

## **Westboro Baptist Church Funeral Protests Protected by First Amendment, Supreme Court Rules**

The controversial activities of the Westboro Baptist Church culminated in a near-unanimous Supreme Court decision in March 2011. *Snyder v. Phelps* (U.S. 2011). In an 8-to-1 ruling, the Court held that Westboro members could not be held liable for the emotional distress caused by their demonstration at the funeral of Lance Cpl. Matthew Snyder, a 20-year-old soldier killed in Iraq. According to the Court, regardless of how offensive the protestors' activities may be, they are fully protected by the First Amendment.

The decision turned primarily on whether the Westboro demonstration involved matters of "public concern," a category of speech that "is entitled to 'special protection' under the First Amendment." Unlike speech involving private matters, "speech concerning public affairs is more than self-expression; it is the essence of self-government," according to the Court. Thus, public speech "occupies the highest rung of the hierarchy of First Amendment values." The Court also found it significant that the demonstrators remained on public land, maintained a required 1000 foot distance from the church, and did not interfere with the funeral service. In fact, Snyder's father – the plaintiff in the lawsuit – was unable to hear the protestors or read their signs during the funeral itself, but learned of their content afterwards while searching for references to his son on the Internet.

While most Americans undoubtedly reject the views expressed by Westboro (a small extremist group of people, most of whom who share the same name – and bloodline – as founder Fred Phelps),<sup>1</sup> the Court's decision implicitly recognized that, for freedom of speech to mean anything, it must protect those with whom we vehemently disagree. That the decision was virtually unanimous and crossed the Court's ideological lines suggests that it was fairly conventional as a matter of constitutional law. Nevertheless, the passionate dissent written by Associate Justice Samuel A. Alito may resonate more strongly with some readers.

Much of the majority's opinion focused on the distinction between private speech and public speech. Perhaps the most striking aspect of the Court's analysis is how thinly the categories must be sliced to determine on which side of the line a particular type of speech falls. While noting that the test for public speech is not "well defined," the Court wrote that such speech generally relates "to any matter of political, social, or other concern to the community" or "is the subject of legitimate news interest." Since Westboro speaks out on "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy," it comments on "matters of public import." The inappropriate or controversial character of the speech is irrelevant. Thus, a Westboro sign

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<sup>1</sup> <http://www.thedailybeast.com/articles/2009/07/23/family-of-hate.html>

suggesting that U.S. soldiers are going to hell because God is angry with America's tolerant attitude towards homosexuality is protected public speech even though it is "upsetting or arouses contempt."

That some of the signs appeared to be directed at Matthew Snyder personally did not convert public speech into private speech, according to the Court, because the "dominant theme of Westboro's demonstration spoke to broader public issues." Justice Alito took issue with this statement in his dissent. In his view, Westboro's "attack on Matthew was of central importance" to the demonstration. Such vicious, personal speech "should not be immunized," he added, "simply because it is interspersed with speech that is protected." This statement highlights the fundamental difference in the way the Justices viewed the demonstration. While the majority saw it as a public protest, in a public place, on matters of public importance, Justice Alito saw it as a savage verbal attack on a private individual in connection with the most personal of events – a funeral. For Justice Alito, the majority opinion leaves individuals little protection from such attacks, even when they intentionally cause significant emotional harm. Associate Justice Stephen G. Breyer, in his concurring opinion, sought to assuage this concern, reaffirming that the majority opinion "does not hold or imply that the State is always powerless to provide private individuals with necessary protection."

While the Court's decision may be constitutionally sound, it raises more questions than it answers about the distinction between private and public speech. With the prevalence of social media, the blogosphere, and reality television, the line between public and private has become increasingly blurred. As these trends continue, the public/private speech dichotomy may become less useful in analyzing the scope of First Amendment protection. What – after all – is a matter of "private concern" anymore when average citizens publicize the minutiae of their lives on a multitude of social networking platforms. Adding to the uncertainty is the growing debate over whether – and to what extent – the virtual world (like the physical one) can be divided into "public" and "private" spaces, a distinction that the *Snyder* Court found significant in reaching its decision. Unfortunately the decision sheds no light on that debate, since the majority declined to consider the constitutionality of Westboro's Internet postings on the ground that Snyder had waived those arguments by failing to mention the postings in his Petition.

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