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**Free Speech Cases in the Supreme Court’s Most Recent Term**

*by Cassandra F. Fortin and Paul Shapiro*

**Introduction**

The five First Amendment cases on the Supreme Court's 2010-2011 docket presented a range of free speech questions arising in vastly different contexts. This article addresses two of those five cases:

- **Brown v. Entertainment Merchants Association** (holding that a California law restricting the sale or rental of violent video games to minors did not comport with the First Amendment); and

- **Snyder v. Phelps** (holding that the First Amendment shields from tort liability demonstrators picketing near a soldier's funeral service).

Briefly, the recent Free Speech cases not addressed in this article include: **Nevada Commission on Ethics v. Carrigan** (holding that Nevada's recusal law, which imposes sanctions on state legislators for voting on matters in which they have a conflict of interest, does not unconstitutionally burden the First Amendment rights of state legislators); **Sorrell v. IMS Health Inc.** (holding that Vermont's prescription privacy law, which restricted pharmaceutical manufacturers from obtaining or using certain prescription data collected from pharmacies for marketing purposes, imposed content- and speaker-based burdens on protected expression; and Vermont's Justifications for the statute did not withstand heightened scrutiny); and **Arizona Free Enterprise Club v. Bennett** (holding that Arizona's matching funds scheme of public financing in elections for statewide office substantially burdens the political speech of privately-financed candidates and their supporters, and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny).

**Brown v. Entertainment Merchants Association et al.**

*Brown v. Entertainment Merchants Association* involved a challenge to a California statute prohibiting the sale or rental of violent video games to minors without parental consent. The Court invalidated the restriction, holding
that it did not comport with the First Amendment because it burdened the speech of, among others, video game manufacturers; video games qualify for First Amendment protection; and California had failed to demonstrate the law satisfied strict scrutiny. Brown v. Entm't Merchants Ass'n, No. 08-1448, 564 U.S. __ (June 27, 2011).

The Court stated that "under our Constitution, 'esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'" Id. at 2 (quoting U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000)). Furthermore, the Court noted that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." Brown, 564 U.S. at ____ (slip op., at 2-3) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

The Court determined that the holding of United States v. Stevens, 559 U.S. ___, 130 S. Ct. 1577 (2010), controlled in Brown. Last term, the Court in Stevens held that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." Brown, 564 U.S. at ____ (slip op., at 3). Stevens concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. Id. The Court reasoned that "[t]here was no American tradition of forbidding the depiction of animal cruelty – though States have long had laws against committing it." Id. at 4 (emphasis in original).

California argued that it had a compelling interest to ensure minors are not exposed to "obscene material" without first obtaining parental government consent. In response, the Court argued there was no constitutionally permissible justification for creating a category of content-based restrictions applicable only to minors, other than the "obscenity" standard set forth in Ginsberg v. New York, 390 U.S. 629 (1968) (prohibiting the sale of sexual materials to minors). Moreover, the Court identified excerpts from Grimm's fairy tales, Dante's Inferno, and The Odyssey, noting that the history of students encountering such materials as these, in their education, cut against extending the definition of "obscenity" to include violent content.

While the Court noted that a State possesses legitimate power to protect children from harm, "that does not include a free-floating power to restrict the ideas to which children may be exposed" and that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Brown, 564 U.S. at ____ (slip op., at 7) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 213-14 (1975)). The Court rejected California's argument that "video games present special problems because they are 'interactive,' in that the player participates in the violent action on screen and determines its outcome," pointing out that literature can offer a similarly interactive experience. Brown, 564 U.S. at ____ (slip op., at 10-11).
Finally, the majority was not persuaded by the psychological studies California cited in support of the restriction and noted that the studies have been rejected by every court to consider them. Those studies found, *inter alia*, that the interactive nature of the video game medium has a larger impact on a minor's behavior, as compared to the more passive experience of reading a book or watching a television show. The majority took issue with the studies from both a constitutional and an empirical standpoint. The Court determined the medium does not significantly alter the First Amendment analysis; indeed, the "new medium" argument could have been made for each new technology (*e.g.*, comic books, radio, television). Finally, the Court found the studies failed to prove the requisite causality between a minor playing video games and an increase in that minor's aggressive behavior to justify imposing content-based restrictions.

*Snyder v. Phelps et al.*

Arguably, one of the most anticipated decisions of the term came in *Snyder v. Phelps*, a case involving the controversial Westboro Baptist Church ("WBC") and its practice of picketing funerals of American soldiers killed in Iraq and Afghanistan. *See Snyder v. Phelps*, No. 09-751, 562 U.S. ___ (March 2, 2011). *Snyder* presented a conflict between the First Amendment's guarantee of freedom of speech and the imposition of tort liability for personal injuries caused by speech. In a narrow decision, the Court held that the First Amendment shields WBC from tort liability for picketing near a military funeral because the content of its message addressed matters of public concern.

WBC received extensive coverage in the news media for its belief that God punishes America for its tolerance of homosexuality with the death of American servicemen and women. To dramatize that belief, members of WBC picket military funerals. In March 2006, WBC picketed near the funeral ceremony of twenty-year-old Marine Lance Corporal Matthew Snyder, who was killed while on deployment in Iraq. WBC complied with police instructions to contain its protest to an area approximately 1,000 feet from the church where Matthew's funeral took place. The signs WBC members held—displaying such messages as "Thank God for Dead Soldiers," "God Hates the USA/Thank God for 9/11," "America is Doomed," "God Hates You," and several others—were not visible to attendees of the funeral.

However, Albert Snyder, Matthew's father ("Snyder"), was able to see the tops of the signs as the motorcade drove past the protest area. Snyder saw and read the signs later when he viewed television news coverage of his son's funeral. Snyder sued Fred Phelps, founder of WBC, and six WBC parishioners in federal court, asserting five claims under Maryland state tort law. The jury returned a verdict for Snyder on his claims of intentional infliction of emotional distress and invasion of privacy and awarded compensatory and punitive damages totaling nearly $11 million, later reduced to
nearly $5 million. The Fourth Circuit reversed on First Amendment grounds.

The Supreme Court said that resolution of the First Amendment claim "turns largely on whether [WBC's] speech is of public or private concern, as determined by all the circumstances of the case." Snyder, 562 U.S. at (slip op., at 5). Speech is of public concern, said the Court, "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'” or when it is newsworthy, which is to say, "a subject of general interest and of value and concern to the public." Id. at 6-7 (internal citations omitted). To determine when any particular speech is of public or private concern, courts must examine the content, form, and context of the speech. Id. at 7. The Court said that while the picketers' signs "may fall short of refined social or political commentary," those signs nevertheless reflected WBC's position on matters of public import, including "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." Id. at 8.

The fact that the signs were exhibited in the context of a funeral made no difference, given that the picketers were on public land, next to a public street, at a distance of 1,000 feet from the Church. Because liability in this case was founded on the content of the speech (and its viewpoint) and those views were matters of public concern, the First Amendment shielded WBC members from tort liability. The Court reiterated its view—previously expressed in Hustler Magazine v. Falwell, 485 U.S. 46 (1988)—that making the outrageousness of the speech the linchpin of liability raises a constitutionally unacceptable danger that liability will be imposed because of a jury's subjective dislike of the particular expression.

Several questions remain after Snyder: Is speech of public concern simply because it attracts a news camera? Though the Court said nothing about it, may liability attach if the speech, even though of public concern, contains false statements of facts about a private figure? Finally, the Court observed that the actions of WBC picketers would be subject to reasonable content-neutral time, place, and manner restrictions, but expressed no opinion on the laws of forty-three states that restrict funeral picketing. Taken at face value, the Court's opinion indicates that injurious speech that is of public concern is constitutionally protected, absent the presence of some other quality such as "fighting words." Snyder reaffirmed the Court's commitment to robust, uninhibited, wide open, and even vicious public discourse.

Conclusion

These cases illustrate the Court's broad conception of "speech" protected by the First Amendment, a consistent theme over the past several years. One lesson to draw is that, as a general proposition, in any given free speech case, the Court appears to favor whichever argument
best frames the question in terms of the First Amendment's "core" functions.

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