes between apparent efforts at rhetorical and emotional appeals, on the one hand, and the use of more detached and principled legal reasoning, on the other, by Justice Alito. The analysis also keeps in mind the risks and dangers identified in Part II regarding dissenting opinions, and both Justice Alito's apparent efforts to avoid them and where he may have failed in this respect.<sup>78</sup> Ultimately, this Part attempts to fathom Justice Alito's evolving free-speech philosophy when it comes to offensive forms of expression.

#### A. *United States v. Stevens*

##### 1. Overview of the Opinion of the Court

In *Stevens*, an eight-justice majority of the Court: (1) initially refused to recognize a new category of unprotected speech for depictions of animal cruelty;<sup>79</sup> and then (2) struck down, as substantially overbroad, a federal statute ostensibly targeting crush videos but that, as the majority wrote, created “a criminal prohibition of alarming breadth.”<sup>80</sup> In reaching these two results, the majority precluded neither the possibility

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78. See *supra* Part II.C.

79. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

80. *Id.* at 1588, 1592.

that there may be additional categories of unprotected expression that it has yet to recognize<sup>81</sup> nor the prospect that a more carefully and narrowly crafted statute targeting animal cruelty might pass constitutional muster.<sup>82</sup>

As to the possibility that there may be additional classes of unprotected speech beyond those the Court previously has identified, the majority made it clear that future categorical exclusions will not be based on “a simple balancing test” that does no more than weigh the value of the speech against its societal costs.<sup>83</sup> Chief Justice Roberts wrote for the majority:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.<sup>84</sup>

Instead of embracing such a value-based approach that purports to balance the burdens and benefits of speech, Chief Justice Roberts used the example of child pornography—a current category of unprotected expression—to indicate that speech typically will go completely unprotected by the First Amendment only when its production is inextricably intertwined with abuse of humans, is linked directly to conduct that is illegal throughout the nation, and perpetuates a market for the resulting speech product.<sup>85</sup>

Finally, the majority rejected the notion that the federal crush-video statute’s inclusion of an exemption provision—a provision similar to the third prong of the Supreme Court’s current test for obscenity<sup>86</sup> developed nearly four decades ago in *Miller v. California*<sup>87</sup>—was sufficient to save

81. See *id.* at 1586 (writing that there may be “some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law,” and adding that “[w]e need not foreclose the future recognition of such additional categories”).

82. See *id.* at 1592 (“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.”).

83. *Id.* at 1585.

84. *Id.*

85. *Id.* at 1586.

86. Obscenity is not protected by the First Amendment’s guarantee of free speech. *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”).

87. 413 U.S. 15 (1973). In *Miller*, the Court held that when determining whether material is obscene, jurors and judges must consider: (1) whether “the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to [a] prurient interest”;

it from unconstitutionality.<sup>88</sup> In particular, the third part of the *Miller* obscenity test provides that speech must be considered non-obscene if it possesses serious literary, artistic, political, or scientific value.<sup>89</sup> Similarly, the statute at issue in *Stevens* provided an exemption for depictions of animal cruelty that have “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”<sup>90</sup>

Chief Justice Roberts observed the limited scope of applicability of the third prong of the *Miller* test, noting that in *Miller* the Court did not “determine that serious value could be used as a general precondition to protecting *other* types of speech.”<sup>91</sup> The “other” refers to speech *other than* sexually-explicit content,<sup>92</sup> meaning that statutory inclusion of a *Miller*-like third prong apparently is not a constitutional cure-all. Chief Justice Roberts added that “the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception” of the statute in *Stevens* targeting violent images, not sexually explicit ones.<sup>93</sup>

## 2. Justice Alito’s Dissent in *Stevens*

To provide a mechanism for delineating and highlighting the various themes within Justice Alito’s dissent in *Stevens*, this section of the Article uses sub-headings.

### a. Emotional, Rhetorical Punches and Value Judgments About Speech

The opening sentences of Justice Alito’s dissent in *Stevens* pull no punches. They are loaded with raw emotion, rebuking the majority for delivering an opinion that, in Justice Alito’s mind, likely will lead to the proliferation of crush videos:

The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent *horrific* acts of animal *cruelty*—in particular, the creation and commercial *exploitation* of “crush videos,” a form of *depraved* entertainment that

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(2) whether it “depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and (3) whether, “*taken as a whole*, [the work] *lacks serious literary, artistic, political, or scientific value*.” *Id.* at 24 (emphasis added) (citations omitted) (internal quotation marks omitted).

88. See *Stevens*, 130 S. Ct. at 1590.

89. *Miller*, 413 U.S. at 24.

90. *Stevens*, 130 S. Ct. at 1582-83 (quoting 18 U.S.C. § 48(b) (2006), *amended by* Animal Crush Video Prohibition Act of 2010, 18 U.S.C. § 48 (Supp. IV 2011)).

91. *Id.* at 1591.

92. *Id.*

93. *Id.*



has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted.<sup>94</sup>

The italicized words above—"horrific," "cruelty," "exploitation," and "depraved"—pack an emotional wallop that allows Justice Alito immediately and seamlessly to create a crucial value-based dichotomy—valueless speech<sup>95</sup> versus, as he put it, "a valuable statute."<sup>96</sup> This instantly put him in direct opposition to the approach agreed upon by the eight-justice majority, namely that the fact that speech is of low value or little social benefit does not, standing alone, mean that it should go without First Amendment protection.<sup>97</sup> Justice Alito, in contrast, seems quite comfortable with making value judgments about speech and, in particular, with censoring speech that he perceives as valueless.

#### b. Speech Versus Conduct

Justice Alito's dissent gives short shrift to the First Amendment interests within his value-versus-valueless speech dichotomy by suggesting the statute was not intended to suppress speech, but was designed to quash conduct, particularly "horrific acts of animal cruelty."<sup>98</sup> In other words, Justice Alito appears to play a second dichotomy card—the distinction between speech and conduct—that allows the government to suppress speech in order to squelch the underlying conduct.<sup>99</sup>

This tactic harkens back four decades to Justice Harry Blackmun's dissent in another offensive speech case, *Cohen v. California*.<sup>100</sup> Deploying a speech-versus-conduct framing in order to foist the case

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94. *Id.* at 1592 (Alito, J., dissenting) (emphasis added).

95. *See id.* (contending that crush videos are "depraved entertainment that has no social value").

96. *Id.*

97. *See supra* text accompanying notes 83-85.

98. *Stevens*, 130 S. Ct. at 1592 (Alito, J., dissenting).

99. As Justice Alito explained:

The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

*Id.* at 1598-99.

100. 403 U.S. 15 (1971).

outside of the realm of possible First Amendment protection, Justice Blackmun initially determined that *Cohen* was about “mainly conduct and little speech.”<sup>101</sup> Openly deriding Paul Robert Cohen’s wearing of a jacket emblazoned with the words “Fuck the Draft” as an “absurd and immature antic,”<sup>102</sup> and attacking the majority’s “agonizing over First Amendment values”<sup>103</sup>—as if free-speech theory was seemingly irrelevant—as “misplaced and unnecessary,”<sup>104</sup> Justice Blackmun’s dissent thus arguably provides a template upon which Justice Alito could mount his own in *Stevens*. In other words, if the speech is offensive, then what Justices Blackmun and Alito are really concerned with is the conduct that underlies that speech.

### c. The Parade of Horrors Argument

Perhaps even more disappointing in *Stevens* than his emotional rhetoric is Justice Alito’s quick appeal—in his second sentence, no less—to a speculative, parade-of-horrors argument<sup>105</sup> to justify upholding the crush-video statute.<sup>106</sup> The majority’s action simply is “unwarranted,”<sup>107</sup> Justice Alito asserts, because the floodgates now might well open, directly due to its decision, to release an outpouring of new titles in the crush-video industry.<sup>108</sup>

One federal appellate court recently observed, “[t]he strength of a proposed parade of horrors . . . lies ‘in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil represented by the imagined parade, and (2) the probability that the parade will in fact materialize.’”<sup>109</sup> In the case of Justice Alito’s appeal to a proposed parade of horrors, the weakness lies in the fact that the probability that the parade will in fact materialize is minimal.

It will be recalled, for instance, that the majority did *not* hold that crush-video statutes must always be deemed unconstitutional, but rather that the specific one at issue in *Stevens* simply was too poorly drafted to

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101. *Id.* at 27 (Blackmun, J., dissenting).

102. *Id.*

103. *Id.*

104. *Id.*

105. See Eric Lode, Comment, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469, 1470-71 (1999) (discussing the “parade of horrors” metaphor).

106. *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (Alito, J., dissenting).

107. *Id.*

108. *Id.* (contending that the majority’s decision “has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production”).

109. *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1046 (9th Cir. 2005) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 986 n.11 (1991)).

survive judicial review.<sup>110</sup> As Chief Justice Roberts wrote, the justices “need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.”<sup>111</sup> In other words, Chief Justice Roberts was not giving the go-ahead for the proliferation of crush videos, but rather was telegraphing to Congress that it might go back to the legislative drawing board to try again. This, in fact, is what Congress did in response to *Stevens*, with a revised version of 18 U.S.C. § 48 now in place that provides a more carefully drafted definition of “animal crush videos” and a new list of exceptions to their prohibition.<sup>112</sup> Justice Alito’s emotional appeal to a parade of prospective horrors stemming from the majority’s decision in *Stevens* thus carries little legal weight.

#### d. A More Reasoned, Dispassionate Approach

After these opening emotional salvos, Justice Alito settled into a much more detailed and formal criticism of the legal standard applied by the majority—namely, the overbreadth doctrine—to declare the federal statute at issue unconstitutional.<sup>113</sup> In brief, he asserted that rather than employ a facial invalidity test such as overbreadth, the majority instead should have used an as-applied challenge,<sup>114</sup> such as the strict scrutiny standard<sup>115</sup> that typically applies to content-based statutes.<sup>116</sup> As Justice

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110. *Stevens*, 130 S. Ct. at 1592.

111. *Id.*

112. See Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177 (codified as amended at 18 U.S.C. § 48 (Supp. IV 2011)); see also Gene Policinski, *New Year Will See Some Old First Amendment Issues*, SAN ANTONIO EXPRESS-NEWS, Jan. 6, 2011, <http://www.mysanantonio.com/community/northeast/news/article/New-Year-will-see-some-old-First-Amendment-issues-937262.php> (observing that “[a] just-signed federal law outlawing so-called ‘crush videos’ replaced an earlier version voided this year by the Supreme Court” and adding that “[t]he new law was crafted in response to the justices’ decision that the original was too broadly written to be enforced, and might be used against legitimate productions such as hunting films”).

113. *Stevens*, 130 S. Ct. at 1593-94 (Alito, J., dissenting).

114. *Id.* The difference between facial and as-applied challenges was encapsulated in a recent law journal article:

To challenge a measure, individuals can bring either a facial or an as-applied challenge or both. A successful facial challenge finds the measure, or the part at issue, unconstitutional per se, and it is no more. A successful as-applied challenge, as the name implies, finds the measure or its part unconstitutional as applied to the individual, leaving it otherwise intact.

Roger Pilon, *Foreword: Facial v. As-Applied Challenges: Does It Matter?*, 2009 CATO SUP. CT. REV. vii, ix.

115. 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 Commc’ns of 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

Alito wrote, “[t]he ‘strong medicine’ of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court.”<sup>117</sup> He thus concluded there was “no reason to depart here from the generally preferred procedure of considering the question of overbreadth only as a last resort.”<sup>118</sup>

Chief Justice Roberts responded, in a footnote, to Justice Alito’s contention that the majority applied the wrong rule to analyze the case. Chief Justice Roberts wrote that “no as-applied claim has been preserved. Neither court below construed Stevens’s briefs as adequately developing a separate attack on a defined subset of the statute’s applications (say, dogfighting videos).”<sup>119</sup>

That a disagreement arose among the justices on whether a facial or an as-applied challenge was more appropriate to apply is not at all surprising, and thus Justice Alito’s departure from the majority here cannot be viewed as either an unwarranted criticism or a personal attack. As Harvard Law School Professor Richard H. Fallon, Jr. has observed, “within the Supreme Court and among scholarly commentators, a debate rages over when litigants should be able to challenge statutes as ‘facially’ invalid, rather than merely invalid ‘as applied.’”<sup>120</sup> This debate, in turn, falls within what Professor David L. Faigman dubs as a “larger and ever present struggle over how constitutional issues should be framed.”<sup>121</sup>

What is somewhat unusual, however, is that Chief Justice Roberts opted to employ a facial challenge in *Stevens*.<sup>122</sup> Columbia Law School Professor Gillian E. Metzger wrote in 2009—one year before the High Court’s ruling in *Stevens*—that a “recurring theme of the Roberts Court’s jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation. On a number of occasions the Court has rejected facial constitutional challenges while reserving the

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it chooses the least restrictive means to further the articulated interest”).

116. See generally Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657 (2010) (addressing the differences between facial challenges and as-applied challenges).

117. *Stevens*, 130 S. Ct. at 1593 (Alito, J., dissenting).

118. *Id.* at 1594.

119. *Id.* at 1587 n.3 (majority opinion).

120. Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000) (emphasis omitted).

121. David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L.Q. 631, 655 (2009).

122. *Stevens*, 130 S. Ct. at 1587.

possibility that narrower as-applied claims might succeed.”<sup>123</sup> She adds that “the Roberts Court has advocated the as-applied approach in contexts in which facial challenges were previously the norm, suggesting that it intends to restrict the availability of facial challenges more than in the past.”<sup>124</sup> In brief, Chief Justice Roberts’s deployment of a facial challenge in *Stevens* is out of step with Metzger’s analysis of his prior jurisprudence. Perhaps, then, Justice Alito’s contention that an as-applied challenge should have been used in *Stevens* merely reflects an effort to call the majority back to a legal course it previously charted under Chief Justice Roberts’s leadership. Indeed, if it is true, as one scholar suggested, that “Supreme Court jurisprudence is in disarray concerning facial and as-applied challenges to the constitutionality of statutes,”<sup>125</sup> then Justice Alito might simply have been suggesting that there was no reason to abandon a developing and consistent path of avoiding facial challenges whenever possible.

Justice Alito, however, perhaps demonstrating a desire not to offend his fellow justices or to cause future workplace friction or antagonization, nonetheless provided his own facial analysis of the federal statute under the strictures of the overbreadth doctrine. This tactic may be characterized, in this author’s opinion, as an “assuming *arguendo* strategy.” In other words, while vigorously asserting that overbreadth was the incorrect doctrine to apply in *Stevens*, Justice Alito nevertheless applied it himself to show that, for the sake of argument, the statute still should have been held constitutional and that the majority reached the wrong conclusion, regardless of its mode of analysis.<sup>126</sup>

In particular, Justice Alito challenged the majority’s conclusion that the law was overbroad because it would sweep within its ambit otherwise lawful “depictions of hunters killing or wounding game and depictions of animals being slaughtered for food.”<sup>127</sup> Justice Alito reasoned that the examples the majority set forth to demonstrate overbreadth were, in fact, of a very limited nature, leading him to conclude that the statute at issue did “not appear to have a large number of unconstitutional applications. Invalidation for overbreadth is appropriate only if the challenged statute suffers from *substantial overbreadth*—judged not just in absolute terms, but in relation to the

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123. Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 773 (2009).

124. *Id.* at 773-74.

125. Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1748 (2006).

126. *Stevens*, 130 S. Ct. at 1594 (Alito, J., dissenting).

127. *Id.*

statute's 'plainly legitimate sweep.'"<sup>128</sup> In brief, Justice Alito was clear that for a statute to be overbroad, it must be *substantially* overbroad and that the recitation of a few examples of potential overbreadth will not alone suffice to render a statute unconstitutional.

Justice Alito also gave the statute a narrowing construction by reasoning that, contrary to the majority's conclusion, it "does not apply to depictions of hunting."<sup>129</sup> He reasoned here that because the statute at issue "targets depictions of '*animal cruelty*,'"<sup>130</sup> it "may reasonably be interpreted not to reach most if not all hunting depictions."<sup>131</sup> In other words, the phrase "animal cruelty" narrowly confined the statute's sweep. Furthermore, Justice Alito turned to legislative intent, concluding that "I do not have the slightest doubt that Congress, in enacting § 48, had no intention of restricting the creation, sale, or possession of depictions of hunting. Proponents of the law made this point clearly."<sup>132</sup>

As for those hunting videos that might conceivably fall within the statute's reach, Justice Alito concluded that most would still be protected under the portion of the statute safeguarding a depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."<sup>133</sup> As Justice Alito wrote, "I would hold that hunting depictions fall comfortably within the exception set out in § 48(b)."<sup>134</sup> As for any hunting depictions that might *not* fall within one of the exceptions specified in this sub-section, those cases, Justice Alito determined, would be so "isolated"—in other words, so few and so far between—that they would not illustrate *substantial* overbreadth.<sup>135</sup>

In summary, Justice Alito took a very different tack than the majority in applying the overbreadth doctrine. By engaging in an analysis that used legislative intent and a narrowing construction, Justice Alito read virtually any overbreadth out of the law. But Justice Alito was not done; he went on to do more than just save the statute from an unconstitutional demise at the hands of an overbreadth challenge.

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128. *Id.* at 1597 (emphasis added) (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)).

129. *Id.* at 1595.

130. *Id.* (emphasis added).

131. *Id.*

132. *Id.* at 1596.

133. 18 U.S.C. § 48(b) (2006), amended by Animal Crush Video Prohibition Act of 2010, 18 U.S.C. § 48 (Supp. IV 2011); *Stevens*, 130 S. Ct. at 1596 (Alito, J., dissenting).

134. *Stevens*, 130 S. Ct. at 1596 (Alito, J., dissenting).

135. *Id.*

## e. A New Category of Unprotected Expression

After concluding the statute was not overbroad, Justice Alito refocused his analysis specifically on crush videos, characterizing them as “a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos.”<sup>136</sup> This set the stage for Justice Alito’s close comparison between crush videos and child pornography—or, as Professor Miller W. Shealy Jr. recently dubbed Justice Alito’s analogy, “a rather interesting comparison.”<sup>137</sup>

Child pornography is one of the few categories of speech not protected by the First Amendment.<sup>138</sup> It thus makes sense that Justice Alito would draw comparisons between it and crush videos, given his obvious revulsion for them.<sup>139</sup> In 1982, the Supreme Court in *New York v. Ferber*<sup>140</sup> upheld, against a First Amendment challenge, a New York statute targeting the production and distribution of child pornography,<sup>141</sup> reasoning that “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance”<sup>142</sup> and finding “that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.”<sup>143</sup> The *Ferber* Court buttressed its conclusion that child pornography constitutes an unprotected category of speech by determining that:

The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.<sup>144</sup>

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136. *Id.* at 1599.

137. Miller W. Shealy Jr., *The Best of the Supremes: A Review of the U.S. Supreme Court Term, 2009-2010*, S.C. LAW., Nov. 2010, at 24, 28.

138. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002).

139. *See supra* Part III.A.2.a.

140. 458 U.S. 747 (1982).

141. *Id.* at 750, 774.

142. *Id.* at 757.

143. *Id.* at 758 (footnote omitted).

144. *Id.* at 759 (footnote omitted).

Finally, the Court in *Ferber* observed near legislative uniformity in the United States when it comes to the production of child pornography, noting that “*virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating ‘child pornography.’*”<sup>145</sup> It added that “[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the *production of such materials, an activity illegal throughout the Nation.*”<sup>146</sup>

Justice Alito analogized crush videos to child pornography and, in particular, to the Court’s reasoning in *Ferber*.<sup>147</sup> For instance, just as the production of child pornography was universally forbidden in the United States at the time of *Ferber*,<sup>148</sup> so too was animal cruelty banned at the time of *Stevens*.<sup>149</sup> Furthermore, just as minors are necessarily harmed to create the speech product that is child pornography,<sup>150</sup> so too are animals necessarily harmed to create the speech products that are crush videos.<sup>151</sup> Justice Alito thus concluded that “[a]pplying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.”<sup>152</sup>

#### f. Summary of Justice Alito’s Dissent in *Stevens*

Justice Alito led his *Stevens* dissent with an initial emotional punch that not only telegraphed his revulsion with crush videos, but also reflected the two factors in his free-speech philosophy noted in the Introduction: (1) a morality factor; and (2) a substantive-merits factor.<sup>153</sup> Crush videos are both an immoral form of speech—they are

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145. *Id.* at 758 (emphasis added).

146. *Id.* at 761 (emphasis added).

147. *United States v. Stevens*, 130 S. Ct. 1577, 1599 (2010) (Alito, J., dissenting) (opining that the Court in *Ferber* “held that child pornography is not protected speech, and I believe that *Ferber*’s reasoning dictates a similar conclusion here”).

148. *See supra* text accompanying note 145.

149. *Stevens*, 130 S. Ct. at 1598 (Alito, J., dissenting) (“It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty.”).

150. *Id.* at 1599.

151. *See id.* at 1600 (“[T]he harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations.”).

152. *Id.* at 1601.

153. *See discussion supra* Part I (describing the *morality factor* as involving cultural-based judgments about decency, distaste, disgust, offense, and outrage, and the *substantive-merits factor* as involving intellectual judgments about the perceived political value and contribution of speech toward democracy).



“depraved”<sup>154</sup>—and a type of expression “that has no social value.”<sup>155</sup> But after this lead and quickly playing what appear to be both a speech-versus-conduct card<sup>156</sup> and a parade-of-horrors trope,<sup>157</sup> Justice Alito settled into a much more detailed and level-headed criticism of the majority’s decision to apply a facial overbreadth challenge rather than an as-applied strict scrutiny test.<sup>158</sup> He then provided a detailed explanation of why crush videos are akin to child pornography in terms of the reason both should go without First Amendment protection.<sup>159</sup>

## B. Snyder v. Phelps

### 1. Overview of the Opinion of the Court

In *Snyder*, an eight-justice majority held that the First Amendment freedom of speech shielded members of the WBC from tort liability for holding signs conveying offensive messages,<sup>160</sup> while standing on public property about 1000 feet away from the funeral for a U.S. soldier killed in Iraq.<sup>161</sup> The case pivoted on a lawsuit filed by the deceased soldier’s father, Albert Snyder, who claimed he suffered emotional distress as a result of the WBC’s signs emblazoned with message such as “God Hates the USA/Thank God for 9/11,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” and “God Hates Fags.”<sup>162</sup> Mr. Snyder alleged he was “unable to separate the thought of his dead son from his thoughts of Westboro’s picketing.”<sup>163</sup> But as the majority emphasized, in what might have been an attempt to make *Snyder* an easy case—easy enough, at least, to get eight justices to agree with the result despite its emotionally troubling nature—“[a]lthough [Albert] Snyder testified that he could see the tops of the picket signs as he drove to the funeral, *he did not see what was written on the signs until later that night*, while watching a news broadcast covering the event.”<sup>164</sup>

Although the signs may have offended Albert Snyder, the majority emphasized that they also were imbued with content about “matters of public import,” including commentary on “the political and moral

154. *Stevens*, 130 S. Ct. at 1592 (Alito, J., dissenting).

155. *Id.*

156. *See supra* Part III.A.2.b.

157. *See supra* Part III.A.2.c.

158. *See supra* Part III.A.2.d.

159. *See supra* Part III.A.2.e.

160. *See supra* note 17 (describing the content of some of the signs).

161. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

162. *Id.* at 1213-14.

163. *Id.* at 1214.

164. *Id.* at 1213-14 (emphasis added).

conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy.”<sup>165</sup> In brief, the signs tapped directly into the core belief of the WBC—“that the United States is overly tolerant of sin and that God kills American soldiers as punishment.”<sup>166</sup> Writing the majority opinion, just as he had done in *Stevens*, Chief Justice Roberts reasoned:

Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder’s funeral, but did not itself disrupt that funeral, and Westboro’s choice to conduct its picketing at that time and place did not alter the nature of its speech.<sup>167</sup>

Chief Justice Roberts added that the Supreme Court could not react to such speech “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.”<sup>168</sup> In reaching this pro-free speech conclusion, Chief Justice Roberts observed that the majority’s ruling was “narrow.”<sup>169</sup> Indeed it was, due in large part to how the majority framed the case by concentrating on certain facts—the speech related to matters of public concern, took place on public property, and was not even seen at the funeral by Mr. Snyder<sup>170</sup>—and by eliminating certain, potentially complicating issues from its consideration.

In particular, the majority in *Snyder* failed to address or consider: (1) the alleged harm suffered by Mr. Snyder from reading the “epic” that was posted on the Internet by the WBC after the funeral and that contained “religiously oriented denunciations of the Snyders”;<sup>171</sup> (2) whether Mr. Snyder could actually prove the requisite elements of the underlying tort causes of actions;<sup>172</sup> (3) the constitutionality of legislatively created buffer zones around funerals to keep protestors away;<sup>173</sup> and (4) whether Mr. Snyder, as the target of the WBC’s speech

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165. *Id.* at 1217.

166. *Id.* at 1213.

167. *Id.* at 1220.

168. *Id.*

169. *Id.*

170. *Id.* at 1215, 1218-19.

171. *Id.* at 1214 n.1. Chief Justice Roberts avoided this issue by finding that “[t]he 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.” *Id.*

172. *See id.* at 1215 n.2 (writing that “we proceed on the unexamined premise that respondents’ speech was tortious”).

173. *See id.* at 1218 (observing how the Court had “no occasion to consider” either the constitutionality of Maryland’s funeral-protest statute or the constitutionality of “other similar

and the plaintiff in the lawsuit, was a private figure (rather than a public figure) and whether this plaintiff-status distinction should affect the Court's analysis of his intentional infliction of emotional distress claim in light of the Court's 1988 ruling in *Hustler Magazine, Inc. v. Falwell*.<sup>174</sup>

As First Amendment defense attorney Robert Corn-Revere and three fellow lawyers at Davis Wright Tremaine LLP recently noted, the majority opinion in *Snyder* "did not explicitly address the Fourth Circuit's broad holding extending *Hustler*'s protections to private-figure plaintiffs."<sup>175</sup> The Court thus dodged a question that the author of this Article posed elsewhere and that it would have been able to analyze in *Snyder*:

Should the same level of constitutional protection extended in 1988 by the United States Supreme Court in *Hustler Magazine v. Falwell* to defendants in intentional infliction of emotional distress cases brought by public figures and public officials who claim that speech causes them severe emotional distress be similarly applied to cases brought by private-figure plaintiffs when the speech at issue is both political and centers on a matter of public concern?<sup>176</sup>

Instead of addressing these issues, the majority concentrated on what it concluded were two very important "public" factual aspects of the case—the *content* of the speech (as focusing on matters of public concern) and the *public location* where the speech occurred.<sup>177</sup> Chief Justice Roberts made it plain that the WBC members, acting in compliance with police instructions, were peacefully standing on a small

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regulations" adopted across the country).

174. 485 U.S. 46 (1988). In *Hustler*, the High Court held that when public figures and public officials sue for intentional infliction of emotional distress based upon outrageous expression, they are required to prove—in addition to the underlying elements of intentional infliction of emotional distress—"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. As Professor Eugene Volokh observed in a law journal article published prior to the High Court's ruling in *Snyder*: "The plaintiff in *Snyder*, the father of the fallen marine Lance Corporal Matthew Snyder, is not a public figure, and some have argued that this makes the reasoning of *Hustler* inapplicable." Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 304.

175. Robert Corn-Revere et al., *It's All Over But the Shouting: Despite Early Mixed Signals, Eight Justices Vote to Protect Funeral Protests*, MEDIA, PRIVACY & DEFAMATION L. COMMITTEE NEWSL. (Am. Bar Ass'n, Tort Trial & Ins. Practice Section, Chi., Ill.), Spring 2011, at 13, 13, available at [http://www.americanbar.org/content/dam/aba/uncategorized/tips/media/2011\\_media\\_spring.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/tips/media/2011_media_spring.pdf).

176. Clay Calvert, *War & [Emotional] Peace: Death in Iraq and the Need to Constitutionalize Speech-Based IIED Claims Beyond Hustler Magazine v. Falwell*, 29 N. ILL. U. L. REV. 51, 57 (2008) (footnote omitted).

177. *Snyder*, 131 S. Ct. at 1216, 1218-19.

patch of public land next to a public street about 1000 feet away from the church where the funeral for Matthew Snyder was being held.<sup>178</sup> He 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.”<sup>179</sup>

The majority opinion in *Snyder* thus amounts to an exercise of what Professor Cass Sunstein calls “judicial minimalism,”<sup>180</sup> in which justices “decide no more than they have to decide. They leave things open. They make deliberate decisions about what should be left unsaid. This practice is pervasive: doing and saying as little as necessary to justify an outcome.”<sup>181</sup> In particular, the majority’s decision reflects a subset of judicial minimalism sometimes known as procedural minimalism—in contrast with substantive minimalism—that “holds that a court (particularly the Supreme Court) should do what is necessary to resolve a constitutional case, but should avoid issues not necessary to the resolution of that particular case.”<sup>182</sup> That the Chief Justice would write such a minimalist decision for the eight-justice majority in *Snyder* is not surprising, however, given Chief Justice Roberts’s open embracement of minimalism.<sup>183</sup>

In summary, as narrowly framed by the majority, the end result in *Snyder*—Charles D. Tobin, chair of the American Bar Association’s Forum on Communications Law, recently hailed it as “a beautiful decision” and “the new high-water mark for protection of political expression”<sup>184</sup>—was almost a forgone conclusion, a done-deal in

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178. As Chief Justice Roberts wrote:

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

*Id.* at 1218–19.

179. *Id.* at 1219.

180. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996).

181. *Id.* at 6; see also Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J. L. & LIBERTY 347, 352 (2010) (“Minimalism is the view that courts should resolve cases by issuing narrow rulings that steer clear of broad principles and wide implications.”).

182. Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1459 (2000).

183. See Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 835–36 (2008) (describing “Chief Justice Roberts’s plea for narrowness and his suggestion that if it is not necessary for a court to say more to decide a case, it is necessary for a court not to say more to decide a case”).

184. Charles D. Tobin, *From the Chair: Inglorious Bastards and Other Patriotic Americans*, COMM. LAW. (Am. Bar Ass’n, Forum on Commc’ns Law, Chi., Ill.), June 2011, at 2, 2, available at [http://www.americanbar.org/content/dam/aba/publishing/communications\\_lawyer/june2011/comm\\_](http://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/june2011/comm_)

layspeak. As constitutional scholar Geoffrey Stone put it, the only surprise “was that anyone dissented.”<sup>185</sup> That dissent, of course, was authored by Justice Alito and, as the next subsection indicates, it was emotionally laden and angry in tone.

## 2. Justice Alito’s Dissent in *Snyder*

To understand the jarring nature of Justice Alito’s solo dissent in *Snyder*, a little bit of what might be considered contradictory and incongruous context is helpful. For instance, during the January 2006 U.S. Senate confirmation hearings for Justice Alito, Judge Edward Baker of the U.S. Court of Appeals for the Third Circuit testified that “[i]n hundreds of conferences, I have never once heard Sam raise his voice, express anger or sarcasm, or even try to proselytize. Rather, he expresses his views in measured and tempered tones.”<sup>186</sup>

That might have been the situation back in chambers when Justice Alito served on the Third Circuit, but his dissent in *Snyder* embodies an almost palpable sense of anger—repeated anger, no less—at the majority’s protection of the speech rights of the WBC members. Leading off with a blatantly emotional appeal, just as he had done in *Stevens*,<sup>187</sup> Justice Alito’s opening sentence characterized the speech of the WBC members as a “vicious verbal assault.”<sup>188</sup>

It is a theme that runs throughout his *Snyder* dissent, branding over and over again the WBC’s speech as an “attack,”<sup>189</sup> almost as if it were much more conduct and physical force than the expression of an opinion—another trope he used in *Stevens* by posing a speech-versus-conduct dichotomy<sup>190</sup>—and thus, as conduct, not subject to the strictures of the First Amendment. Perhaps this was Justice Alito’s rhetorical

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185. Nina Totenberg, *High Court Rules for Anti-Gay Protestors at Funerals*, NPR (Mar. 2, 2011), <http://www.npr.org/2011/03/02/134194491/high-court-rules-for-military-funeral-protesters>. 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. 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.*

*Id.* (emphasis added).

186. Mary L. Clark, *My Brethren’s (Gate) Keeper? Testimony by U.S. Judges at Others’ Supreme Court Confirmation Hearings: Its Implications for Judicial Independence and Judicial Ethics*, 40 ARIZ. ST. L.J. 1181, 1189 (2008) (internal quotation marks omitted).

187. See *supra* Part III.A.2.a.

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

189. See *infra* text accompanying notes 191-209.

190. See *supra* Part III.A.2.b.

strategy—to constantly pound home the emotional point about just how atrocious the conduct *and* the speech was in *Snyder* and, in turn, to demonstrate precisely why it did not warrant any federal constitutional protection in the face of state-law tort claims.

#### a. Speech as an Attack—A Repetitive Attack, That Is

To obtain a better grasp on the emotional repetitiousness of Justice Alito's writing, it helps to visualize his continual use of the same (or very similar) phrases, stripped of their accompanying prose. In particular, Justice Alito utilized the following terms, apparently interchangeably, to characterize the speech of the WBC's members:

- “vicious verbal *assault*”<sup>191</sup>
- “malevolent verbal *attack*”<sup>192</sup>
- “respondents’ right to *brutalize* Mr. Snyder”<sup>193</sup>
- “vicious verbal *attacks*”<sup>194</sup>
- “an *attack* like the one at issue here”<sup>195</sup>
- “respondents *brutally attacked* Matthew Snyder”<sup>196</sup>
- “verbal *assaults*”<sup>197</sup>
- “this *attack* was not speech on a matter of public concern”<sup>198</sup>
- “a verbal *attack*”<sup>199</sup>
- “respondents’ *attack* on Matthew Snyder”<sup>200</sup>
- “respondents’ personal *attack* on Matthew Snyder”<sup>201</sup>
- “the sting of their *attack*”<sup>202</sup>
- “a cold and calculated strategy to *slash a stranger*”<sup>203</sup>
- “actionable verbal *attacks*”<sup>204</sup>
- “a verbal *assault*”<sup>205</sup>
- “the wounds inflicted by vicious verbal *assaults*”<sup>206</sup>
- “the verbal *attacks* that severely wounded petitioner”<sup>207</sup>

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191. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting) (emphasis added).

192. *Id.* (emphasis added).

193. *Id.* (emphasis added).

194. *Id.* (emphasis added).

195. *Id.* at 1223 (emphasis added).

196. *Id.* (emphasis added).

197. *Id.* at 1224 (emphasis added).

198. *Id.* at 1226 (emphasis added).

199. *Id.* (emphasis added).

200. *Id.* at 1227 (emphasis added).

201. *Id.* (emphasis added).

202. *Id.* (emphasis added).

203. *Id.* (emphasis added).

204. *Id.* (emphasis added).

205. *Id.* (emphasis added).

206. *Id.* (emphasis added).

207. *Id.* (emphasis added).

- “a personal verbal *assault*”<sup>208</sup>
- “*brutalization* of innocent victims”<sup>209</sup>

One must wonder if such repetition of the word “attack,” as well as the use of similar words like “assault,” “slash,” and “brutalization,” amounts to rhetorical overkill that distracts from and diminishes the more substantive parts and points of Justice Alito’s argument. Is there really a logical, principled need for using a variation of the word “attack” more than one dozen times in a single dissenting opinion? Did Justice Alito overplay the “forensic force”<sup>210</sup> card and sacrifice reason by equating the speech of WBC members to virtual fisticuffs?

Indeed, Justice Alito’s heated rhetoric may have been what caused Chief Justice Roberts to describe Justice Alito as flat-out “wrong” at one point in the majority opinion.<sup>211</sup> In other words, rather than write in more convivial, neutral, or temperate tones that there was, perhaps, a “disagreement of opinion” or a “divergence of logic” on a particular point of law between the majority and dissent, Chief Justice Roberts pulled no punches and bluntly blasted his colleague as “wrong.”<sup>212</sup> It will be recalled that one of the dangers of writing dissents is offending colleagues on the same court.<sup>213</sup> Justice Alito may have crossed into this danger zone by writing a dissent that was described variously in the news media as “blistering,”<sup>214</sup> “muscular,”<sup>215</sup> and “strongly worded.”<sup>216</sup>

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

209. *Id.* at 1229 (emphasis added).

210. Waltz, *supra* note 65, at 173.

211. In particular, the Chief Justice wrote in a footnote:

The dissent is *wrong* to suggest that the Court considers a public street “a free-fire zone in which otherwise actionable verbal attacks are shielded from liability.” The fact that Westboro conducted its picketing adjacent to a public street does not insulate the speech from liability, but instead heightens concerns that what is at issue is an effort to communicate to the public the church’s views on matters of public concern. That is why our precedents so clearly recognize the special significance of this traditional public forum.

*Snyder*, 131 S. Ct. at 1218 n.4 (emphasis added) (citation omitted).

212. *Id.*

213. See *supra* notes 72-74 and accompanying text.

214. Robert Knight, *High Cost of Free Speech: Military Families Take the Hit for First Amendment Protection*, WASH. TIMES (Mar. 4, 2011), <http://www.washingtontimes.com/news/2011/mar/4/high-cost-of-free-speech/?page=all>.

215. Robert Barnes, *Alito Stands Alone on Supreme Court’s First Amendment Cases*, WASH. POST, Mar. 4, 2011, at A2.

216. Todd Etshman, *Reaction to Westboro Ruling: Correct, Disturbing*, DAILY REC. (Mar. 3, 2011, 5:15 PM), <http://nydailyrecord.com/blog/2011/03/03/reaction-to-westboro-ruling%E2%80%8888correct-disturbing/>.

### b. Drawing Unclear Lines Between Emotional Attacks

Strikingly, Justice Alito cited the Supreme Court's 1964 ruling in the seminal defamation case of *Sullivan* to acknowledge that WBC members are free under the First Amendment to "express their views in terms that are 'uninhibited,' 'vehement,' and 'caustic.'"<sup>217</sup> Fathoming a distinct and clear difference is not so straightforward, however, between speech that Justice Alito considers permissible by the WBC—expression that is uninhibited, vehement, and caustic—and speech he considers impermissible—expression amounting to an attack. Put differently, where is the legal border that demarcates and separates speech that is caustic and vehement from speech that assaults and attacks? Perhaps Justice Alito's emotions might have clouded his reasoning in leading him to believe that there are, indeed, logical and precise legal standards that distinguish vehement and caustic expression from that speech which attacks.

Justice Alito's statements asserting that the WBC members "brutally attacked Matthew Snyder"<sup>218</sup> and launched a "personal attack on Matthew Snyder"<sup>219</sup> seem particularly disingenuous. Why? Because, to be blunt, Matthew Snyder was dead and, in turn, he was not the plaintiff in the case.

From a legal perspective, Matthew Snyder could not have been "attacked," either physically or emotionally, by the speech. There is, for instance, a "centuries-old rule against liability for defamation of [the] dead,"<sup>220</sup> and the right of privacy is generally considered to be a personal right that cannot be vicariously asserted.<sup>221</sup> Matthew's father, Albert Snyder, was the only person who possibly could have experienced an attack.

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217. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting) (emphasis added) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

218. *Id.* at 1223.

219. *Id.* at 1227.

220. Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1525 (1989); see also Raymond Iryami, Note, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083, 1083 (1999) (observing that "common law courts have steadfastly refused to provide a private cause of action for defamation of the dead").

221. RESTATEMENT (SECOND) OF TORTS § 652I cmt. a (1977) (noting that "[t]he right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded").



## c. Familial Privacy Rights Trump Assaultive Speech

Perhaps Justice Alito in *Snyder* is seeking to extend what the author of this Article described in 2005 as “a nascent, inchoate, and sometimes politically-charged jurisprudence,” namely “the privacy of death.”<sup>222</sup> It is an emerging body of law in which courts focus “not simply on the privacy rights of the dead, but also on the privacy rights of the deceased’s immediate relatives. These rights include their ability to control the publication of postmortem images and the dying words of their departed loved ones.”<sup>223</sup>

For instance, in the federal Freedom of Information Act (“FOIA”)<sup>224</sup> dispute of *National Archives & Records Administration v. Favish*<sup>225</sup>—a case decided in 2004 before Justice Alito joined the High Court—Justice Kennedy wrote for a unanimous Court that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”<sup>226</sup> More specifically, the *Favish* Court held “that FOIA recognizes surviving family members’ right to personal privacy with respect to their close relative’s death-scene images.”<sup>227</sup>

Justice Alito seems to want to extend such relational privacy rights surrounding the dead to include a locational or geographic right of familial privacy *near*—not simply *at*—funerals. In the case of *Snyder*, the geographic sphere of privacy that Justice Alito evidently envisions would include at least a 1000-foot buffer zone near funerals, since that is approximately how far away the WBC members were from the funeral for Matthew Snyder.<sup>228</sup> George Washington University Professor Jeffrey Rosen suggests that Justice Alito’s dissent in *Snyder* positions Justice Alito, more than any other current justice, “as a stalwart defender of privacy, particularly in cases with strong free speech interests on the other side. He cares more about the government’s ability to protect a range of privacy values—including dignity, anonymity and community

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222. Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 133-34 (2006) (emphasis omitted).

223. *Id.* at 134 (emphasis added).

224. Freedom of Information Act of 2009, 5 U.S.C. § 552 (2006 & Supp. IV 2011).

225. 541 U.S. 157 (2004).

226. *Id.* at 168.

227. *Id.* at 170.

228. *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (observing that “[t]he picketing was conducted . . . some 1,000 feet from the church” (emphasis added)).

standards of decency—than anyone else on the court.”<sup>229</sup> Rosen goes so far in the same *Washington Post* commentary to anoint Justice Alito “America’s privacy cop.”<sup>230</sup>

Thus, while some lower courts have acknowledged both that “family members have a common law privacy right in the death images of a decedent, subject to certain limitations”<sup>231</sup> and that the Supreme Court’s ruling in *Favish* “did not limit the application of the family members’ privacy right to the Freedom of Information Act context,”<sup>232</sup> Justice Alito expands this emerging, common-law privacy right over gruesome death-scene images to the geographic areas surrounding ceremonies and rituals reserved for both reflection and celebration of the lives of the deceased.<sup>233</sup> This familial privacy right would trump freedom of speech when it comes to expression that, as Justice Alito put it, personally attacks the deceased whose life is being celebrated.<sup>234</sup>

Taken to its logical next step, this certainly puts a rather odd spin or twist on what constitutional law scholar Rodney Smolla characterizes as the “Child’s First Amendment,” under which the First Amendment would safeguard only that speech which is suitable for a child’s eyes or ears.<sup>235</sup> The Supreme Court has rejected this notion, making it clear that the First Amendment prohibits legislation that restricts expression to “only what is fit for children”<sup>236</sup> and that the governmental interest in protecting children from harmful materials “does not justify an unnecessarily broad suppression of speech addressed to adults.”<sup>237</sup>

Justice Alito, however, intimates that it *is* permissible—at least in the environs surrounding funerals and burial ceremonies—to eliminate expression that is critical of a deceased child (Matthew Snyder) when a surviving parent (Albert Snyder) is present.<sup>238</sup> In other words, he seemingly would permit legislation that contracts the sphere of

229. Jeffrey Rosen, *Supreme Privacy Protector*, WASH. POST, Mar. 6, 2011, at B4.

230. *Id.*

231. *Catsouras v. Dep’t of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 358 (Ct. App. 2010), *rev. denied*, 2010 Cal. LEXIS 3456 (Ct. App. Apr. 14, 2010); *see generally* Clay Calvert, *Salvaging Privacy & Tranquility from the Wreckage: Images of Death, Emotions of Distress & Remedies of Tort in the Age of the Internet*, 2010 MICH. ST. L. REV. 311 (discussing the California appellate court’s ruling in *Catsouras*).

232. *Catsouras*, 104 Cal. Rptr. 3d at 365.

233. *See Snyder*, 131 S. Ct. at 1227-28 (Alito, J., dissenting).

234. *See supra* text accompanying notes 188-89 (characterizing the speech of the WBC members as an attack on the deceased, Matthew Snyder).

235. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 328 (1992) (noting that under this theory, the First Amendment would permit the “regulation of speech implicating children in ways that would be impermissible for adults”).

236. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

237. *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

238. *See Snyder*, 131 S. Ct. at 1222, 1228 (Alito, J., dissenting).

permissible expression near funerals *to only that which is fit for a grieving parent*. One wonders whether Justice Alito is suggesting the development of what might be called “A Grieving Parent’s First Amendment.”

d. Borrowing a Page from the Critical Race Theory Playbook?

There is no small amount of irony that the conservative-leaning Justice Alito, with his repeated focus on verbal attacks, sounds almost like a liberal-leaning critical race theorist<sup>239</sup> from the *Words that Wound*<sup>240</sup> and the hate speech<sup>241</sup> movement era of the late 1980s and 1990s.<sup>242</sup> As Kathleen Sullivan, former Dean of Stanford Law School, succinctly encapsulated the views of some members of this legal faction, “[t]he new speech regulators . . . relativize the mind/body distinction by equating some verbal with physical assault. They deem *hate speech* an act of aggression with real costs to its victims: to be terrified into flight and silence can be *as bad an injury as a punch in the nose*.”<sup>243</sup>

Rather than focusing on racist verbal attacks that target members of historically oppressed groups, however, Justice Alito concentrates in *Snyder* on verbal volleys pinpointing private individuals at “a time of acute emotional vulnerability” and “intense emotional sensitivity.”<sup>244</sup> At one point, in fact, Justice Alito seemingly paraphrased the title of the book *Words that Wound* when he wrote that “respondents’ verbal assaults will wound the family and friends of the deceased.”<sup>245</sup>

Justice Alito’s overly repetitive use of variations of the word “attack” suggests an apparent attempt to blur, or even to obliterate, the traditional speech-conduct dichotomy that underlies so much of First

239. See generally Richard Delgado & Jean Stefancic, Essay, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) (providing an annotated list of major critical race theory works).

240. See generally MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

241. See generally Richard Delgado & Jean Stefancic, Essay, *Hateful Speech, Loving Communities: Why Our Notion of “A Just Balance” Changes So Slowly*, 82 CALIF. L. REV. 851 (1994) (providing an overview regarding the views of two competing camps of thought on hate speech regulation on college campuses); John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653 (1994) (providing an excellent overview of the concept of hate speech and debate surrounding its protection and punishment).

242. Although there is no judicially recognized definition of hate speech, it may be defined as “speech that expresses hatred or bias toward members of racial, religious, or other groups.” Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 488.

243. Kathleen M. Sullivan, Professor, Stanford Law Sch., *Free Speech Wars*, Lecture at Southern Methodist University Goldberg Lecture (Apr. 14, 1994), in 48 SMU L. REV. 203, 209 (1994) (emphasis added).

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

245. *Id.* at 1224 (emphasis added).

Amendment jurisprudence.<sup>246</sup> While the Supreme Court has held that certain types of conduct can rise to the level of speech for purposes of receiving First Amendment protection as forms of symbolic speech,<sup>247</sup> Justice Alito seemingly wants the converse to hold true—that certain types of speech can rise to the level of conduct (attacks and assaults, as he puts it) and thus be pushed outside the ambit of First Amendment protection.<sup>248</sup> As described earlier, Justice Alito also played the speech-versus-conduct dichotomy card in *Stevens*.<sup>249</sup>

#### e. Implicating the News Media As Complicit in the Harm?

Solidifying his use of the speech-versus-conduct dichotomy, Justice Alito spent much of his dissent focusing on the deliberate and exploitive *conduct* of the WBC members and how, in turn, their tactics and strategies—their conduct, in other words—set the stage for the harm Albert Snyder allegedly suffered from their speech. Justice Alito, for instance, condemned the WBC's "well-practiced *strategy* for attracting public attention"<sup>250</sup> and how it "has devised a *strategy* that remedies"<sup>251</sup> the potential problem of not garnering such attention. He noted, for instance, that "they issue press releases to ensure that their protests will attract public attention."<sup>252</sup>

Furthermore, Justice Alito asserted that the WBC members only argued "that the First Amendment gave them a license to engage in *such conduct*."<sup>253</sup> In brief, Justice Alito seems almost as perturbed by the WBC's well-orchestrated, strategic conduct and how the news media, in turn, fell prey to the WBC's tactics than he is by the WBC's speech.<sup>254</sup>

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246. Sullivan, *supra* note 243, at 206 (addressing the "mind/body distinction," and noting that "[i]n First Amendment controversies, this distinction is sometimes called the speech/conduct or the expression/action distinction"). Further, "[f]ree speech libertarianism holds speech privileged above conduct. Government may regulate the clash of bodies but not the stirring of hearts and minds." *Id.* "[The] mind/body distinction is inscribed deeply in modern First Amendment law" such that "when expression offends your sensibilities, the solution is not to call the sheriff but to turn the other cheek". *Id.*

247. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-67 (1991) (describing nude dancing as "expressive conduct within the outer perimeters of the First Amendment" and discussing "symbolic speech").

248. *Snyder*, 131 S. Ct. at 1223 (Alito, J., dissenting).

249. See *supra* notes 98-104 and accompanying text.

250. *Snyder*, 131 S. Ct. at 1223 (Alito, J., dissenting) (emphasis added).

251. *Id.* at 1224 (emphasis added).

252. *Id.*

253. *Id.* at 1223 (emphasis added).

254. Justice Alito wrote:

On the morning of Matthew Snyder's funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than

Being media savvy in terms of staging news events, however, does not exempt one from the protection of the First Amendment. If being media savvy were against the law, then no one would know, for example, of the otherwise unimportant Kardashian sisters,<sup>255</sup> and public relations firms that try to create favorable media buzz for their clients would be illegal. Likewise, manipulating the news media to gain a megaphone for one's message, even if it is offensive, does not strip one of constitutional protection. Using the news media is neither a crime nor a tort.

Perhaps Justice Alito's real gripe thus should lie with the news media outlets that feed on the type of visuals (hoisting signs with offensive messages<sup>256</sup>) and conflict (counter-protests staged by those who object to the WBC's speech) that the WBC members generate when they appear at funerals. As Justice Alito wrote, the WBC's "strategy works because . . . the media is irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain."<sup>257</sup>

His dissent may have done some good on this point, however, by forcing news media organizations to consider their coverage of the WBC. In an editorial about the *Snyder* decision, for instance, the *St. Louis Post-Dispatch* observed that "Justice Alito's dissent devoted considerable attention to the Phelps family's media strategy."<sup>258</sup> The newspaper's editorial board then reflected that "[t]he Phelps' vile protest antics are not new or newsworthy. News organizations should think long and hard before becoming patsies in Phelps' publicity schemes and, in

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5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.) But of course, a small group picketing at any of these locations would have probably gone unnoticed.

*Id.* at 1223-24 (footnotes omitted).

255. See Donna Freydkin, *Kardashians Take Brand to 'New York': Reality Sisters Dash Off to Open Clothing Store*, USA TODAY, Jan. 20, 2011, at 1D (providing background on Kim Kardashian); see also Tina Dirmann, *Well Adjusted: Paris Hilton, Embarking on a New Reality TV Series, Is Seeking to Put 'The Spoiled-Heiress Perception' to Rest*, L.A. TIMES, May 30, 2011, at D1 (describing Paris Hilton as "the Kim Kardashian of her day—a wealthy, attractive young woman, largely famous for being famous, who starred as a cover girl for gossip magazines and websites" (emphasis added)).

256. See, e.g., *Snyder*, 131 S. Ct. at 1213.

257. *Id.* at 1224 (Alito, J., dissenting).

258. Editorial, *Free to Hate Our View: Military Funeral Protests Are Free Speech But Not News*, ST. LOUIS POST-DISPATCH, Mar. 4, 2011, at A14.

doing so, inflict even more pain and suffering on grieving military families.”<sup>259</sup> In brief, Justice Alito’s decision may have influenced journalism ethics but not First Amendment law.

#### f. Framing the Rights to Be Balanced: An Uneven Scale

Justice Alito’s framing of the issue in *Snyder* in the second paragraph of his dissent seemed to pit what he apparently considers to be a fundamental right of relational privacy—a right to be left alone near funerals—against a First Amendment right of free expression.<sup>260</sup> He quickly lambasted the latter right, referring to it as a First Amendment “right to brutalize,” while dubbing the former privacy right as an “elementary right” of any parent “to bury his son in peace.”<sup>261</sup> When framed in this way in his second paragraph—a right to brutalize versus a right to peaceful burial—the direction of the rest of Justice Alito’s dissent was telegraphed, if not obvious, and it was clear which right, in his mind, should prevail.

An interesting question here is whether Justice Alito perceives this right of relational privacy near funerals and burial services to be a U.S. constitutional right and, if so, the source from which that right arises. Is it, as noted earlier,<sup>262</sup> a geographic, location-based privacy right, perhaps akin to what Justice William O. Douglas in *Griswold v. Connecticut*<sup>263</sup> called “the sacred precincts of marital bedrooms”?<sup>264</sup> Is Justice Alito suggesting that the areas within 1000 feet of funerals are similarly sacred precincts?

It is important also to note that *Griswold* focused on a relational family right—a right between a husband and a wife<sup>265</sup> that pivots on the “intimate relation of husband and wife.”<sup>266</sup> Justice Alito also seems focused on a relational privacy right in *Snyder*, namely the right of a parent to bury his or her child in peace.<sup>267</sup> In other words, if there are privacy rights between husband and wife, then there would seem to be a

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259. *Id.*

260. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

261. *Id.*

262. See *supra* notes 226-28 and accompanying text.

263. 381 U.S. 479 (1965).

264. *Id.* at 485.

265. See *id.* at 486 (focusing on “the notions of privacy surrounding the marriage relationship”).

266. *Id.* at 482.

267. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting). “Mr. Snyder wanted what is surely the *right of any parent* who experiences such an incalculable loss: *to bury his son in peace*. But respondents, members of the Westboro Baptist Church, deprived him of that *elementary right*.” *Id.* (emphasis added).

privacy right that stems from the offspring relationship between a father and son. Perhaps, then, the right of privacy that Justice Alito alludes to is a hybrid of both geographic and relational rights. It is disappointing that Justice Alito did not elaborate on the source of what he called an “elementary right”<sup>268</sup> that Albert Snyder possessed in burying his son, Matthew Snyder.

In the 2010 decision of *Doe v. Reed*,<sup>269</sup> centering on the disclosure of the names of signers of referendum petitions in Washington State,<sup>270</sup> Justice Alito wrote a concurring opinion in which he noted “a half century of our case law . . . firmly establishes that individuals have a right to privacy of belief and association.”<sup>271</sup> His focus in *Reed* on the importance and recognition of associational and informational privacy rights in the Constitution<sup>272</sup>—and the potential for harm if those rights are abused—suggests that Justice Alito may be willing to find a similar familial association privacy lurking in the U.S. Constitution that would protect the likes of Albert Snyder from harassment.<sup>273</sup>

#### g. Resurrecting *Chaplinsky v. New Hampshire*’s Low-Value Theory?

Another way of interpreting Justice Alito’s dissent in *Snyder* is to consider it as an effort to resuscitate or resurrect the low-value speech theory of *Chaplinsky v. New Hampshire*<sup>274</sup>—a theory which, as Professor Jeffrey M. Shaman asserts, is “based upon a good deal of reasoning that has since been repudiated by the Supreme Court itself.”<sup>275</sup> In fact, it is a theory that the majority in *Stevens* rejected as providing a sufficient rationale for eliminating speech from the scope of First Amendment

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268. *Id.*

269. 130 S. Ct. 2811 (2010).

270. *Id.* at 2815.

271. *Id.* at 2824 (Alito, J., concurring).

272. *Id.* at 2824-25.

273. In *Reed*, Justice Alito noted, with regard to release of the private information of referendum signers, that “[t]he potential that such information could be used for harassment is vast.” *Id.* at 2825.

274. 315 U.S. 568, 572 (1942). See Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 301 (1995) (“The low-value speech theory traces its genesis to a bit of Supreme Court dictum in the 1942 case of *Chaplinsky v. New Hampshire*.”).

275. *Id.* at 303.

protection.<sup>276</sup> In particular, Justice Alito, quoting *Chaplinsky*, wrote in his *Snyder* dissent:

This Court has recognized that words may “*by their very utterance inflict injury*” and that the First Amendment does not shield utterances that form “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.” When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.<sup>277</sup>

The first italicized portion of this quote taps into the Supreme Court’s two-part definition in *Chaplinsky* of fighting words—“*those which by their very utterance inflict injury* or tend to incite an immediate breach of the peace.”<sup>278</sup> While fighting words are not protected by the First Amendment,<sup>279</sup> the problem for Justice Alito with regard to the first, emphasized part of this definition is that there now is, as First Amendment scholar Rodney Smolla recently wrote, a “strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence.”<sup>280</sup> For instance, one federal appellate court wrote in 2008:

Although the “inflict-injury” alternative in *Chaplinsky*’s definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does not have a tendency to provoke an immediate breach of the peace.<sup>281</sup>

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276. Chief Justice Roberts wrote in *Stevens*:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. *Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (emphasis added).

277. *Snyder v. Phelps*, 131 S. Ct. 1207, 1223 (2011) (Alito, J., dissenting) (emphasis added) (citations omitted) (quoting *Chaplinsky*, 315 U.S. at 572).

278. *Chaplinsky*, 315 U.S. at 572 (emphasis added).

279. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (“It is clear that ‘fighting words’—those that provoke immediate violence—are not protected by the First Amendment.”).

280. Rodney A. Smolla, *Words “Which By Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009).

281. *Purtell v. Mason*, 527 F.3d 615, 624 (7th Cir. 2008).



Another federal appellate court observed in 1995 that “[f]ighting words is a small class of expressive conduct that is likely to provoke the average person to retaliate, and thereby cause a breach of the peace.”<sup>282</sup> Even more recently, a federal court in April 2011 defined fighting words as “words that by their very utterance provoke a swift physical retaliation and incite an immediate breach of the peace. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.”<sup>283</sup> It is key to notice here that the court has *not* defined fighting words as those that by their very utterance inflict injury, but rather as *those that by their very utterance provoke a fight*.

Smolla, president of Furman University, adds that “under current doctrine, expression may be punished only after tight requirements of intent, immediacy, and likelihood of causation are established,”<sup>284</sup> in stark contrast to the Justice Alito-quoted portion of *Chaplinsky*:

[S]uggest[ing] that it may be appropriate for society to prohibit and punish certain expression because the expression itself is inherently harmful. The words themselves are “bullets” that inflict injury. No extraneous proof of injury, no additional assessment of causation or imminence or likelihood of damage, is required to justify laws that penalize their utterance.<sup>285</sup>

In brief, as the author of this Article has argued elsewhere, the words which “*by their very utterance inflict injury*” portion of *Chaplinsky*’s definition of fighting words “has been implicitly jettisoned to the ash can of Constitutional refuse.”<sup>286</sup> It seems like a rather quixotic task for Justice Alito thus either to try to revive it or to lean on it for support in his *Snyder* dissent.

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282. *Knight Riders of the Ku Klux Klan v. City of Cincinnati*, 72 F.3d 43, 46 (6th Cir. 1995); see also *State v. Suhn*, 759 N.W.2d 546, 548 (S.D. 2008). “In decisions since the 1942 *Chaplinsky* decision, the United States Supreme Court has narrowed the ‘fighting words’ doctrine. The Court recognized that some ‘verbal tumult, discord, and even offensive utterance’ is necessary for free expression and debate.” *Suhn*, 759 N.W.2d at 548 (footnote omitted) (quoting *Cohen v. California*, 403 U.S. 15, 24-25 (1971)).

283. *Bethel v. City of Mobile*, No. 10-0009-CG-N, 2011 WL 1298130, at \*6 (S.D. Ala. Apr. 5, 2011) (emphasis added) (citation omitted).

284. Smolla, *supra* note 280, at 358.

285. *Id.* at 357 (emphasis omitted).

286. Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 2 (2010) (emphasis added).

C. *Brown v. Entertainment Merchants Ass'n*

## 1. Overview of the Opinion of the Court

Both Justices Scalia and Alito were born in Trenton, New Jersey.<sup>287</sup> In *Brown*, however, the two New Jersey justices could not have been any further apart from each other in terms of their reasoning and logic than Upper Saddle River<sup>288</sup> is demographically from Camden County in the Garden State.<sup>289</sup> The tension between the two actually was obvious during oral argument of the case in November 2010.<sup>290</sup> When Justice Scalia was questioning the attorney representing California about why an exception from the First Amendment freedom of speech should be made for violent content, the following exchange occurred:

**JUSTICE ALITO:** Well, I think what Justice Scalia wants to know is what James Madison thought about video games.  
(Laughter.)

**JUSTICE ALITO:** Did he enjoy them?

**JUSTICE SCALIA:** No, I want to know what James Madison thought about violence. Was there any indication that anybody thought, when the First Amendment was adopted, that there—there was an exception to it for—for speech regarding violence? Anybody?<sup>291</sup>

In authoring the opinion of the Court, Justice Scalia: (1) initially refused to carve out a new category of unprotected expression for violent content directed at minors, using the Court's earlier reasoning from *Stevens*<sup>292</sup> to support this conclusion;<sup>293</sup> and then (2) applied the strict scrutiny standard and found that the California statute could not pass constitutional muster under this rigorous form of judicial review.<sup>294</sup> Along the way, Justice Scalia and the four justices who joined the

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287. SUPREME COURT OF THE U.S., *supra* note 22.

288. In 2009, the estimated median household income in Upper Saddle River, New Jersey was \$161,779, and the estimated median house or condominium value that same year was \$926,150. *Upper Saddle River, New Jersey*, CITY-DATA.COM, <http://www.city-data.com/city/Upper-Saddle-River-New-Jersey.html> (last visited Mar. 1, 2012).

289. In 2009, the estimated median household income in Camden County, New Jersey was \$60,946, and estimated median house or condominium value that same year was \$226,900. *Camden County, New Jersey (NJ)*, CITY-DATA.COM, [http://www.city-data.com/county/Camden\\_County-NJ.html](http://www.city-data.com/county/Camden_County-NJ.html) (last visited Mar. 1, 2012).

290. Transcript of Oral Argument, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1448.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf).

291. *Id.* at 17.

292. See *supra* Part III.A.1 (describing the opinion of the Court in *Stevens*).

293. *Brown*, 131 S. Ct. at 2734-36.

294. *Id.* at 2738-42.

opinion of the Court<sup>295</sup> found: (1) the social science evidence proffered by California inadequate to demonstrate a compelling interest in protecting minors;<sup>296</sup> (2) the statute was under-inclusive in terms of serving its alleged interests;<sup>297</sup> and (3) the voluntary ratings system for video games “does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.”<sup>298</sup>

## 2. Justice Alito’s Concurrence in *Brown*

Although concurring opinions once were a rarity filed by the justices of the Supreme Court, they now are commonplace.<sup>299</sup> In a recent law journal article, Professor Robert F. Blomquist observes that “a concurring judicial opinion can be testy—or even downright hostile—to the majority opinion from which it reacts.”<sup>300</sup> But he adds that in the case of a pure concurring opinion—one like Justice Alito’s in *Brown* that is neither a partial dissent nor a partial concurrence—

we would expect the opinion to be congenial to the opinion in chief of the majority or plurality—although this can probably not be presumed; perhaps the concurrence agrees with the result or the reasoning of the court but takes the principal opinion of the court to task for not going far enough in expanding the holding, or for the opposite reason of going too far.<sup>301</sup>

Justice Alito’s concurrence in *Brown*, with which Chief Justice Roberts joined after the two Bush nominees had gone their separate

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295. The opinion of the Court was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. *Id.* at 2732.

296. *Id.* at 2738-39.

297. *Id.* at 2740. The Court stated:

California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. . . . California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

*Id.*

298. *Id.* at 2741.

299. See Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 903-04 (2009) (describing the rise in the writing of concurring opinions at the High Court level).

300. Robert F. Blomquist, *Concurrence, Posner-Style: Ten Ways to Look at the Concurring Opinions of Judge Richard A. Posner*, 71 ALB. L. REV. 37, 39 (2008).

301. *Id.* at 39-40 (emphasis added).

ways in both *Stevens* and *Snyder*,<sup>302</sup> is anything but congenial and, in fact, does take the opinion of the Court to task in an effect that seems clearly designed to weaken the strength of that opinion by openly questioning its reasoning and analysis.<sup>303</sup> Justice Alito's concurrence also appears to straddle the fence between the opinion of the Court and the two dissents in the case,<sup>304</sup> as it provides a very narrow reason for striking down California's law<sup>305</sup>—it was too vague in its terminology<sup>306</sup>—while simultaneously lauding the state's lawmakers for the efforts at protecting minors and helping parents.<sup>307</sup>

Indeed, Justice Alito praised California legislators for making “a pioneering effort” that was “well intentioned.”<sup>308</sup> He essentially encouraged lawmakers in California and other states to try again with a better crafted law, writing:

I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.<sup>309</sup>

He was simultaneously deferential to legislative judgment while critical of Justice Scalia, writing that “we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.”<sup>310</sup> He called Justice Scalia's opinion “far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before.”<sup>311</sup> He dubbed Justice Scalia's opinion “sweeping,”<sup>312</sup> implying that it went far too far. Justice Alito even suggested that proof of causation of harm caused by playing violent video games should not necessarily be required to uphold

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302. *Brown*, 131 S. Ct. at 2742 (Alito, J., concurring); see *supra* notes 21-23 and accompanying text.

303. *Brown*, 131 S. Ct. at 2742, 2746-48, 2751 (Alito, J., concurring).

304. Justices Clarence Thomas and Stephen Breyer filed separate dissents, neither of which was joined by another justice. *Id.* at 2751 (Thomas, J., dissenting); *id.* at 2761 (Breyer, J., dissenting).

305. *Id.* at 2751 (Alito, J., concurring).

306. See *id.* at 2742 (concluding that the statute's “terms are not framed with the precision that the Constitution demands”).

307. See *id.*

308. *Id.*

309. *Id.* at 2751.

310. *Id.* at 2742.

311. *Id.* at 2748.

312. *Id.* at 2747.

a similar law in the future, as he wrote that such social science evidence “may not be realistically obtainable given the nature of the phenomenon in question.”<sup>313</sup>

Furthermore, Justice Alito openly questioned Justice Scalia’s praise of the video game industry’s voluntary ratings system, remarking that “[t]he Court does not mention the fact that the industry adopted this system in response to the threat of federal regulation.”<sup>314</sup> He added that “[n]or does the Court acknowledge that compliance with this system at the time of the enactment of the California law left much to be desired—or that *future enforcement may decline if the video-game industry perceives that any threat of government regulation has vanished*.”<sup>315</sup> This last point seems to mark a return to the type of parade-of-horrors argument Justice Alito used in his *Stevens* dissent.<sup>316</sup> He speculates that if the video game industry interprets the result in *Brown* as an absolute victory for its side, then its own efforts at voluntary enforcement will decrease because it has nothing to fear in terms of possible governmental retribution.<sup>317</sup>

Justice Alito even added another sin of omission to Justice Scalia’s opinion, contending that Scalia failed to mention “that many parents today are simply not able to monitor their children’s use of computers and gaming devices.”<sup>318</sup> Apparently Justice Alito thus would like to see the government step into the parental role in such cases of parental irresponsibility.

Justice Alito ultimately attempted to undermine the weight of authority of the opinion of the Court when he called Justice Scalia flat-out “wrong in saying that the holding in *United States v. Stevens* . . . ‘controls this case.’”<sup>319</sup> The end result of Justice Alito’s opinion was, in the parlance of our times, a slap-down to the opinion of the Court. It may have been labeled a concurrence, but it came as close as possible to being a dissent masquerading as a concurring opinion.

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313. *Id.*

314. *Id.* at 2747-48.

315. *Id.* at 2748 (emphasis added) (footnote omitted).

316. *See supra* Part III.A.2.c.

317. *Brown*, 131 S. Ct. at 2747-48 (Alito, J., concurring).

318. *Id.* at 2748.

319. *Id.* at 2747.

### D. Summary

Two dissents and one very near dissent—a concurring opinion that takes the opinion of the Court to task. That is the bottom-line on the judicial scorecard for Justice Alito in *Stevens*, *Snyder*, and *Brown*.<sup>320</sup>

Justice Alito is no friend to speech that offends his sense of morality and substantive merit. He would carve out a new category of unprotected expression for repulsive forms of entertainment like crush videos,<sup>321</sup> and he would thwart hyperbolic speech that he finds amounts to personal attacks on private individuals during moments of grieving.<sup>322</sup> He would give legislators more deference and future opportunities to better craft legislation targeting violent video games.<sup>323</sup>

In contrast to his opinions in *Stevens*, *Snyder*, and *Brown*, Justice Alito has responded favorably to free speech concerns on a number of occasions throughout his judicial career. Some of those decisions are explored in the next part of this Article.

## IV. THE FREE-SPEECH FLIPSIDE: JUSTICE ALITO TO THE DEFENSE OF THE FIRST AMENDMENT, PARTICULARLY WHEN SPEECH IS POLITICAL

Despite his two recent dissents and one dissent-light described in Part III, Justice Alito has issued or joined with multiple opinions over the years in which he has strongly advocated for the protection of speech. In fact, on the same day Justice Alito issued his concurrence in *Brown* criticizing Justice Scalia's reasoning in the opinion of the Court, Justice Alito joined with all of his fellow Republican-nominated justices to strike down an Arizona funding statute that, as Chief Justice Roberts wrote for the majority, “substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.”<sup>324</sup> Chief Justice Roberts's opinion, with which Justice Alito joined, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*<sup>325</sup> focused on the primacy of political speech and rejected Arizona's efforts to level the playing field in terms of political expression by creating a matching funding scheme.<sup>326</sup> As Chief Justice Roberts reasoned, “‘Leveling the playing field’ can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a

320. See *supra* Part III.A.2.a–f, III.B.2.a–g, III.C.2.

321. See *supra* Part III.A.2.e.

322. See *supra* Part III.B.2.c.

323. See *supra* text accompanying notes 308–10.

324. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

325. 131 S. Ct. 2806 (2011).

326. *Id.* at 2825–26.

critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom.”<sup>327</sup>

This outcome was telegraphed in 2010 when Justice Alito joined with a majority in *Citizens United v. Federal Election Commission*<sup>328</sup> to support the rights of corporations (including non-profit public advocacy corporations) and unions to use independent expenditures to engage in political speech that advocates for the election or defeat of candidates and electioneering communications within thirty days of a primary election and sixty days of a general election.<sup>329</sup> The majority opinion, with which Justice Alito joined,<sup>330</sup> emphasized the primacy of political speech, noting that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people” and that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>331</sup>

Clearly these two cases illustrate that Justice Alito is a friend to political speech—speech that he apparently finds having, as the Introduction put it, substantive merit. Put differently, for Justice Alito there is a marked qualitative difference between forms of entertainment like crush videos and violent video games, as well as the hate speech of the WBC, than the speech of a political candidate running for office.

The rest of this Part of the Article thus examines some more of those instances in which Justice Alito has proffered pro-speech proclivities, attempting in the process to hit the highlights of Justice Alito’s pro-First Amendment positions. This Part thus provides a sharp, if not jarring, juxtaposition from the positions taken by Justice Alito in his opinions in *Stevens*, *Snyder*, and *Brown*.

#### A. *Davis v. Federal Election Commission*<sup>332</sup>

Justice Alito authored the opinion of the Court in *Davis*,<sup>333</sup> striking down part of the so-called “Millionaire’s Amendment” to the Bipartisan Campaign Reform Act of 2002 that “under certain circumstances, impose[d] different campaign contribution limits on candidates competing for the same congressional seat.”<sup>334</sup> In particular, the law

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327. *Id.* at 2826.

328. 130 S. Ct. 876 (2010).

329. *Id.* at 886-87, 917.

330. *Id.* at 886.

331. *Id.* at 898.

332. 554 U.S. 724 (2008).

333. *Id.* at 728.

334. *Id.* at 728-29, 744.

treated self-financing candidates differently from non-self-financing candidates, with the latter allowed “to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures”<sup>335</sup> once the self-financing candidate “spends more than \$350,000 in personal funds and creates what the statute apparently regards as a financial imbalance.”<sup>336</sup>

In declaring this law unconstitutional,<sup>337</sup> Justice Alito wrote that “[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.”<sup>338</sup> Justice Alito’s opinion in *Davis* arguably telegraphed his later decision to join with the majority in *Citizens United*, another case striking down a law imposing restrictions on funding for political speech.<sup>339</sup> He remarked, for instance, that the statute at issue in *Davis* “requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.”<sup>340</sup> Furthermore, in rejecting the argument that the statute was necessary to level the playing field between candidates based upon their finances, Justice Alito wrote:

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters’ choices.<sup>341</sup>

This closely tracks the notion echoed later in *Citizens United* that “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>342</sup> The majority in *Citizens United*, in which Justice Alito was a member, added that “[p]rohibited . . . are restrictions distinguishing among different speakers, allowing speech by some but not others.”<sup>343</sup>

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335. *Id.* at 729, 736.

336. *Id.* at 736.

337. *Id.* at 744.

338. *Id.* at 738.

339. See *supra* text accompanying notes 328–31.

340. *Davis*, 554 U.S. at 739.

341. *Id.* at 742.

342. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

343. *Id.* at 898.



B. Christian Legal Society v. Martinez<sup>344</sup>

As was the scenario in *Stevens* and *Snyder*, Justice Alito dissented in *Martinez*.<sup>345</sup> *Martinez* pivoted on the following issue, as framed by Justice Ginsburg for a five-justice majority:<sup>346</sup> “May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students?”<sup>347</sup> The policy, which was enforced by the Hastings College of the Law, which is a part of the University of California system of higher education, was dubbed an “all-comers” policy because student groups were forced to accept all other students who sought membership, regardless of factors such as the students’ sexual orientation and religion.<sup>348</sup> The policy was challenged by the Christian Legal Society student group, which had a policy denying membership to students based upon religion and sexual orientation.<sup>349</sup>

In addressing the issue framed by Justice Ginsburg, Justice Alito began his four-justice dissent—he was joined by fellow conservatives Chief Justice Roberts, Justice Scalia, and Justice Thomas<sup>350</sup>—with a remarkably pro-free speech statement that quotes, in part, the late Justice Oliver Wendell Holmes, Jr., who is perhaps best known for his instantiation of the marketplace of ideas theory<sup>351</sup> in First Amendment

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344. 130 S. Ct. 2971 (2010).

345. *Id.* at 3000 (Alito, J., dissenting).

346. The five-justice majority consisted of Justices Ginsburg, Stevens, Kennedy, Breyer, and Sotomayor. *Id.* at 2977 (majority opinion).

347. *Id.* at 2978.

348. *Id.* at 2978-79.

349. *Id.* at 2978, 2980-81.

350. *Id.* at 3000 (Alito, J., dissenting).

351. The marketplace of ideas theory of free expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 2 (2001). It has been described as “the dominant First Amendment metaphor.” LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 237 (1991). *See generally* SMOLLA, *supra* note 235, at 6-8 (providing an overview of the goals, strengths, and weaknesses of the marketplace of ideas theory).

On the other hand, Holmes also should not be forgotten as the justice who much more infamously—and in a far less enlightened fashion in which he appeared to embrace eugenics—opined, in the process of writing an opinion that upheld a Virginia law allowing for the forced sterilization of the mentally challenged, that “[t]hree generations of imbeciles are enough” and that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Buck v. Bell*, 274 U.S. 200, 207 (1927). First Amendment scholars, this author asserts, should not overlook the more problematic aspects of Holmes’s philosophy in areas other than the First Amendment freedom of speech in which he often is glorified.

jurisprudence.<sup>352</sup> “*The proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’*”<sup>353</sup>

Justice Alito seems to have tossed this notion out the judicial window in *Snyder*, of course, when he made it clear that the Court’s free speech jurisprudence should not protect the hate speech of the members of the WBC nearby funerals.<sup>354</sup> Justice Alito added that the majority’s decision in *Martinez* upholding Hastings’s exclusion of the Christian Legal Society as a registered student organization stood for the proposition that there is “no freedom for expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.”<sup>355</sup>

The speech in *Snyder*, of course, certainly was anything but politically correct—it was both anti-gay (“God Hates Fags”) and anti-family/anti-military (“Thank God for Dead Soldiers”).<sup>356</sup> Perhaps the pivotal difference for Justice Alito, however, is the *situs* of where the expression transpires—speech near a funeral versus speech, as he put it, in an “institution[] of higher learning.”<sup>357</sup>

The irony, of course, is that Justice Alito apparently would have defended the WBC if some of its members were students at Hastings and they, in turn, had sought recognition as a registered student organization. Justice Alito asserted, in attacking Hastings’s policy, that “[t]here are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization.”<sup>358</sup> He added that Hastings’s policy discriminates against “small unpopular groups.”<sup>359</sup> The WBC, if it is nothing else, is

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352. Holmes wrote more than ninety years ago:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the *ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

353. *Martinez*, 130 S. Ct. at 3000 (emphasis added) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

354. See *supra* Part III.B.2.a–g (analyzing Justice Alito’s dissent in *Snyder*).

355. *Martinez*, 130 S. Ct. at 3000.

356. See *supra* notes 17, 162 and accompanying text.

357. *Martinez*, 130 S. Ct. at 3000.

358. *Id.* at 3019.

359. *Id.*

both small and unpopular,<sup>360</sup> and thus Justice Alito clearly would have protected it from the strictures of Hastings's policy.

### C. *The High School Student Speech Cases*

Justice Alito has written two very free-speech friendly opinions in cases affecting the speech rights of students attending public high schools. Those opinions, one written while on the Supreme Court and the other authored when Justice Alito served on the U.S. Court of Appeals for the Third Circuit, are described below.

#### 1. *Morse v. Frederick*<sup>361</sup>

In June 2007, a narrow majority of the Supreme Court,<sup>362</sup> in an opinion authored by Chief Justice Roberts,<sup>363</sup> held in the student-speech case of *Morse* "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."<sup>364</sup> Specifically, Chief Justice Roberts concluded that Juneau-Douglas High School Principal Deborah Morse did not violate the First Amendment speech rights of student Joseph Frederick when, at a school-sanctioned and school-supervised event during the Olympic Torch Relay, she confiscated a banner Frederick and his mates had hoisted, carrying the inscrutable message, "BONG HiTS 4 JESUS."<sup>365</sup> In brief, the majority determined that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."<sup>366</sup>

Although Justice Alito agreed with the pro-censorship outcome in *Morse*, he authored a critical concurring opinion, joined by Justice Kennedy,<sup>367</sup> in which he opined:

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue,

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360. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) (noting that WBC members believe that "the United States is overly tolerant of sin and that God kills American soldiers as punishment").

361. 551 U.S. 393 (2007).

362. The ruling included a dissent by Justice John Paul Stevens that was joined by Justices David Souter and Ruth Bader Ginsburg. *Id.* at 433 (Stevens, J., dissenting).

363. *Id.* at 396 (majority opinion).

364. *Id.* at 397.

365. *Id.* at 396-98.

366. *Id.* at 403.

367. *Id.* at 422 (Alito, J., concurring).

including speech on issues such as “the wisdom of the war on drugs or of legalizing marijuana for medicinal use.”<sup>368</sup>

Justice Alito thus made it clear that had Joseph Frederick’s banner contained any political or social commentary, he would have switched sides and ruled in favor of the First Amendment speech interests of the student.<sup>369</sup> In other words, had Frederick’s banner said, “Legalize Medical Marijuana” or “Drug Laws Suck,” it seems that Justice Alito would have protected the speech because marijuana legalization is a political issue.

Justice Alito also attempted to cabin and confine the scope of Chief Justice Roberts’s *Morse* ruling by adding that “I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.”<sup>370</sup> Justice Alito emphasized that “illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits.”<sup>371</sup>

Furthermore, Justice Alito lent support for student speech rights when he opined that “[t]he opinion of the Court does *not* endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission.’”<sup>372</sup> In rejecting the government’s argument for such vast and expansive authority to censor students’ speech, Justice Alito asserted that the government’s proposed rule “can easily be manipulated in dangerous ways” and lead to “abuse.”<sup>373</sup>

In brief, while Justice Alito concurred with the result of a pro-censorship opinion, he attempted to make it abundantly clear that the reach of *Morse* was restricted to its rather quirky set of facts.<sup>374</sup> As the author of this Article asserted elsewhere, “Justice Alito, in fact,

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368. *Id.*

369. *See id.* at 423.

370. *Id.*

371. *Id.* at 425.

372. *Id.* at 423 (emphasis added).

373. *Id.*

374. *See* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 403 (2011) (describing how Justice Alito’s concurrence was intended “to highlight that the decision was limited to allowing restrictions of speech reasonably interpreted as advocating illegal drug use”).

repeatedly attempted to make it exceedingly clear that his concurrence in *Morse* was very limited and confined to the facts of the case.”<sup>375</sup>

Clearly Justice Alito in *Morse* was far more free-speech friendly than another Republican-nominated justice, namely Justice Thomas, who joined with the majority in both *Snyder* and *Stevens*.<sup>376</sup> Justice Thomas not only concurred with the pro-censorship result in *Morse*,<sup>377</sup> but wrote separately to argue that public school students possess no First Amendment speech rights whatsoever,<sup>378</sup> and to express his view that the seminal Supreme Court ruling recognizing students’ First Amendment speech rights, *Tinker v. Des Moines Independent Community School District*,<sup>379</sup> should be overruled.<sup>380</sup>

The bottom line, then, is that Justice Alito in *Morse* expressed support for protecting student speech that might be imbued with either political or social commentary. In addition, and unlike Justice Thomas, Justice Alito expressed his continuing support for the Supreme Court’s precedent in *Tinker*.<sup>381</sup>

## 2. *Saxe v. State College Area School District*<sup>382</sup>

Six years prior to his concurrence in *Morse*, Justice Alito signaled his support for public-school student speech rights while on the U.S. Court of Appeals for the Third Circuit. That is when he wrote the opinion for a unanimous three-judge panel in *Saxe*.<sup>383</sup> Justice Alito held in *Saxe* that a school district’s anti-harassment policy was substantially overbroad and thus violated the First Amendment speech rights of public school students.<sup>384</sup> Specifically, the policy at issue in *Saxe* provided that:

Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of

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375. Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court’s Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 9 (2008).

376. *Snyder v. Phelps*, 131 S. Ct. 1207, 1212 (2011); *United States v. Stevens*, 130 S. Ct. 1577, 1582 (2010).

377. *Morse*, 551 U.S. at 410 (Thomas, J., concurring).

378. *Id.* at 419 (“In light of the history of American public education, it cannot seriously be suggested that the First Amendment ‘freedom of speech’ encompasses a student’s right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students.”).

379. 393 U.S. 503 (1969).

380. *Morse*, 551 U.S. at 410 (Thomas, J., concurring).

381. *Id.* at 422 (Alito, J., concurring).

382. 240 F.3d 200 (3d Cir. 2001).

383. *Id.* at 202.

384. *See id.* at 217 (“The [school district’s policy] appears to cover substantially more speech than could be prohibited under *Tinker*’s substantial disruption test. Accordingly, we hold that the Policy is unconstitutionally overbroad.”).

any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning 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.<sup>385</sup>

What is very surprising in *Saxe*, in light of his recent opinions in *Stevens*, *Snyder*, and *Brown*, is the amount of time Justice Alito spent emphasizing that the First Amendment requires protecting offensive expression. For instance, Justice Alito wrote in *Saxe* that there is “no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs.”<sup>386</sup>

Furthermore, Justice Alito favorably quoted the Supreme Court’s inspiring *dicta* from the flag-burning case of *Texas v. Johnson*<sup>387</sup> 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 offensive or disagreeable.”<sup>388</sup> Justice Alito, in fact, encapsulated the High Court’s rulings in this area by observing that “[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”<sup>389</sup>

Justice Alito also suggested that offensive expression is particularly deserving of protection when it features a component of political commentary. In particular, he wrote, in the process of critiquing the State College Area School District’s anti-harassment policy, that:

By prohibiting disparaging speech directed at a person’s “values,” the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about “values” may offend is not cause for its prohibition, but rather the reason for its protection . . . .<sup>390</sup>

Justice Alito’s dissent in *Snyder* thus seems to be an abrupt and radical departure from his seeming embracement of the Court’s

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385. *Id.* at 202-03.

386. *Id.* at 206.

387. 491 U.S. 397 (1989).

388. *Saxe*, 240 F.3d at 209 (quoting *Johnson*, 491 U.S. at 414) (internal quotation marks omitted).

389. *Id.* at 215.

390. *Id.* at 210.

precedent for protecting offensive expression just a decade earlier in *Saxe*. One must wonder what provoked the shift in his decision-making over the intervening ten years.

During his nomination hearings to the Supreme Court and under questioning by Senator Russell D. Feingold, Justice Alito explained that the regulation at issue in *Saxe* “not only prohibited expression of political viewpoints, but went so far as to prohibit just about anything that you could say about another student.”<sup>391</sup>

In summary, Justice Alito will protect speech, especially if it is political or otherwise qualitatively important in nature.<sup>392</sup> He has demonstrated a willingness in both *Morse* and *Saxe* to protect the speech of minors,<sup>393</sup> something that Justice Thomas now is clearly unwilling to afford, given his dissent in *Brown*.<sup>394</sup> He is also quick to strike down funding laws that might somehow limit or otherwise affect the speech of candidates running for public office, as is evidenced by the opinion he authored in *Davis* and by the opinions with which he joined in both *Bennett* and *Citizens United*.<sup>395</sup>

## V. CONCLUSION

*“Dissents are not unwarranted annoyances, rather they contribute to the most important of all marketplaces—the marketplace of ideas.”*<sup>396</sup>

Judge Altimari’s observation provides an ironically fitting way to conclude an article about, in large part, the recent First Amendment-based, lone dissents of Justice Alito in *Stevens* and *Snyder*. Why? Because while Justice Alito’s twin dissents themselves may contribute to the High Court’s own marketplace of ideas, they all argue in favor of jettisoning from the larger marketplace of ideas<sup>397</sup> certain types of offensive expression: crush videos (*Stevens*) and hate speech (*Snyder*).

It remains to be seen, of course, whether Justice Alito’s dissents, as well as his complaints in his *Brown* concurrence about the content of violent video games and Justice Scalia’s reasoning, eventually will carry

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391. Andrew Trotter, *Alito Is Pressed on Student Speech, Stance on Affirmative Action Issues*, EDUC. WK., Jan. 18, 2006, at 28 (internal quotation marks omitted).

392. See *supra* Part IV.A–C.

393. See *supra* text accompanying notes 369–73, 382–84.

394. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) (writing that free speech “does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians”).

395. See *supra* text accompanying notes 324–34, 337–41.

396. Altimari, *supra* note 69, at 284 (emphasis added).

397. See *supra* notes 351–52 and accompanying text (discussing the marketplace of ideas theory).

the day in limiting the scope of uncivil expression that violates his standards of decency and substantive importance. Professor Mark Tushnet astutely observes that “[d]issents are vindicated because the social, economic, or political environment changes. Or they seem increasingly out of touch with reality for precisely the same reason.”<sup>398</sup>

That Justice Alito would write contentious dissenting opinions and a testy concurrence like that in *Brown* may be quite fitting for a jurist who took his seat only after a politically partisan and fractured Senate confirmation process.<sup>399</sup> Furthermore, he has proved more than willing and able to speak out bluntly—even if it was just moving his lips—when he appeared to mouth the words “not true” while shaking his head in response to President Barack Obama’s denunciation during the January 2010 State of the Union address of the Court’s ruling in the corporate and union speech case of *Citizens United*.<sup>400</sup> It thus may not be surprising that Justice Alito has the moxie to write lone dissents, even in cases like *Stevens* and *Snyder* where the split from his fellow justices cannot be explained on political or ideological grounds.<sup>401</sup>

During his January 2006 confirmation hearings, Justice Alito remarked that “it’s my job to apply the law. It’s not my job to change the law or to bend the law to achieve any result.”<sup>402</sup> Justice Alito’s recent dissents in *Stevens* and *Snyder*, however, suggest that he may be trying to change the law—in particular, First Amendment jurisprudence when it comes to offensive speech that he perceives to be of low value—in order to meet his own subjective standards of decency, civility, and substantive importance of expression. Perhaps the end result he seeks is a more civil, convivial, and refined marketplace of ideas that exists to serve the needs—not the wants—of a self-governing democracy and its citizens.

Speech, in contrast, that offends Justice Alito’s notions of decency and substantive value falls outside the scope of First Amendment protection. Indeed, Professor Geoffrey Stone recently called Justice

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398. Tushnet, *supra* note 70, at 222.

399. See David D. Kirkpatrick, *Alito Sworn In As Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21. The fifty-eight to forty-two vote to confirm Justice Alito “was unusually close and partisan. In the last 100 years of Supreme Court confirmations, only one vote was closer: the 52-to-48 decision to confirm Justice Clarence Thomas in 1991.” *Id.*

400. Robert Barnes, *Alito Dissents on Obama Critique of Court Decision*, WASH. POST, Jan. 28, 2010, at A6.

401. Cf. Robert J. Lunn, *A Minority of One*, DAILY REC., Mar. 7, 2011, at 4 (writing, from Lunn’s perspective as a former appellate court judge, that “an 8-1 decision is never a good thing if your views are embodied in the ‘1,’” and adding that it “was never easy to be a sole dissenter on those rare occasions when it happened, particularly where the split cannot be explained on ideological grounds”).

402. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 15 (2009).



Alito's dissents in both *Stevens* and *Snyder* "virtually lawless,"<sup>403</sup> adding that Justice Alito "seems almost off the charts in his seeming inability to follow settled law when it counters his gut sense of right and wrong."<sup>404</sup> Indeed, this may be why Justice Antonin Scalia had to remind Justice Alito in *Brown* that a personal sense of "disgust is not a valid basis for restricting expression."<sup>405</sup> Justice Alito's views certainly contradict the late Justice Hugo Black's admonition that "it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."<sup>406</sup> Justice Alito certainly seems to hate the ideas conveyed by the WBC, crush videos, and violent video games, but he chooses to jettison them from protection based upon what appears to be his subjective view that they simply amount to indecent communication.

Perhaps part of Justice Alito's philosophy was telegraphed during his prepared statement during his Senate confirmation hearings. That is when he contrasted the irresponsibility of the smart and "privileged people,"<sup>407</sup> he witnessed while studying at Princeton University with "the good sense and the decency of the people back in [his] community"<sup>408</sup> and "the good sense and the decency of [his] friends and [his] neighbors."<sup>409</sup> Conceivably, it is this latter italicized concept—*decency*—that underlies part of the First Amendment decision-making of Justice Alito. In particular, it is representative of what this Article described in the Introduction as the *morality factor* in Justice Alito's free-speech philosophy—a factor that favors decency, civility, and respectfulness in speech and that disfavors offensiveness, disgust, and outrageousness.<sup>410</sup>

Indeed, it is decidedly difficult to find any shred of decency among people who either kill helpless animals in the production of crush videos or exploit funerals for U.S. soldiers in order to selfishly attract media attention to their own hateful and hurtful messages. Similarly, it can be

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403. Conery, *supra* note 24 (internal quotation marks omitted).

404. *Id.* (internal quotation marks omitted).

405. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

406. *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

407. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2006), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-277/U.pdf> (statement of Samuel A. Alito, Jr.).

408. *Id.* (emphasis added).

409. *Id.* (emphasis added).

410. See discussion *supra* Part I (describing the *morality factor* as involving cultural-based judgments about decency, distaste, disgust, offense, and outrage).

argued that killing and maiming virtual people in video games smacks of indecent behavior and that, in turn, a decent-minded parent would never allow his or her child to play such a violent game in which the child commits virtual murder and mayhem.

The notion that certain speech simply is not decent enough to protect connects directly with Justice Alito's argument in *Snyder*, quoting from *Chaplinsky*, that some types of expression are of such low value as to not merit First Amendment protection.<sup>411</sup> As Justice Alito wrote, "the First Amendment does not shield utterances that form '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*.'" <sup>412</sup> In other words, just as *Chaplinsky* drew a dichotomy between low-value speech and high-value speech, Justice Alito may draw a parallel distinction between indecent, valueless speech versus decent, important speech. Speech that is indecent, in turn, may be policed because of what the *Chaplinsky* Court called the "social interest in order and morality."<sup>413</sup>

The view that moral disapproval of a message constitutes a sufficient ground for squelching speech must be called into question today in light of the Supreme Court's reasoning in areas involving other constitutional rights.<sup>414</sup> If "[m]oral disapproval" of a group of individuals "is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause,"<sup>415</sup> then surely moral disapproval of messages is an insufficient interest to punish or suppress speech under the much more rigorous strict scrutiny standard of judicial review to which content-based regulations on speech are subjected.<sup>416</sup>

Indeed, the Supreme Court specifically rejected the argument of the government in *Cohen* that a state could, "acting as guardians of *public morality*,"<sup>417</sup> jettison the word "fuck" from the public vocabulary.<sup>418</sup> As the Court wrote in *Cohen*, it is "often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the

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411. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1223 (2011) (Alito, J., dissenting).

412. *Id.* (emphasis added) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

413. See *Chaplinsky*, 315 U.S. at 572.

414. See *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause.").

415. *Id.* at 582.

416. See *supra* notes 34, 115 (addressing strict scrutiny).

417. *Cohen v. California*, 403 U.S. 15, 22 (1971) (emphasis added).

418. *Id.* at 16, 22-23.

Constitution leaves matters of taste and style so largely to the individual.”<sup>419</sup>

Adding support for a possible *moral-versus-immoral interpretation* of Justice Alito’s First Amendment philosophy is his quotation, within *Snyder*, of the Court’s aging statement from *Cantwell v. Connecticut*<sup>420</sup> that “personal abuse is *not in any proper sense* communication of information or opinion safeguarded by the Constitution.”<sup>421</sup> In other words, there are proper and improper ways of speaking—decent and indecent, moral and immoral modes of communication.

High-value speech for Justice Alito would appear to be that which, in line with his concurrence in the student-speech case of *Morse*, includes social and political commentary.<sup>422</sup> While the majority in *Snyder* emphasized that the WBC’s speech contained precisely such content,<sup>423</sup> Justice Alito countered that the WBC’s speech “make[s] no contribution to public debate.”<sup>424</sup> Justice Alito wrote:

[I]t is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder’s purely private conduct does not.<sup>425</sup>

Any political commentary made by the WBC was, in Justice Alito’s view, part of a transparent First Amendment boot-strapping strategy of blending the personal with the political in order to bring all of the speech within the purview of constitutional protection. “I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected,”<sup>426</sup> Justice Alito reasoned, adding that “[t]he First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents’ attack on

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419. *Id.* at 25.

420. 310 U.S. 296 (1940).

421. *Id.* at 310 (emphasis added).

422. See *supra* text accompanying notes 367-69.

423. See *supra* Part III.B.1.

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

425. *Id.* at 1226 (emphasis added) (footnote omitted).

426. *Id.* at 1227.

Matthew Snyder and his family should be treated differently.”<sup>427</sup>

Justice Alito also interpreted all of the signs, despite their seeming reference to larger political issues, to be personal in reference and personal affronts to Matthew Snyder. Justice Alito observed that “[t]here were signs reading ‘God Hates Fags,’ ‘Semper Fi Fags,’ ‘Fags Doom Nations,’ and ‘Fag Troops.’ Another placard depicted two men engaging in anal intercourse. *A reasonable bystander seeing those signs would have likely concluded that they were meant to suggest that the deceased was a homosexual.*”<sup>428</sup>

Justice Alito’s dissents in *Stevens* and *Snyder*, along with the sentiments raised in his concurrence in *Brown*, clearly contradict two statements he made during a 2007 speech at a National Italian American Foundation (“NIAF”) luncheon.<sup>429</sup> Justice Alito stated at the time: “I’m a very strong believer in the First Amendment and the right of people to speak and to write”<sup>430</sup> and “I would be reluctant to support restrictions on what people could say.”<sup>431</sup> While Justice Alito’s dissent in *Snyder* certainly restricts what people can say and write (at least the type of hateful messages they can scrawl on signs and post on the Internet), it may be possible to interpret his dissent in *Stevens* and his concurrence in *Brown* in a manner that is somewhat consistent with his statements at the NIAF luncheon.

In particular, perhaps Justice Alito perceives *Stevens* and *Brown* as focusing *not* on the words that people are allowed to either say or write to convey a message, but rather on visual, image-based speech products that they are allowed to create, produce, and sell for a profit—namely, videos depicting animal cruelty and video games portraying violent imagery. Taking this logic one step further, Justice Alito might be drawing a distinction in his own First Amendment philosophy between words/language, on the one hand, and images/products, on the other, when it comes to the scope of constitutional protection they should receive. Maybe the latter are, for Justice Alito, less deserving of protection because they are merely images and, in particular, because they are images created and sold for a profit and, in turn, consumed solely for purposes of entertainment.

The problem, of course, is that the Supreme Court has recognized for sixty years now that motion pictures are protected by the First

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427. *Id.*

428. *Id.* at 1225 (emphasis added) (citation omitted).

429. Robert Barnes, *Alito Calls Free-Speech Limits ‘Dangerous’ as Court Considers Cases*, WASH. POST, June 14, 2007, at A25.

430. *Id.* (internal quotation marks omitted).

431. *Id.* (internal quotation marks omitted).

Amendment, even if their purpose is purely to entertain.<sup>432</sup> The Supreme Court wrote in *Joseph Burstyn, Inc. v. Wilson*<sup>433</sup> in 1952:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.<sup>434</sup>

The Court emphasized this point again three decades ago, in the context of an adult-entertainment case, when it wrote that “[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”<sup>435</sup> The bottom line in 2011 is that Justice Alito is no friend to free expression, at least when the speech in question offends his notions of morality and decency and when it lacks a substantive, political component or when such a political component, as in *Snyder*, is overshadowed by a personal affront.

Justice Alito now has a prime opportunity to extend his apparent crusade against offensive, low-value speech in 2012. Why? Because on the same day the Court held unconstitutional California’s violent video game statute in *Brown*, it granted certiorari in *Federal Communications Commission v. Fox Television Stations, Inc.*<sup>436</sup> involving First and Fifth Amendment-based challenges to the Federal Communications Commission’s (“FCC”) policy targeting indecent speech on the broadcast airwaves.<sup>437</sup> In particular, the Court granted certiorari as to “[w]hether the Federal Communications Commission’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.”<sup>438</sup>

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432. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

433. 343 U.S. 495 (1952).

434. *Id.* at 501 (footnote omitted).

435. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

436. No. 10-1293, 2011 WL 1527312 (June 27, 2011).

437. See Ted Johnson, *High Court to Weigh FCC Indecency Reach*, DAILY VARIETY, June 28, 2011, at 1 (reporting that “the high court agreed to review the broadcast networks’ challenge to the FCC’s crackdown on so-called fleeting expletives, with oral arguments expected later this year or early next year,” and noting that “[t]he court said that its review will be limited to whether the FCC’s enforcement regime violates the First or Fifth amendment[.]” guarantees of freedom of speech and due process).

438. FCC, 2011 WL 1527312, at \*1.

If the analysis in this Article accurately describes Justice Alito's First Amendment free-speech philosophy as including both a morality factor and a substantive-merits factor,<sup>439</sup> it is quite likely that Justice Alito will uphold the FCC's enforcement because: (1) the use of curse words during times of the day at which children may be in the TV viewing audience will offend his notion of decency under the morality factor; and (2) the use of curse words uttered during live entertainment award shows, like those at issue in *Fox Television Stations, Inc. v. Federal Communications Commission*<sup>440</sup> that were spoken by celebrities Cher and Nicole Richie,<sup>441</sup> lack any substantive merit, unlike political speech of candidates running for elected office. Indeed, during oral argument on January 10, 2012, Justice Alito played to the parade-of-horrors argument, speculating about whether or not TV would be flooded with "people parading around in the nude and a stream of expletives" if the FCC's regulatory power over indecency was struck down.<sup>442</sup> The only exception to a Justice Alito ruling upholding the FCC's current regime might occur if Justice Alito, as he did in *Brown*, completely ducks the First Amendment issue and, instead, declares the FCC's enforcement regime void for vagueness in violation of Fifth Amendment due process guarantees.<sup>443</sup>

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439. See discussion *supra* Part I (describing these two components of Justice Alito's free-speech philosophy).

440. 613 F.3d 317 (2d Cir. 2010).

441. One of the four incidents at issue in the case involved Cher, who, during the live broadcast of the 2002 Billboard Music Awards, uttered the statement: "People have been telling me I'm on the way out every year, right? So fuck 'em." *Id.* at 323. A second incident centers on the speech of Nicole Richie who, during the 2003 Billboard Music Awards, exclaimed: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.*

442. Transcript of Oral Argument at 29, *FCC*, 2011 WL 1527312 (June 27, 2011) (No. 10-1293), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1293.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1293.pdf).

443. See *supra* notes 305-06, 308-09 and accompanying text.

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