

Greg White, Trib Board of Contributors: Protesters of our war dead test limits of the cherished First Amendment

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Board of Contributors

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“If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.”

— *Oliver Wendell Holmes*

The U.S. Supreme Court is expected to rule in the next few weeks in the funeral picketing case of Snyder v. Phelps. And while most agree that picketing funerals of dead soldiers is egregious, this case, which has drawn national attention, comes down to the Supreme Court deciding on a matter of freedom of speech.

The defendant, 82-year-old Rev. Fred Phelps, and his Topeka, Kan.-based Westboro Baptist Church followers make a regular practice of picketing the funerals of fallen military personnel. They carry signs with crude attacks on homosexuals and Catholics. A couple of examples read “Thank God for Dead Soldiers” and “God Hates the USA.” Phelps’ group, which is an independent Baptist church, believes that American soldiers are dying because God is punishing America for its tolerance of homosexuality.

Albert Snyder, the plaintiff, is the father of deceased Marine Lance Cpl. Matthew Snyder whose 2006 funeral was picketed and targeted by Phelps and his Westboro followers.

Snyder sued for infliction of emotional distress and won an \$11 million judgment in 2007. But his reward was reduced and then overturned on appeal, with a decision upholding the Westboro group’s right to free speech. Additionally, a 4th U.S. Circuit Court of Appeals in March ordered Snyder to pay \$16,510 of the Westboro Baptist Church’s almost \$100,000 in legal fees.

The Supreme Court agreed to hear the case, which has triggered a national debate over free speech and military privacy.

Snyder’s suit was based not only on the presence of the protesters at the funeral but on the venomous language posted on Westboro’s website, www.godhatesfags.com. The website accused the Snyders of teaching their son “to support the largest pedophile machine in the history of the world.”

Undoubtedly, there is mutual agreement by most Americans that the protests are despicable. But the court’s decision won’t be that simple.

Deciding this case will test the very foundation of the First Amendment guarantee of freedom of speech.

Justices can approach the case with a broad view of what free speech means in the United States, or the Supreme Court can attempt to navigate some legal technicalities. Whatever method it chooses, Americans will be forced to take a hard look at their own view of the judicial system — primarily because Americans have entrusted this very difficult decision to an independent judiciary, and not to the voice and will of the majority.

Were the outcome of this case submitted to a vote of the American people, I would not risk much by predicting that the \$11 million judgment initially awarded to the Snyder family would be upheld. But judicial systems — such as ours that are bound by a Constitution — are forced to impose results in service to overriding principles, even when the results seem unjust, unfair or unpopular.

In the Snyder case, it is quite possible that the Supreme Court will feel compelled to honor a principle that is uniquely American in its breadth.

False speech, hateful speech and even unwelcome speech is all protected, to some degree, under the First Amendment. So if we are to truly honor the tenets of freedom of speech, we cannot make too many exceptions. As Justice Holmes said, we must be particularly vigilant to protect the speech that we hate.

But, this does not mean that the Supreme Court has no ability to fashion some protection from contemptible speech. In the 1988 case of *Frisby v. Schultz*, the Supreme Court upheld a ban on protests in front of the home of a physician who performed abortions and was ruled to be particularly vulnerable to physical harm. And there have been several other cases that recognize that free speech must end at the point where it crosses the boundaries of common decency. Adopting the rationale of these cases to the Snyder family's funeral would not be difficult, yet it would necessarily add another exception to the freedom of speech.

Justices have distinguished free speech that is directed against a particular individual from speech that is a part of public discourse. Laws banning telephone harassment, for instance, are almost always upheld and only prohibit speech intended to annoy, disturb or harass a particular person.

But in the case of the Snyder's funeral, the tragedy experienced by that family was used by Phelps and his followers to communicate the Phelps message. And using someone else — especially someone who has recently experienced tragedy — as a platform to promote one's views does not square with a traditional view of free speech.

This leaves the high court with a difficult choice. If they decide to protect hateful speech, that would send a powerful message about just how important the principle of free speech is to our society. It also would make the protection of free speech so broad that future cases seeking to limit speech in any way would be virtually foreclosed.

A decision that travels the path through recognized exceptions — like the abortion protest case or telephone harassment — might well be justified, but would also open the door for more limitations and exceptions to free speech. And we might all regret the existence of a body of law that restricts a constitutional guarantee of free speech.

Ultimately, the Supreme Court's ruling will undoubtedly anger or disappoint many. The majority of Americans, though, will not have a vote in how the case turns out. And that leads all of us to an appreciation of the fact that our system has assigned this very difficult decision to a body that is not responsive to public opinion. America is one of the few societies that can celebrate the fact that it will abide by a decision that may be very unpopular with its citizens. But that decision is designed to protect our freedoms.

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