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To Secure These Rights: The Supreme Court and *Snyder v. Phelps*

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TO SECURE THESE RIGHTS: THE SUPREME COURT AND *SNYDER V. PHELPS*

ETHAN FISHMAN¹

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I. INTRODUCTION

Historically, the United States Supreme Court has taken a morally neutral approach towards issues involving freedom of expression.² Instead of evaluating the content or substance of the views being expressed, the Court has relied primarily upon formalistic time, place, and manner considerations to guide its judgment in such cases.³ The rationale, as well as the advantages and disadvantages of this judicial approach are vividly illustrated in *Snyder v. Phelps*—the Court’s March 2011 ruling that patently hateful protests at military funerals are protected by the First Amendment of the Constitution.⁴

Matthew Snyder was a heterosexual twenty-year-old, Marine Corps Lance Corporal who died fighting for his country in Al-Qa’im, Iraq.⁵ Fred

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2. See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). In this seminal case, the Supreme Court clearly indicates that “[t]he First Amendment generally prevents government from proscribing speech, . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” *Id.*

3. See generally *R.A.V.*, 505 U.S. at 383, 386 (reaffirming that content-based regulations are presumptively invalid and indicating that time, place, and manner regulations are permissible); see also *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding reasonable “time, place, or manner” regulations, only if they are “justified without reference to the content of regulated speech.”); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (affirming that “content-neutral” time, place, and manner regulations are acceptable).

4. See generally *Snyder*, 131 S. Ct. 1207.

5. *Id.* at 1212; see Barley Snyder, LLC, MatthewSnyder.Org, <http://www.matthewsnyder.org/> (last visited 10/10/2011); Nina Totenberg, *High Court Asked to Limit Military*

Phelps, Sr. is the founder of the Westboro Church, a Baptist congregation in Topeka, Kansas composed mainly of his extended family.⁶ The Westboro Church is defined by hatefulness. Included among the targets of its rancor are homosexuals, the United States for tolerating homosexuals, the American military for defending the United States, and anyone or any religion that does not completely share its dogma.⁷ It especially loves to hate Catholicism.⁸ The church has chosen to publicize its messages by protesting at hundreds of funerals over the past twenty years.⁹ On March 10, 2006, Westboro congregants picketed Matthew Snyder's funeral at a Catholic cemetery in Westminster, Maryland, carrying placards that read "Thank God for Dead Soldiers," "God hates you," and "You are going to hell."¹⁰

After a civil suit was brought by Albert Snyder, Matthew's father, a Federal District Court awarded Snyder millions of dollars in compensatory and punitive damages against Westboro, finding that the church intentionally caused him psychological strain and distress.¹¹ When the Fourth Circuit Court of Appeals subsequently reversed the judgment,¹² Mr. Snyder appealed to the United States Supreme Court, which, on March 2, 2011, issued its 8-1 ruling.¹³ Writing for the majority, Chief Justice John

Funeral Protests, NPR, October 6, 2010, <http://www.npr.org/templates/story/story.php?storyId=130357711>; Jon Hurdle, *Kansas Church Liable in Marine Funeral Protest*, Reuters, October 31, 2007, <http://www.reuters.com/article/2007/10/31/us-iraq-gay-lawsuit-idUSN3134225120071031>.

6. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571 (D. Md. 2008) rev'd, 580 F.3d 206 (4th Cir. 2009) aff'd, 131 S. Ct. 1207 (2011). Of the sixty or seventy members of the Westboro Baptist Church, led by Phelps, only ten or twenty people are not family members. *Id.* According to trial testimony, "the members of this church practice a 'fire and brimstone' fundamentalist religious faith." *Id.*

7. See *id.*

8. See *id.*

9. *Snyder*, 131 S. Ct. at 1212.

10. *Snyder*, 533 F. Supp. 2d at 571.

11. *Id.* at 597-598. The jury originally awarded \$10.9 million in total damages, encompassing both punitive and compensatory damages, but the Court reduced the award to \$5 million. *Id.*

12. *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) aff'd, 131 S. Ct. 1207 (2011).

13. *Snyder*, 131 S. Ct. at 1212. The trial court found Westboro Baptist Church liable for millions of dollars based on the emotional toll the protesting activity had taken on Snyder—he had testified that the memories of his son were interminably linked to the thoughts of the picketing, and that he often became "tearful, angry, and physically ill" when he thought about it. See *id.* at 1214. Expert witnesses had testified that the emotional anguish of Snyder resulted in severe emotional distress—specifically, causing depression and exacerbating preexisting health conditions. *Id.* The Court of Appeals reversed the decision on the basis that the statements made by Westboro were protected under the First Amendment, because those statements were on "matters of public concern, were not provably false, and were expressed solely through

G. Roberts, Jr. affirmed the Circuit Court's decision.¹⁴ Justice Robert's argued that Westboro's protests are clear examples of public speech, which occupy "the highest rung of the hierarchy of First Amendment values."¹⁵ While Westboro's messages "may fall short of refined social or political commentary," he admitted, "the issues they highlight—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—are matters of public import."¹⁶

II. SNYDER V. PHELPS: THE FIRST AMENDMENT AND PROTECTED SPEECH

Albert Snyder had successfully demonstrated to the District Court that Westboro "intentionally or recklessly engaged in extreme and outrageous conduct that caused [him to] suffer severe emotional distress."¹⁷ However, according to Chief Justice Roberts' interpretation of the First Amendment, "outrageousness" is irrelevant to the prosecution of freedom of speech cases as it represents "a highly malleable standard" that defies definition in objective terms.¹⁸ "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain," Chief Justice Roberts concluded;¹⁹

On the facts before us, we cannot react to that pain 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. That choice requires that we shield Westboro from tort liability for its picketing in this case.²⁰

Of special significance to Chief Justice Roberts was that the Westboro congregants had "the right to be where they were" because they followed legal procedures.²¹ They picketed on a public street 1,000 feet from the

hyperbolic rhetoric." *Id.* In finding that Westboro Baptist church was entitled to judgment as a matter of law, the Court of Appeals largely ignored the content of the speech and the emotional consequences felt by Snyder, instead focusing on the time, place, and manner in which the speech was carried out. *See id.* The appeal to the Supreme Court was a natural progression of the contentious litigation between a broken man and a prolific organization engaging in first amendment activities. *See id.*

14. *Id.* at 1212.

15. *Id.* at 1211.

16. *Id.* at 1217.

17. *Id.* at 1215.

18. *Id.* at 1219 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

19. *Snyder*, 131 S. Ct. at 1220.

20. *Id.*

21. *Id.* at 1218. (emphasis added).

funeral, obeyed the instructions of police, and protested nonviolently.²² “A group of parishioners standing at the very spot where Westboro stood, holding signs that said ‘God Bless America’ and ‘God Loves You’ would not have been subjected to liability,” the Chief Justice maintained.²³ Rather, “[i]t was what Westboro said that exposed it to tort damages.”²⁴

In sum, Justice Roberts stated that Westboro could not be held legally culpable for the severity of Albert Snyder’s anguish because of the manner in which it conducted its protests: it deferred to the police and addressed public, not personal, issues that are shielded from government interference by the First Amendment.²⁵ Justice Stephen G. Breyer joined the majority but wrote separately in an apparent attempt to limit the scope of Justice Roberts’ language.²⁶ Other types of expression such as internet postings, Justice Breyer advised, might not qualify for similar constitutional protection.²⁷

The lone dissenter, Justice Samuel A. Alito, Jr., took a more substantive approach to the case.²⁸ He challenged Justice Roberts’ determination that Westboro’s verbal attacks on Matthew Snyder were impersonal.²⁹ It targeted him because he was a Catholic soldier, Alito argued.³⁰ Since the church knew “the media is irresistibly drawn to the sight of persons who are visibly in grief,” Alito asserted that the church shrewdly calculated that the more psychological pain it inflicted on the Snyder family, the more publicity it would be able to obtain for its hateful views.³¹ In support of his argument, Justice Alito pointed out that Westboro only canceled its threat to picket the Catholic funeral of Christina Taylor Green, the little girl murdered by a crazed gunman in Tucson, Arizona, when a radio station agreed to give it free air-time.³² “In order to have a society in which public issues can be openly and vigorously debated,” Justice Alito concluded, “it is not necessary to allow the brutalization of innocent victims”³³

22. *Id.* at 1210.

23. *Id.* at 1219.

24. *Id.* (reiterating that punishing speech based on content is impermissible).

25. *See Snyder*, 131 S. Ct. at 1212.

26. *See id.* at 1221 (Breyer, J., concurring).

27. *See id.*

28. *See id.* at 1222–29 (Alito, J., dissenting).

29. *See id.* at 1226–28.

30. *Id.* at 1226.

31. *See Snyder*, 131 S. Ct. at 1224.

32. *Id.* at 1224.

33. *Id.* at 1229.

III. FREEDOM OF EXPRESSION AND THE SUPREME COURT

This is not the first time the Roberts Court has taken a formalistic or situational position on freedom of expression cases.³⁴ In 2010, it overturned federal laws that limit the amount of money corporations can spend on political campaigns³⁵ and that ban depictions of animal cruelty.³⁶ Past courts have chosen the formalistic route to overturn policies regulating expression as well.³⁷ In the 1949 case of *Terminiello v. Chicago*, for example, a majority of the justices ruled as unconstitutional a \$100 fine imposed by the city on a suspended Catholic priest, known as the “Father Coughlin of the South,” for delivering a virulent speech in praise of fascism and racism at a local auditorium.³⁸ Coming as they did on the heels of a world war in which countless Americans were killed and wounded by fascists, Terminiello’s rants were so incendiary that, despite the presence of a large contingent of Chicago police, order could not be maintained.³⁹

Twenty-nine years later, in *National Socialist Party v. Village of Skokie* [hereinafter “*Skokie*”], the Court again applied the content neutral doctrine to loathsome fascist ideology.⁴⁰ After failing in their initial bid to stage a demonstration in Chicago’s downtown Marquette Park, a group of American Nazis planned a march in suburban Skokie.⁴¹ The swastika-emblazoned Nazis chose Skokie because of its large population of Holocaust survivors, whose very existence they held in contempt.⁴² When the municipal government of Skokie enjoined the march and a succession of Illinois State courts refused to stay its injunction, their decision was appealed to the United States Supreme Court, which criticized the Illinois court for violating the Nazis’ First Amendment rights.⁴³ On remand, state

34. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010).

35. *Citizens*, 130 S. Ct. at 913.

36. *Stevens*, 130 S. Ct. at 1582, 1592.

37. See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

38. See *id.* at 4–5.

39. *Id.* at 37.

40. See generally *Nat’l Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (finding that to uphold an injunction denying members of the Nazi party the right to demonstrate would constitute a denial of first amendment protections).

41. See *Village of Skokie v. Nat’l Socialist Party of America*, 366 N.E.2d 347, 349–50 (Ill. App. Ct. 1977).

42. See *id.* at 349 (noting that greater than fifty percent of the village’s population is made up of Jewish people, including hundreds of concentration camp survivors and thousands whose relatives were murdered by the Nazis).

43. See *Village of Skokie*, 432 U.S. at 43–44.

jurists promptly reversed themselves and ruled in favor of the marchers.⁴⁴

As the *Snyder*, *Terminiello*, and *Skokie* cases demonstrate, procedural jurists come in all political stripes.⁴⁵ Although Justices Roberts, Scalia, Thomas, Kennedy, Breyer, Ginsburg, Sotomayor, and Kagan rarely agree on matters such as government regulation of the economy, for example, in *Snyder* they were unanimous. Whereas Roberts is considered to be a conservative, Justices William O. Douglas and John Paul Stevens, who delivered the majority opinions in *Terminiello* and the “Skokie Affair,” were liberals.⁴⁶ In words very similar to Chief Justice Roberts, Douglas asserted, “A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁴⁷

The dissenters in *Snyder* and *Terminiello* also thought alike.⁴⁸ Justice Alito’s criticism of the Court in *Snyder* for ignoring the immorality of Westboro’s behavior in favor of a dedication to virtually unlimited freedom of expression was mirrored by Justice Robert H. Jackson’s objection in *Terminiello*.⁴⁹ “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom,” Justice Jackson warned, “it

44. See *Village of Skokie v. Nat’l Socialist Party of America*, 373 N.E.2d 21, 26 (Ill. 1978).

45. See generally *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Village of Skokie*, 432 U.S. 43; *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

46. Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, (Jul. 24, 2010) <http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all>; TIME MAGAZINE, *The Law: The Court’s Uncompromising Libertarian* (Nov. 24, 1975), <http://www.time.com/time/magazine/article/0,9171,913732,2,00.html>.

47. *Terminiello*, 337 U.S. at 4.

48. See *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting) (noting that the First Amendment allows the expression of “views in terms that are ‘uninhibited,’ ‘vehement,’ and ‘caustic’” (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))); *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting) (“Freedom of speech undoubtedly means freedom to express views that challenge deep-seated, sacred beliefs, and to utter sentiments that may provoke resentment.”).

49. See *Snyder*, 131 S. Ct. at 1222–23; *Terminiello*, 337 U.S. at 14. In *Snyder*, Justice Alito stated the following:

Respondents . . . have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. . . . [But] 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.”

131 S. Ct. at 1222–23 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Justice Jackson displayed similar concern in *Terminiello* by noting that the majority opinion seemed “to regard [liberty and order] as enemies of each other and . . . that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society’s need for public order.” 337 U.S. at 14.

will convert the constitutional Bill of Rights into a suicide pact.”⁵⁰

IV. AMERICAN ORIGINS OF CONTENT-NEUTRAL JURISPRUDENCE

In American history, the intellectual origins of content neutral jurisprudence can be traced back to our founding document, the Declaration of Independence.⁵¹ Based upon the social contract theory, that purports to explain the true origin and purpose of government, the Declaration posits the existence of a metaphorical state of nature, predating civil society, in which individuals enjoy boundless natural rights conferred by God.⁵² When their rights come under attack, these formerly completely free individuals emerge from the state of nature and contract with government to defend the liberties God has bestowed upon them.⁵³

From the perspective of the Declaration, a just government is one that effectively protects individual rights.⁵⁴ “We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are Life, Liberty, and the pursuit of Happiness,” the Declaration proclaims.⁵⁵ “That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁵⁶

In the 1927 case of *Whitney v. California*, Justice Louis D. Brandeis restated the Declaration’s central premise that freedom is synonymous with political justice. “Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary,” Brandeis argued;⁵⁷

50. *Terminiello*, 337 U.S. at 37.

51. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776), available at http://www.archives.gov/exhibits/charters/declaration_transcript.html.

52. See *id.* para. 2 (stating that all men “are endowed by their Creator with . . . rights”); Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 852 (2010) (analyzing that through the statements enunciating their “foundational philosophies . . . the founding fathers established their embrace of the social contract theory” in the Declaration of Independence).

53. See paragraph 2 of THE DECLARATION OF INDEPENDENCE, which explains that governments derive powers from the consent of the governed and when that government destroys the existing consensual relationship it is the right of the people to exert their rights against the government.

54. See *id.*

55. *Id.*

56. *Id.*

57. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁵⁸

V. PHILOSOPHICAL PERSPECTIVES ON FREE SPEECH

In the history of Western political philosophy, the thinker who most eloquently articulated the position the Court has defended in free speech cases was John Stuart Mill.⁵⁹ If left unregulated by government, Mill asserted that some sort of natural equilibrium will come into play guaranteeing that truth will prevail over bad ideas.⁶⁰ To prevent tyranny, Mill warned in *On Liberty* that it is necessary for humanity to honor the maxim: “[o]ver himself, over his own body and mind, the individual is sovereign.”⁶¹ The only time expression may be legitimately restricted, he added, is when, as in the instance of “shouting fire in a crowded theatre,” it causes immediate physical harm to others.⁶²

Reiterating Mill’s belief that truth derives from citizens acting as consumers in a free marketplace of ideas, Justice Oliver Wendell Holmes, Jr. wrote in the 1919 case of *Abrams v. United States*:

[W]hen 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.⁶³

The Declaration’s preoccupation with individual rights and Mill’s argument that government interference with the natural ebb and flow of competing ideas will result inevitably in tyranny have convinced

58. *Id.*

59. See JOHN STUART MILL, *ON LIBERTY*, 11 (David Spitz ed., 1975); see also Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (explaining the strong effect that speech has on people); Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (holding that “maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence”); *Whitney*, 274 U.S. at 375 (stating that the ability to think and speak freely is indispensable to political truth).

60. MILL, *supra* note 59.

61. *Id.*

62. *Id.* at 18.

63. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

Americans to rely upon a relativistic approach to free speech content.⁶⁴ By remaining morally neutral, we have concluded, would-be tyrants will be denied the ammunition they require to exploit ethical ideals in an attempt to gain and retain political power.⁶⁵ The specters we rightly cannot seem to shake from our minds are those of the Inquisition during the Middle Ages and the seventeenth century Massachusetts Bay Puritans sanctioning the torture and murder of innocent people considered heretics because they refused to accept certain officially prescribed moral standards. The real “genius of American politics,” historian Daniel Boorstin observed, lies in our insistence that “institutions are not and should not be the grand creations of men toward large ends and outspoken values” such as the moral obligations citizens owe their communities.⁶⁶

The counterpoint to the views of Mill, Boorstin, and the United States Supreme Court is supplied by journalist Walter Lippmann.⁶⁷ Against their arguments, that laws reflecting clearly defined values imperil democracy, Lippmann asserted that free government actually is not capable of surviving without them.⁶⁸ Where “[t]here is no public criterion of the true and the false, of the right and the wrong,” Lippmann argued, “it is impossible to reach intelligible and workable conceptions of popular election, majority rule, representative assemblies, free speech, loyalty, property, corporations, and voluntary associations.”⁶⁹

The dangers posed to freedom by moral relativism, what Lippmann called “public agnosticism,” based upon the assumption that values “are private—with only subjective relevance and significance,”⁷⁰ were discussed further by theologian Reinhold Niebuhr and political scientist John H. Halliwell.⁷¹ Laissez-faire, the moral relativists’ weapon of choice in the realms of both economics and freedom of expression, Niebuhr argued, embodies a false “secularized version of providence.”⁷² The

64. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at http://www.archives.gov/exhibits/charters/declaration_transcript.html; MILL, *supra* note 59.

65. MILL, *supra* note 59.

66. DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS 6 (Univ. of Chicago Press 1967) (1953).

67. See WALTER LIPPMANN, ESSAYS IN THE PUBLIC PHILOSOPHY 128 (1955) (stating that freedom of speech may lead to deception).

68. See *id.* at 101.

69. *Id.* at 101, 114.

70. *Id.* at 99.

71. See generally JOHN HALLOWELL, MAIN CURRENTS IN MODERN POLITICAL THOUGHT (H. Holt 1950); REINHOLD NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS (University of Chicago Press 1960) (1944).

72. NIEBUHR, *supra* note 71.

abiding faith of proponents of laissez-faire, such as Adam Smith, is that when human beings pursue their own interests they are being “led by an invisible hand to promote an end which is not [their] intention.”⁷³ According to Niebuhr, “[t]his ‘invisible hand’ is of course the power of a pre-established social harmony, conceived as a harmony of nature, which transmutes conflicts of self-interest into a vast scheme of mutual service.”⁷⁴

Viewing laissez-faire theory as a naïve depiction of human relations, Niebuhr wryly labeled it “harmless egotis[m].”⁷⁵ When applied to economics, he maintained, laissez-faire theory ignores the practice by which business monopolies artificially increase the price of goods and decrease their quality.⁷⁶ In the realm of expression, it underestimates the power of communication monopolies to close the lines of open discussion and overestimates the ability of citizens to protect themselves against lies spread by manipulative demagogues.⁷⁷

By Hallowell’s estimation, societies taking ideals seriously are less apt to fall prey to tyrants than those practicing moral relativism.⁷⁸ Without in any way discounting the amount of suffering caused by the Inquisition and the Puritans in the name of God’s love, he calculated that Nazi Germany and the Soviet Union, both of which denied the existence of universal moral laws, were responsible for much more human devastation.⁷⁹ The Nazis were motivated by an irrational “triumph of the will” that took pride in subverting moral standards by brute force.⁸⁰ The communist doctrine of historical materialism teaches that truth is always relative to prevailing economic conditions.⁸¹ The problem with moral relativists, Hallowell wrote, is that once they “purge the word justice from [their] vocabulary” it becomes logically impossible for them to “condemn a tyrant as unjust” or to even “recognize tyranny when it arises.”⁸²

Who can be trusted to interpret moral ideals accurately? To Hallowell, their interpretation must derive, not from one person, organization, or regime, but continuous communal dialogues that seek to

73. *Id.*

74. *Id.*

75. *Id.* at 30.

76. *See id.* at 114.

77. *See id.*

78. *See* HALLOWELL, *supra* note 71, at 67.

79. *See id.* at 441.

80. NIEBUHR, *supra* note 71, at 123–24.

81. *See* HALLOWELL, *supra* note 71, at 410.

82. John Hallowell, “*Modern Liberalism: An Invitation to Suicide*,” 46 S. ATL. Q. 459 (1947).

reconcile the wisdom of the ages with contemporary circumstances.⁸³ “When we stand upon the shoulders of those who have gone before us,” Hallowell wrote, “we increase our vision.”⁸⁴ Under no illusion that the perfect meaning of ideals such as justice ever could be discovered by imperfect human beings, he nevertheless was confident that through the process of dialogical discovery over time, communities would become more decent places to live.⁸⁵

Yet Lippmann, Niebuhr, and Hallowell’s warnings generally go unheeded in the United States.⁸⁶ We remain a country that is dedicated to free expression as an end in itself.⁸⁷ We continue to be leery of explicit definitions of justice that threaten to work their way into law.⁸⁸ The faintest suggestion that politics should be “about cultivating virtue,” political scientist Michael Sandel observes, strikes many Americans “as strange, even dangerous.”⁸⁹

As Sandel teaches, however, democratic societies take great risks when they consciously empty their politics “of substantive moral engagement” and seek “to separate questions of fairness and rights from arguments about honor, virtue, and moral desert.”⁹⁰ They expose themselves to the creation of ethical vacuums that citizens seeking normative guidance in uncertain times may find unbearable.⁹¹ Unable to receive direction from civilized, rational sources in society who, in the name of tolerance for dissenting opinions refuse to provide that direction, citizens may accept counsel from sociopathic demagogues offering “narrow, intolerant moralisms.”⁹² When, for example, the Weimar Republic suffered a failure of nerve and was unwilling to combat

83. See HALLOWELL, *supra* note 71, at 188.

84. *Id.* at 195.

85. See *id.* at 196.

86. See generally HALLOWELL, *supra* note 71; LIPPMAN, *supra* note 67; NIEBUHR, *supra* note 71.

87. See U.S. CONST. amend. I, available at http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

88. See John Rawls, *Justice as Fairness*, 67 THE PHIL. REV. 164, 166–67 (1958) (discussing general notions of justice and its purpose and place in society).

89. MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 216 (Farrar, Straus and Giroux eds., 2009).

90. *Id.* at 187.

91. See *id.* at 192.

92. *Id.* at 243.

licentiousness during a difficult time for Germany after World War I, the German people, desperately seeking to regain some semblance of stability in their lives, chose to escape from freedom and embrace the order of a totalitarian regime.⁹³

A related challenge to democracy presented by relativism was identified by Alexis de Tocqueville.⁹⁴ In his celebrated *Democracy in America*, Tocqueville distinguished between two varieties of equality associated with democratic societies: equality of opportunity and egalitarianism or literal equality.⁹⁵ Equality of opportunity requires every person and idea to be given a fair hearing with the expectation that some will prove superior to others.⁹⁶ Egalitarianism takes the relativistic position that no person or idea possesses greater value than another.⁹⁷ In an attempt to escape the intense competition to succeed that equality of opportunity engenders, Tocqueville feared citizens would voluntarily abandon freedom for the literal equality despotism can guarantee.⁹⁸ Under despotism the competitive pressures abate and everyone is equally enslaved except the despot who dictates exactly how they all must act and think.⁹⁹ “[D]emocratic peoples have a natural taste for liberty; left to themselves, they will seek it . . .” Tocqueville wrote:

But their passion for equality is ardent, insatiable, eternal, and invincible . . . They want equality in freedom, and if they cannot have that, they still want equality in slavery. They will put up with poverty, servitude, and barbarism, but they will not endure aristocracy. This is true at all times, but especially in our own. All men and all powers who try to stand up against this irresistible passion will be overthrown and destroyed by it. In our own day freedom cannot be established without it, and despotism itself cannot reign without its support.¹⁰⁰

Ultimately, the central issue raised by *Snyder* concerns how much virtue can be directly infused into democratic institutions.¹⁰¹ Observers such as Lippmann, Niebuhr, Hallowell, Sandel, and Tocqueville maintain

93. See ERICH FROMM, *ESCAPE FROM FREEDOM* 209–10 (Holt et al eds., 1941).

94. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 454–55 (J.P. Mayer ed., George Lawrence Trans., 1969).

95. See *id.* at 503.

96. See *id.* at 630.

97. See *id.* at 503.

98. See *id.* at 509–10.

99. See *id.*

100. DE TOCQUEVILLE, *supra* note 94, at 506.

101. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011) (holding that when speech is a matter of public concern, the inappropriateness of such speech is irrelevant to a determination as to whether it violates the First Amendment).

that a delicate balance between liberty and virtue must exist in order for free societies to flourish.¹⁰² Freedom without virtue leads to the licentious Weimar Republic.¹⁰³ Virtue without freedom becomes the tyrannical Inquisition.¹⁰⁴ The alarming message sent by *Snyder* is that in the United States, the balance has tilted far away from virtue.¹⁰⁵

One way to rectify this imbalance would be to classify the kind of behavior Westboro exhibits as hate speech. Many developed nations around the world criminalize hate speech.¹⁰⁶ In the United States, however, where content neutral jurisprudence reflects a larger cultural milieu of moral relativism, hateful expression continues to be protected by the law.¹⁰⁷ Speaking for a majority of the Court in the 1992 case of *R. A. V. v. City of St. Paul*, for example, Justice Antonin Scalia overturned the conviction of a teenager for violating a St. Paul, Minnesota hate speech statute by burning a wooden cross on the lawn of an African American family.¹⁰⁸ St. Paul could have successfully prosecuted the teenager for openly burning wood, Justice Scalia argued, but not for voicing his odious opinions on race relations.¹⁰⁹ According to Justice Scalia, the “First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”¹¹⁰

This is not to say that the Court has been willing to defend all forms of expression.¹¹¹ In the 1951 case of *Dennis v. United States*, for example,

102. See LIPPMAN, *supra* note 67, at 142–44; NIEBUHR, *supra* note 71, at 3; HALLOWELL, *supra* note 71, at 225; SANDEL, *supra* note 89, at 9; DE TOCQUEVILLE, *supra* note 94, at 233.

103. See FROMM, *supra* note 93, at 36–37.

104. See BOORSTIN, *supra* note 66, at 36–39 (chronicling the impact of successful settlement upon the philosophy of the New England Puritans).

105. See *Snyder*, 131 S. Ct. at 1218–1220 (concluding that speech of church members who picketed near the funeral of military service member was of public concern and entitled to special protection under the First Amendment).

106. See PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE* 125 (Univ. Press of Kansas, 1999); see also, e.g., Criminal Code of Canada, R.S.C. 1985, c. C-46, §§ 318–320 (Can.) (stating that “Hate Propaganda” is punishable by up to five years imprisonment and it includes any speech which advocates or promotes genocide against an identifiable group of the public distinguished by color, race, religion, ethnic origin, or sexual orientation).

107. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (finding an ordinance preventing racially biased speech to be in violation of the First Amendment).

108. *Id.* at 381–84.

109. *Id.* at 385.

110. *Id.* at 391.

111. See, e.g., *Dennis v. United States*, 341 U.S. 494, 510–11 (1951) (holding that speech that posed a clear and present danger was not protected under the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (ruling that “fighting words” do not constitute speech protected under the Constitution).

it upheld the conviction of an American communist leader whose speeches, publications, and assemblies were interpreted as posing a clear and present danger to democratic government in the United States.¹¹² As with Fred Phelps, Sr., however, it was the circumstances surrounding Eugene Dennis' words that interested the Court, not their inherent worth.¹¹³ In the 1942 case of *Chaplinsky v. New Hampshire*, moreover, the Court ruled that personally insulting "fighting words" are not entitled to First Amendment protection.¹¹⁴ The Court was unwilling to apply the "fighting words" precedent to *Snyder*, however, because it did not consider Westboro's protests to be personal insults.¹¹⁵

VI. CONCLUSION

A major disconnection exists between Westboro's unmistakably shameful protests at funerals and how the United States Supreme Court described that conduct.¹¹⁶ By denying grieving families their moments of solace and exploiting their sorrow, the Westboro church intentionally makes a mockery of the most fundamental rules of civility and common decency.¹¹⁷ Yet Chief Justice Roberts characterized the protests as examples of public speech that occupy "the highest rung of the hierarchy of First Amendment values."¹¹⁸

The Court apparently chooses to view the United States as a society composed of "masterless" human beings who, in the words of political scientist Walter Berns, define "the good life" as one in which a person is "permitted to speak, publish, and worship in his own way, without guidance from moral principle or guidance by the law in the name of moral principle."¹¹⁹ As a rule, civilized people dread licentiousness because they view it as an ominous threat to the maintenance of a just social order.¹²⁰ Morally responsible, freedom-loving Americans need to be made aware

112. *Dennis*, 341 U.S. at 510–511.

113. Compare *Dennis*, 341 U.S. at 513 (stating that whether the First Amendment protects activity that constitutes a violation of the statute must depend upon a judicial determination of its scope applied to the circumstances of the case), with *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (holding that the circumstances surrounding Westboro's act did not create a situation for which the state could punish Westboro and deny it of First Amendment protection).

114. *Chaplinsky*, 315 U.S. at 573.

115. See *Snyder*, 131 S. Ct. at 1215–17.

116. See *id.* at 1213.

117. See *id.* at 1223–24 (Alito, J., dissenting).

118. *Id.* at 1215 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (2003)).

119. WALTER BERNs, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 164 (1957).

120. See *supra* notes 100–105 and accompanying text.

that in its recent *Snyder v. Phelps* decision, the Court essentially equated liberty with license.¹²¹

Proponents of content neutral jurisprudence recognize that a free flow of ideas is necessary for citizens to sustain democracies with informed decisions.¹²² But every form of expression does not constitute an idea. Ideas are rational concepts that invite logical debate. Ku Klux Klan cross burnings, Nazi swastikas, and Westboro signs reading “Thank God for Dead Soldiers” are mindless symbols of hatred meant to incite violent responses.¹²³ For these reasons, the Court should continue to protect ideas, abandon content neutrality, and begin to outlaw hate speech.

121. See *Snyder*, 131 S. Ct. at 1220–21 (holding that picketing with signs stating “Thank God for Dead Soldiers” was still a form of protected speech under the First Amendment).

122. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50–51 (1988).

123. Cf. *Snyder*, 131 S. Ct. at 1214 (illustrating several examples of inflammatory statements and messages displayed on picket signs at protests).

