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CONTENT NEUTRALITY AND COMPELLING INTERESTS: THE OCTOBER 2010 TERM

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TWO First Amendment cases from last Term addressed when content regulation is justified by particularly compelling interests. The answer implied by both cases is: not often.

1.

Brown v. Entertainment Merchants Ass'n took up a California law imposing a civil fine for selling violent video games to minors without the consent of a guardian.¹ Like all such laws challenged thus far, this one had been struck down on First Amendment grounds in the lower courts.² The Supreme Court affirmed in an opinion written by Justice Scalia and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

The Court first held that video games were expression for purposes of the First Amendment. It then characterized California as attempting to create a new unprotected category of speech: speech that is unacceptably violent for minors.³ The Court rejected this category. It distinguished the

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¹ 131 S. Ct. 2729, 2732 (2011). The law also required such videos to be labeled "18." *Id.*

² See Respondent's Brief in Opposition to Petition for Writ of Certiorari at 12–13, *Schwarzenegger v. Entm't Merchs. Ass'n* (9th Cir. 2009) (No. 08-1448), 2009 WL 2187807, *cert. granted sub nom.* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

³ See *Brown*, 131 S. Ct. at 2735.

special category of speech that is obscene as to minors on the ground that obscenity is also an unprotected category for adults. “Violent speech” is not an unprotected category as to adults, and thus no category exists which could be extended to provide special protection for children.⁴ Indeed, the Court said, given the violent content of children’s fare—such as Grimm’s Fairy Tales and *The Lord of the Flies*, there is no American tradition of protecting children from violent expression.⁵ The Court rejected the State’s claim that video games pose special harms because they are interactive. “[A]ll literature is interactive,” the Court concluded.⁶ Following arguments made by the respondent, it likened the California law to historical attempts to protect children from new media such as dime novels, movies, and comic books.⁷

Because the law did not target an unprotected category, the Court treated it as a content-based regulation and applied strict scrutiny.⁸ For a number of reasons, the law failed. First, in light of the mixed empirical evidence on the connection between violent video games and violent conduct, the State had argued that the Court should give deference to the legislature’s conclusions about the connection. The Court refused to grant such deference and further expressed skepticism about the empirical basis for the legislature’s conclusions.⁹

Second, the law was fatally underinclusive in that the studies supporting the law also showed correlations between violence and unregulated expression, such as Saturday morning cartoons and even images of guns.¹⁰ Finally, the Court rejected the State’s interest in aiding parental authority. It found that the voluntary ratings system for video games enabled parental supervision and discouraged sales to minors, thereby diminishing the State’s interest. It also found this rationale overinclusive, because some parents would be unconcerned about violent video games and thus would not require the State’s aid.¹¹

Justice Alito, joined by the Chief Justice, concurred in the judgment. He concluded that the California law was fatally vague but reserved the possibility that a clearer regulation should pass muster. He argued that

⁴ Id.

⁵ Id. at 2736–37.

⁶ Id. at 2738.

⁷ Id. at 2737.

⁸ Id. at 2738.

⁹ Id. at 2738–39.

¹⁰ Id. at 2739–40.

¹¹ Id. at 2741.

the majority was wrong to reject the possibility that video games could be qualitatively different from other media in their capacity to cause harm.¹²

Justice Thomas and Justice Breyer each wrote a dissent.¹³ Justice Breyer agreed with the majority that the law was a content-based regulation but parted ways at the scrutiny stage, where he thought the law should pass. He took the majority to task for downplaying both the State's interest in protecting minors and the extent to which the Court's precedents supported that interest. He concluded that its proper recognition should lead the Court to defer to the state.¹⁴

2.

The second case is *Snyder v. Phelps*.¹⁵ After Marine Lance Corporal Matthew Snyder was killed in the line of duty in Iraq, his family held a funeral for him at his home church in Westminster, Maryland. The funeral occasioned a picket by the Westboro Baptist Church of Topeka, Kansas. Led by Fred Phelps and made up almost entirely of his family members, the Westboro Baptist Church ("WBC") holds that homosexuality is a sin and that America's war casualties are a sign of God's wrath over the presence of gay servicemembers in the military. The picket took place on a piece of public property 1000 feet from the funeral site. Representative signs read: "God Hates the USA/Thank God for 9/11," "Thank God for IEDs," "Thank God for Dead Soldiers," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."¹⁶ Plaintiff Albert Snyder, Matthew's father, testified that he saw the tops of some picket signs on the way to the funeral but did not know what they said until he saw news coverage of the picket later that evening.¹⁷

A few weeks after the funeral, a WBC member posted an online narrative entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder,"

¹² Id. at 2751 (Alito, J., concurring in the judgment).

¹³ Justice Thomas argued that the original public understanding of the First Amendment would not have extended free speech rights to minors at all. Id. at 2751–61 (Thomas, J., dissenting).

¹⁴ Id. at 2771 (Breyer, J., dissenting).

¹⁵ 131 S. Ct. 1207 (2011).

¹⁶ Id. at 1213.

¹⁷ Id. at 1213–14.

which stated that Matthew was an adulterer and Catholic idolater whose parents “raised him for the devil.”¹⁸ Plaintiff Snyder found and read the posting during an internet search on his son.¹⁹

Snyder filed suit against Fred Phelps, his daughters, and WBC, alleging defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The district court awarded the defendants summary judgment on the defamation and publicity claims. The others proceeded to trial, where a jury found for Snyder and awarded \$2.9 million in compensatory damages and \$8 million in punitive damages, the latter of which the court remitted to \$2.1 million. The Fourth Circuit reversed, holding that WBC’s speech constituted protected expression under the First Amendment.²⁰

The Supreme Court affirmed the judgment of the Fourth Circuit. In an opinion joined by the entire Court except Justice Alito, the Chief Justice held that the picket was protected expression because it occurred in a public place and dealt with matters of public concern.²¹ Even if a few of the signs related to Matthew Snyder, still “the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues,” expression on which is protected by the First Amendment.²²

Because the speech was protected, it could not be regulated “simply because it is upsetting or arouses contempt.”²³ In addition, the malleability of the outrageousness standard created a risk that the jury actually imposed liability out of illicit discrimination against WBC’s opinion on public issues.²⁴ Thus, the verdict on intentional infliction of emotional distress had to be set aside.²⁵ On the claim of intrusion upon seclusion, the Court rejected Snyder’s argument that he was a captive audience deserving of special protection, given that the picket did not disrupt the fu-

¹⁸ *Id.* at 1225–26 (Alito, J., dissenting).

¹⁹ *Id.* at 1214 n.1.

²⁰ *Id.* at 1214.

²¹ *Id.* at 1216, 1219.

²² *Id.* at 1217.

²³ *Id.* at 1219.

²⁴ Here the Court claims both that regulation on the basis of offensiveness is inherently wrongful and that it creates an impermissible risk of covert viewpoint discrimination against speakers’ opinions on public issues. The Court is often unclear as to whether discrimination on the basis of message or communicative impact is wrongful in itself or only for its propensity to conceal a narrower form of discrimination. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); see also Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 250–251 (2012).

²⁵ *Snyder*, 131 S. Ct. at 1219.

neral and Snyder was not aware of it until after the fact. Because the tort claims failed, the conspiracy claim predicated upon them also failed.

The Court rested its decision entirely on the picket, not the online posting. It concluded that because Snyder did not mention the posting in his petition for certiorari and spent only one paragraph on it in his merits brief, the posting was not properly before the Court.²⁶

Justice Breyer wrote a separate concurrence to say that he took the Court's opinion to say nothing about a case "where *A* (in order to draw attention to his views on a public matter) might launch a verbal assault upon *B*, a private person, publicly revealing the most intimate details of *B*'s private life, while knowing that the revelation will cause *B* severe emotional harm."²⁷

Justice Alito dissented. He argued that WBC's right to express views on public issues should not insulate it from tort liability for "intentionally inflict[ing] severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."²⁸ He pointed out various ways in which the picket and online posting "specifically attacked Matthew Snyder."²⁹

3.

What do these cases have in common? First, both involve content-based regulation, meaning that laws target expression for what it is saying. The Court in *Brown* took for granted that the law was content-based on its face because it singled out "violent" speech from other speech. In *Snyder*, the picture is more complicated, because intentional infliction of emotional distress is a neutral tort principle, which arguably need not involve speech at all.³⁰ But the Court again automatically treated it as content-based regulation, presumably because it was obvious that the alleged emotional distress in this case—and thus the application of the tort

²⁶ Id. at 1214 n.1.

²⁷ Id. at 1221 (Breyer, J., concurring).

²⁸ Id. at 1222 (Alito, J., dissenting).

²⁹ Id. at 1226.

³⁰ See, e.g., Benjamin C. Zipursky, *Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law, 60 DePaul L. Rev. 473, 499–505 (2011).

principle—necessarily arose from the offensiveness of WBC’s message.³¹

Second, while First Amendment doctrine expresses extreme distrust of content-based regulation, it has recognized that certain interests may justify it in some circumstances. Two of these interests are the protection of minors and the protection of the privacy of private individuals.³² Thus, both *Brown* and *Snyder* implicated interests in protecting against special kinds of harm, hypothetically capable of supporting content-based regulation.

Yet, in both cases, the Court came out against those interests and in favor of its regular aversion to content discrimination. In the course of doing so, moreover, the Court arguably minimized the countervailing interests in both cases.

In *Brown*, this disparagement occurred at the level of legal rules. The majority suggested that the Court has not shown special solicitude for the interest in protecting minors outside the confines of an already unprotected category, such as obscenity.³³ Previously, however, the Court held that “a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”³⁴ Such regulation may be appropriate “only in relatively narrow and well-defined circumstances,” but those circumstances have not previously been confined to speech

³¹ See, e.g., *Cohen v. California*, 403 U.S. 15, 18 (1971) (treating essentially as content-based the application of a facially neutral breach-of-the-peace law where “[t]he conviction quite clearly rest[ed] upon the asserted offensiveness of the *words* Cohen used to convey his message to the public”).

³² See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (recognizing that protection against disclosure of private facts may hypothetically justify regulation); *The Fla. Star v. B.J.F.*, 491 U.S. 524, 530 (1989) (same); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208–13 (1975) (finding that protection of minors and “the privacy rights of . . . unwilling viewers” may justify content-based regulation).

³³ True, the Court says all this in the context of rejecting a special unprotected category of speech that is violent as to minors. Perhaps it does not mean to suggest that the protection of minors can never justify content-based regulation under strict scrutiny. But its deep skepticism of this interest appears to carry over into—even, Justice Breyer argues, largely to control—its application of strict scrutiny in this case. The overall implication is that by and large minors should be treated no differently from adults when it comes to the state’s interest in regulating expression.

³⁴ *Erznoznik*, 422 U.S. at 214 n.11 (quoting *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring)).

categories that are unprotected for adults.³⁵ For instance, the Court has upheld laws protecting minors from vulgar language,³⁶ which appears to be protected for adults.³⁷ The school speech cases, too, suggest a wider array of legitimate state concerns regarding minors' exposure to speech.³⁸ It is difficult to know what justifies these cases if not a special interest in protecting minors.

Similarly, the Court was quick to reject the notion that video games may differ from other media in ways that justify more regulation. Although the Court is sometimes insensitive to differences among media,³⁹ on some important occasions, it has shown concern for such differences. Broadcast is treated differently from cable communications,⁴⁰ and differently again from print,⁴¹ on the basis of the various communicative features of these media. Meanwhile, the obscenity cases suggest that the written word is likely to be obscene only rarely: the category overwhelmingly pertains to visual media.⁴² At times, then, the Court has been willing, quite sensibly, to recognize that the characteristics of a given

³⁵ *Id.* at 213.

³⁶ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978).

³⁷ See *Cohen v. California*, 403 U.S. 15, 20 (1971).

³⁸ See *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (public schools may regulate speech advocating drug use); *Fraser*, 478 U.S. at 683 (“vulgar and offensive terms” may be regulated). These outcomes are justified in part by the state’s special role as educator, but the state’s special role does not justify any form of content regulation whatsoever; it still must have a legitimate reason, related to the state’s undertaking. The only legitimate reason for these regulations would be that minors are not sufficiently mature to be exposed to the messages at issue.

³⁹ *Frederick Schauer, Principles, Institutions, and the First Amendment*, 112 *Harv. L. Rev.* 84, 85–86 (1998).

⁴⁰ Compare *Pacifica Foundation*, 438 U.S. at 748–50 (regulating vulgarity to certain times of day in light of the particularly invasive nature of broadcast communication), with *United States v. Playboy Entm’t Group*, 529 U.S. 803, 806–07 (2000) (striking down a regulation requiring cable operators to scramble sexually explicit material or to move it to certain times of day).

⁴¹ See, e.g., *Estes v. Texas*, 381 U.S. 532, 539, 544–50 (1965) (distinguishing television from other media for its special impact on due process at criminal trials); also compare *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (finding content regulation unconstitutional as to newspapers), with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387–89 (1969) (holding that “reach” and restricted access of broadcast communication justifies content regulation).

⁴² See *Kaplan v. California*, 413 U.S. 115, 119 (1973) (upholding conviction for an obscene book but recognizing that books generally have “a different and preferred place in our hierarchy of values”); see also *id.* at 118 n.3 (listing seventeen cases in which the Court reversed obscenity convictions for books).

medium may determine how far it implicates particular state interests. Here, however, that argument was dismissed out of hand.

In *Snyder*, the diminishment occurs at the factual level. By the time it reached the Supreme Court, Snyder's claim was exclusively that WBC expressed deeply offensive opinions about his son in a particularly sensitive context. The claim was not that WBC disclosed private facts about Matthew, whether false or true: neither the defamation claim nor the publicity claim survived summary judgment. Nor was the claim that the protest disrupted the funeral: the Court placed great emphasis on the fact that it did not.⁴³ What remained was the issue of deeply hurtful *ad hominem* comments in a sensitive context, though in the course of expression on a matter of public concern.

As to how far such speech should be protected, existing First Amendment law does not provide a clear answer, and the Court did not offer much of one here. This is largely because the Court denied that was what took place. "Even if," the Court said, "a few of the signs—such as 'You're Going to Hell' and 'God Hates You'—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."⁴⁴ This suggests that private insults are protected so long as the "overall thrust and dominant theme" of the speech is a matter of public concern. Technically, this appears to be dictum, because as Justice Breyer wrote separately to underscore, the Court remained unconvinced that such private remarks were involved here.⁴⁵

Nevertheless, it is hard to read WBC's activities as *not* implicating Matthew personally. As Justice Alito pointed out, it is impossible with respect to the online posting, which described Matthew as an idolater and adulterer whose parents "raised him for the devil."⁴⁶ Had the Court considered the online material, it could not have remained so equivocal about the role of personal insult in the Phelps' rhetorical style. Even with respect to the picket itself, as Justice Alito also pointed out, many more of the signs could reasonably be read to refer to Matthew and to

⁴³ *Snyder*, 131 S. Ct. at 1218–19.

⁴⁴ *Id.* at 1217.

⁴⁵ The Court also emphasized that Mr. Snyder was not aware of the picket at the time of the funeral, *id.* at 1218–19, but its reasoning on the public-concern issue does not seem to leave room for a claim even had Snyder seen the signs. See *id.* at 1217.

⁴⁶ *Id.* at 1226 (Alito, J., dissenting).

suggest not only that he was going to hell but also that he was gay and that it was a good thing that he was dead.⁴⁷

Moreover, regardless of what the specific signs said, personal comment was implicit in the picket itself. Pickets, as a communicative form, strongly prefer non-random placement. Labor protest tends to occur at the implicated job site. Abortion protest takes place at health-care facilities that perform the procedures. Pickets on the subject of Supreme Court litigation sprout up on the sidewalk before the Court. Although legitimate state interests may sometimes shift pickets from their preferred placements, I doubt that the Court would deny that, in such circumstances, some expressive element of the medium is lost.

Thus, it was no accident that a picket on the WBC's particular subject should occur at the funeral of a dead soldier. The inescapable implication was that Matthew Snyder was personally complicit in the public ills to which the picket referred. This is the case not only as a matter of what the WBC intended but also as a matter of what an objective observer reasonably would have understood.

Indeed, on the Court's understanding of the picket, it is hard to know how it conceived of Matthew's father's tort claim. The Court acknowledged the "anguish" of Mr. Snyder.⁴⁸ But given that he was not aware of the picket at the time, it is hard to know what feature of it would cause such anguish besides the sense that it personally implicated his son.⁴⁹ In denying that it did, the Court implied not only that Snyder did not have a *constitutionally* successful tort claim but that he did not have a tort claim at all.

4.

In the end, neither of these cases probably matters very much. To my mind, both outcomes were probably correct, for reasons slightly different from those offered by the Court. Both cases opened up genuinely difficult questions and prospects of slippery slopes. In *Brown*, upholding the law would have required the Court either to defend the proposition that video games are more damaging than other media (a difficult empir-

⁴⁷ Id. at 1225.

⁴⁸ Id. at 1218.

⁴⁹ But see Zipursky, *supra* note 30, at 480 (arguing that the emotional distress consisted of WBC's making the funeral a "media circus," regardless of its particular message). The Court, however, must have construed the tort claim to turn on the message of the speech in order to conclude that First Amendment values were so heavily implicated.

ical question) or to open the gates to broader media regulation in the name of protecting minors (a slippery slope). Permitting Snyder's claim, meanwhile, would have required the Court either securely to distinguish offensive ideas from offensive personal comment (a difficult conceptual question) or else in addressing the latter to risk undermining its work in protecting the former (a slippery slope).⁵⁰ But while I think the cases were correctly decided, few would contend that the opposite outcome in either case would have been a body blow to free expression or the commitments that support it.

Given the relatively low stakes, what I find most interesting is how the Court reached its conclusions. One might think that a low-stakes situation—involving a one-off tort claim or a very specialized form of regulation—is a fairly safe occasion for acknowledging the state interests competing with freedom of expression, if only to conclude that the latter carries the day. One might think this is particularly the case where the state interests implicated are ones that the Court has previously identified as especially important.

Instead, the Court went out of its way to diminish the competing interests and suggest that even where there may appear to be special considerations in play, there are not. This strategy may be a rational one. Given the size of the Court's docket and the importance of its pronouncements to lower courts, perhaps any serious balancing on its part—like any exceptional outcome—could create ripples far beyond its legitimate scope. All of which is to say, there are virtues in having a strong default rule. But there are also costs.

⁵⁰ Cf. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *Colum. L. Rev.* 334, 341–42 (1991) (noting both the conceptual difficulty of disentangling intrinsically offensive speech from legitimate persuasion and the danger of the government using intrinsic offensiveness as a pretext for regulating protected speech).