U.S. Supreme Court Likely to Continue Robust Free Speech Protection

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Each year, the Supreme Court considers several cases testing the contours of the First Amendment's protection of speech. The justices' enthusiasm for these cases should not be surprising. The free speech guarantee is a core element of our country's founding spirit and calls to protect dissident voices appeal to our visceral aversion to tyranny. In addition to those lofty principles, the underlying facts of First Amendment cases are almost always more enticing than, say, the average ERISA case competing for space on the court's docket.

This solicitous view of free speech cases led one corporate attorney to counsel his clients, in jest (I think), that if they really wanted the Supreme Court to review their business case, they should remove their clothes and claim a First Amendment right to engage in the disputed conduct while naked.

The Roberts Court has not been shy about striking down laws that improperly limit free speech. Indeed, the Roberts Court has probably invited its greatest criticism — including a rebuke in President Obama's State of the Union address — by doing so in unpopular circumstances. Last term, in the infamous *Citizens United* case, the court invalidated limits on corporations' ability to fund political broadcasts. And faced with an odious set of facts, in *United States v. Stevens* , the court nevertheless voided a law restricting the creation and distribution of videos depicting animal cruelty because the statute's definitions were "substantially overbroad" and threatened to chill legitimate speech.

This term, the Roberts Court again appears poised to flex its muscles enforcing the First Amendment. Moreover, this trend of rigorous protection is likely to continue in another case that is headed to the court next term.

Schwarzenegger v. Entertainment Merchants Association

There is a delicious irony in the fact that Arnold Schwarzenegger, who ascended to the governor's office in California as a result of fame and fortune derived from entertainment that glorified violence and mayhem, is now leading the charge to the Supreme Court to regulate

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another species of entertainment glorifying violence and mayhem: video games. Et tu, Terminator?

Through his Attorney General's Office, Schwarzenegger is defending a statute enacted by the California Legislature restricting the sale or rental of "violent video games" to minors. The statute's definition of "violent video games" swept broadly to include any game where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political or scientific value for minors.

The law did not bar parents from procuring such games for their minor children.

An industry group successfully enjoined enforcement of the law. The district court upheld the group's facial challenge to the statute. Applying strict scrutiny to the content-based restriction, the district court held that the state could not demonstrate a sufficient causal connection between playing violent video games and any psychological or neurological harm to minors. The 9th U.S. Circuit Court of Appeals affirmed and noted that California could have promoted its stated interest — protecting minors from inappropriate video content — through less-intrusive means, including parental controls on gaming devices or rating systems for violent content.

The lower courts rejected California's invitation to analogize violent video games to child pornography. The Supreme Court has afforded governments wide berth to address the scourge of child exploitation. Courts, however, have been careful to treat child pornography as sui generis — lest this exception swallow the rules governing content-based restrictions — and, as here, have frequently resisted attempts to apply that jurisprudence by analogy.

The Supreme Court heard oral argument on this case in November 2010. The justices did not seem amenable to the child-pornography analogy. Instead, almost immediately, Justices Antonin Scalia and Ruth Bader Ginsburg expressed concern that the statute's definition of "violent video games" was overbroad and might be applied, if endorsed by the court, to regulate violent imagery in books, movies, and other media. As Scalia noted, "Some of Grimm's fairy tales are quite grim, to tell you the truth."

The court will issue its decision before July 2011, but don't be surprised if the court affirms the lower courts' decisions much sooner than that.

Snyder v. Phelps

The facial challenge in *Schwarzenegger* , by definition, did not force the justices to confront the application of First Amendment principles in a disturbing factual scenario. Another case argued in October 2010, *Snyder v. Phelps* , did just that.

Marine Lance Cpl. Matthew Snyder died in the course of serving our country in Iraq. He was 20. The Marine Corps brought his body home to Maryland, and his parents held a funeral before burying their son.

Fred Phelps was not invited to this funeral. He did not know Matthew Snyder or the Snyder family. This is unsurprising inasmuch as Phelps ran a small Baptist church based in Topeka, Kansas. Virulently anti-gay, Phelps pioneered a revolting-but-effective strategy to generate publicity for his ministry and its extreme views: holding demonstrations alongside soldiers' funerals to preach the message that the reason for such misfortunes was society's continued tolerance of homosexuality. Thus, on their way to and from their son's funeral service, the Snyder family was forced to drive past protesters holding signs bearing offensive messages, like "Thank G*d for Dead Soldiers" and "Semper Fi F*gs." The ministry's Internet website thereafter posted celebratory video clips and commentary from the Snyder funeral protest reinforcing the same harsh messages.

This protest sparked not only publicity but also a lawsuit from the Snyder family alleging intentional infliction of emotional distress and other torts. The Snyders won a $5 million judgment in the district court, including punitive damages.

The judgment was reversed on appeal by the 4th Circuit, and, adding (further) insult to injury, the Snyders were ordered to pay thousands of dollars of attorney fees to Phelps and his ministry. The appellate court concluded that the protesters' message was hyperbole, as opposed to some specific assertion of false facts about Matthew Snyder, and that the disputed speech concerned matters of public importance — homosexuality in the military, the morality of American citizens, etc.

It was this combination that, according to the 4th Circuit, brought the case into alignment with *Hustler Magazine v. Falwell* , a 1988 case in which the Supreme Court held that the First Amendment barred a similar tort suit by the Rev. Jerry Falwell in response to a lewd, exaggerated parody in the magazine. Falwell's status as a public figure played a prominent role in that decision, and the Supreme Court accepted the Snyders' appeal to address whether *Falwell* should be applied to non-public figures.

The Snyders' strategy could result in a sweeping First Amendment opinion. At least one current justice (Scalia) has stated publicly that, if given the chance, he would scrap the whole edifice of separate First-Amendment standards for public figures announced in *New York Times v. Sullivan* . It is certainly getting more difficult each day in the Internet age, with blogs, online social networking, and ubiquitous news coverage, to cabin people within one group or the other. It remains to be seen whether Scalia's position could attract a majority or, more fundamentally, how any majority on that point would affect the result in the *Snyder* case. One can imagine a favorable holding for either side accompanying that change in First Amendment doctrine.

In the end, Scalia is unlikely to assemble five votes in support of such a major upheaval in First Amendment jurisprudence. More attainable, and more likely in light of the court's recent trend of protecting unpopular speech, is a holding that the funeral protest here cannot be undermined by tort suits because it complied with all local laws and addressed matters of public concern (in an albeit utterly distasteful way). Some justices — especially the court's perennial swing vote, Anthony Kennedy — will likely be swayed by the protesters' abhorrent tactics to try to preserve some sphere of operation for tort law as a safeguard of personal privacy. Unfortunately for the Snyders, recent history suggests that those views are likely to find expression only in a dissenting opinion.

Stolen Valor Act

Next term, the court will likely strike down yet another congressional enactment as violative of the First Amendment. The Stolen Valor Act, 18 U.S.C. § 704, makes it a crime for someone to wear military medals that he or she did not earn. This prohibition does not implicate free speech, to be sure, but the act goes further and prohibits someone from even saying falsely that they earned military medals.

Two courts have already invoked the First Amendment to strike down the act's prohibition on "verbal lies." In *United States v. Alvarez* , the 9th Circuit reversed the criminal conviction of a local official who claimed falsely to be a retired Marine who won the Medal of Honor. While the government is seeking en banc review of that decision, it is simultaneously appealing *United States v. Strandlof* to the 10th Circuit. In *Strandlof* , a Colorado district court held that the act was facially invalid and could not be used to prosecute the founder of a veterans' group who falsely portrayed himself to be an ex-Marine awarded the Purple Heart after being wounded in Iraq. (Indeed, the defendant in *Strandlof* never served in the military at all.)

Unless both appellate courts (surprisingly) uphold the constitutionality of the act, the Supreme Court will almost certainly review the case. This would be true even without a split in authority among the lower courts — traditionally the most important factor in attracting the court's attention. The solicitor general bears responsibility for defending the constitutionality of Congress' laws, whenever possible, and the appeals to intermediate appellate courts — which, by Department of Justice policy, must be approved by the Solicitor General's Office — confirm that the government does not consider defense of the act to be frivolous or unwarranted.

The solicitor general is the most trusted advocate in the Supreme Court, and its relatively rare certiorari petitions seem to receive special deference. Moreover, the Supreme Court, as a matter of informal custom, does not allow lower courts to invalidate congressional enactments that affect the entire country; if an act of Congress is to be invalidated, the court seems to say, it should be done by the Supreme Court. Finally — returning to first principles in this article — the intersection between First Amendment and criminal law in an interesting factual scenario will likely prove too alluring for the justices to resist.

Whichever case arrives at the court, it is unlikely to receive a particularly warm welcome. The Roberts Court has shown itself to be protective of free speech even where speech acutely affects actual victims. It is hard to imagine that the justices would uphold criminal penalties for false speech that causes only an abstract harm.

Protecting Unpopular Speech

In each of the three cases described above, the court appears likely to continue its robust protection of free speech. Each of these rulings would protect unpopular speech, to be sure, but that is the animating principle of the First Amendment. It is easy to protect popular speech. It takes guts to protect unpopular speech, and the Roberts Court has shown itself to have guts in this important area of law.