JUSTICE ALITO'S FREE SPEECH JURISPRUDENCE

KEITH E. WHITTINGTON*

When President George W. Bush nominated Samuel Alito to fill a seat on the Supreme Court of the United States in the fall of 2005, the right was amid a libertarian turn on freedom of speech and the First Amendment. An earlier generation of postwar conservatives had a distinctly ambivalent view about the First Amendment. While the core idea that freedom of speech is an important value and should be protected was broadly shared in the mid-twentieth century, conservatives were often quite critical of the ways in which the Court expanded the scope of protections for free speech in those years, not to mention the ways in which free speech was often being exercised by activists and artists on the political left. Free speech controversies routinely revolved around conservatives calling for restrictions on expressive activity, and conservative politicians not infrequently made hay out of art and speech that offended popular sensibilities. Prominent conservative legal scholars like Robert Bork and Walter Berns argued for a more restrictive approach to the First Amendment than the Court had been taking.[1]

By the turn of the twenty-first century, things had become more complicated. The Federalist Society now features a "Freedom of Thought Project" to foster greater consideration of the collapsing "social consensus on the importance of being able to say controversial things."[2] Its annotated bibliography of conservative and legal scholarship designed to introduce students and scholars to legal thought on the right pairs traditional conservative voices like Bork and Berns with more libertarian voices like Eugene Volokh and Michael Kent Curtis.[3] Jurists and politicians on the right have become vocal, if not always consistent, proponents of a robust view of free speech values and associated legal protections,[4] even while a new generation of conservative scholars and activists now complain about an excessive libertarian influence over the conservative legal mind.[5] The most prominent current free speech advocacy group is now the Foundation for Individual Rights in Education (FIRE), as the American Civil Liberties Union

* William Nelson Cromwell Professor of Politics, Princeton University; Visiting Fellow, Hoover Institution.

[1] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971); WALTER BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT (1957).

[2] Freedom of Thought Project, THE FEDERALIST SOCIETY, https://fedsoc.org/projects/freedom-of-thought [https://perma.cc/L97V-9ZW9] (last visited Oct. 26, 2022).

[3] Conservative & Libertarian Legal Scholarship: Constitutional Law, THE FEDERALIST SOCIETY, https://fedsoc.org/commentary/publications/conservative-libertarian-legal-scholarship-constitutional-law [https://perma.cc/KDN9-NNRW], (last updated Jun. 19, 2014).

[4] *See* WAYNE BATCHIS, THE RIGHT'S FIRST AMENDMENT (2016); THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY (2004); Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231 (2014).

[5] *See* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917 (2021); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

(ACLU) has retreated from its traditional commitments on that front, and FIRE is routinely denounced from the left as a "right-wing" group.

Justice Alito reflects that generational transition in the conservative legal movement. At his confirmation hearings in January 2006, then-Judge Alito was pressed hardest on First Amendment questions by Ohio Republican Mike DeWine. DeWine was particularly concerned that the Court's First Amendment jurisprudence had become too accommodating to pornography, which the senator thought was a form of "lesser value speech" entitled to little constitutional protection.[6] Elsewhere in the hearing, however, DeWine found himself on the other side of the First Amendment issue, declaring "there is perhaps no right in our Constitution that is really as important as freedom of speech" and expressing his concern over a "disturbing trend" of dissenting voices being excluded from public places.[7] The nominee waxed enthusiastic about his own strong support for the freedom of speech.[8] Democratic Senator Russell Feingold worried most about whether as a circuit court judge Alito had been too aggressive in protecting the speech rights of students and had won the Golden Gavel Award from the Family Research Council as a result. The question led Judge Alito to point out that he was just applying liberal icon Justice William Brennan's standards for protecting student political expression.[9] The ACLU filed a letter with the Senate expressing its deep concern over the Alito nomination, but notably admitted, "on the other hand, Alito has a generally positive record on issues involving free speech and the free exercise of religion."[10] There was a time when a conservative nominee to the Court could not expect the ACLU to endorse his record on free speech issues (though perhaps in the future the ACLU will complain that conservative nominees have too liberal of a record on free speech), but times had changed.

As a Supreme Court Justice, Alito has continued to develop "a generally positive record on issues involving free speech."[11] So much so, in fact, that Justice Elena Kagan was inspired to charge Alito with "weaponizing the First Amendment," of being too "aggressive" with it and failing to recognize that it was "meant for better things" than protecting dissenting workers from being compelled to pay for political speech with which they disagree.[12] Justice Alito has not always favored parties bringing free speech challenges before the Court. He has, on occasion, thought the majority was too solicitous of free speech claims. But his opinions are notable for emphasizing the importance of protecting unpopular speech from legal suppression or sanction. Even when disagreeing with how his colleagues have approached a free speech issue, Justice Alito has taken a cautious approach to identifying potential restrictions on speech that does not encourage a broad deference to governmental authority to limit personal expression in the name of communal values or societal interests. Across several opinions, he has been particularly

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[6] Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary, 109th Cong. 393 (2006).

[7] *Id*. at 527.

[8] *Id*. at 527–28.

[9] *Id*. at 621.

[10] ACLU Letter to the Senate Judiciary Committee on the Nomination of Samuel A. Alito, Jr. to the United States Supreme Court, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/letter/aclu-letter-senate-judiciary-committee-nomination-samuel-alito-jr-united-states-supreme-court [https://perma.cc/3TQG-TAH2].

[11] *Id*.

[12] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

concerned with the complexity of protecting individual speech in places of heavy governmental regulation.

PROTECTING UNPOPULAR SPEECH

In a recent speech, Justice Alito bemoaned the "growing hostility to the expression of unfashionable views."[13] He viewed it as "[o]ne of the great challenges for the Supreme Court going forward . . . to protect freedom of speech."[14] That freedom "is falling out of favor in some circles" and at risk of "becoming a second-tier constitutional right."[15] As important as the work of the Court might be in elaborating and defending that right, Justice Alito repeated Judge Learned Hand's admonition that the courts will not be of much help if liberty is not understood and valued by ordinary Americans.

Surely it is premature to say that the freedom of speech is in danger of being expelled from the group of "fundamental freedoms" that the post-New Deal Court said was at the heart of the constitutional enterprise and deserving of special favor from the courts. The Court in *Gitlow v. New York* elevated freedom of speech to a place of priority in the constitutional order, noting "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[16] Even after its 1937 retreat, the Court signaled that the freedom of speech was still of special judicial concern.

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.[17]

Justice Jackson emphasized that freedom of speech "may not be infringed on such slender grounds" as might justify state interference with liberties that were, in his eyes at least, less precious.[18]

It would be a remarkable about-face for the Court to truly push freedom of speech into a second-tier category. The Brandeisian effort to elevate speech to a distinctive position that justified heightened judicial scrutiny even when almost no other liberty did has become foundational to how generations of jurists have understood their task. To allow freedom of speech to be trumped by relatively modest societal interests would be truly revolutionary, and Justices on both the left and the right still seem quite committed to the core of free speech principles.

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[13] Justice Samuel Alito, Address at 2020 Federalist Society National Lawyers Convention (Nov. 12, 2022), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/9PP3-YDCK].

[14] *Id*.

[15] *Id*.

[16] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[17] Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

[18] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

But it is certainly possible to see the dangers on the horizon. In his speech, Justice Alito pointed to what might be taken to be an increasingly censorious civil society targeting conservative speech in particular. George Carlin's once scandalous routine on words you cannot say on television from the early 1970s now "seems like a quaint relic" given shifting societal norms around public profanity.[19] But Justice Alito imagines a new list of "Things You Can't Say If You're a Student or Professor at a College or University or an Employee of Many Big Corporations."[20] Those who express socially or religiously conservative views risk "being labeled as bigots and treated as such by governments, employers, and schools."[21] George Carlin might have represented the counterculture of the 1960s, but he was mainstream culture by the end of the 1970s. The evangelical right became politically active in the 1970s partly in response to that cultural transformation, but it is those who might once have identified themselves as part of the "moral majority" who now find themselves cultural outsiders. Like all dissident factions, they have a particular stake in hoping that the majority, or least the powerholders, embrace the virtue of tolerance. The libertarian right has something to offer the conservative right when it comes to carving out a place as a political and social minority in a majoritarian democracy.

Even if the freedom of speech does not get relegated to second-tier status *in toto*, the Court is quite familiar with how to characterize some forms of speech as less than fundamental. It is not hard to imagine a continuation of the long twilight war over where the boundaries are to be drawn between speech that is fundamental and speech that can be more easily subordinated to other values and concerns. Ken Kersch once wrote about how conceptual categories can get transmuted and "how conduct became speech and speech became conduct" as Progressives and New Dealers rethought what expressive activities were and were not worthy of substantial constitutional protection.[22] As he noted, there are ways "in which regime supporters publicly committed to and identified with a program of civil liberties work to constrict freedom which run counter to the substantive imperatives of the regime," by "altering the definitions of what behaviors constitute free speech controversies in the first place."[23] Justice Kagan's warnings against using the First Amendment as a sword fall exactly into that category. What are the "better things" the First Amendment is supposed to protect, as we continue to celebrate the freedom of speech as a fundamental liberty, and what are the kinds of things that can be safely tossed aside in the name of progress? We are in the midst of a set of debates in which the putative defenders of free speech, who will still claim to be civil libertarians, will spend a great deal of time and energy explaining why the speech they want to restrict is not really the kind of speech that is of concern to the First Amendment or to any right-thinking person. Justice Alito pointed to the Second Amendment as an example of a right that got pushed into second-tier status in the past. Hopefully we will not see the day in which the Court explains to the people that the freedom of

[19] Justice Samuel Alito, Address at 2020 Federalist Society National Lawyers Convention (Nov. 12, 2022), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/9PP3-YDCK].

[20] *Id*.

[21] *Id*.

[22] Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and Freedom of Speech*, 8 U. PA. J. CONST. L. 255 (2006).

[23] *Id*. at 258–259.

speech is really best understood as a right to be exercised collectively through government officials rather than by individual citizens, but the prospect that the First Amendment will continue to be treated better than the Second Amendment is a small consolation.

Justice Alito has been as vocal as free speech champions in the past about the importance of protecting the speech that we hate. Justices like Louis Brandeis, Hugo Black, William O. Douglas, and William Brennan were unafraid to be too aggressive about deploying the First Amendment as a sword, and they were insistent that freedom of speech meant nothing if we were unwilling to tolerate the expression of ideas that we detested. In a liberal democracy, we are to overcome wrong ideas by persuasion and mobilization, not by suppression and censorship. It is a hard lesson to learn and to remember, and Justice Alito has been eloquent in reminding us of it.

Justice Alito was most direct on this point in his opinion for the Court in *Matal v. Tam*.[24] The case involved the question of whether the government could refuse to issue a trademark for content that might disparage or bring into contempt any person living or dead. We live in a world in which we are constantly and confidently told that "hate speech is not free speech." Having identified such a shiny new exception to the First Amendment, many are eager to identify the myriad examples of hate speech that they would like to suppress. The disparagement clause of the trademark statute was a compelling vehicle for (once again) making plain that even hate speech is protected by the First Amendment.

Justice Alito had already staked out his position on such matters when he was serving on the Third Circuit. One of the prominent opinions he wrote during that service came in the case of *Saxe v. State College Area School District*,[25] a case involving a harassment policy at a public school. This policy, which a few years earlier would have simply been described a speech code, prohibited any "verbal . . . conduct" that "offends" or "belittles" on the basis of a number of protected characteristics, including "hobbies and values" and "social skills."[26] Such policies remain all-too-common at schools and universities today, sometimes with language that is barely better than that used by the school in this case. Judge Alito pointed out what should have been obvious,

> By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 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." . . . No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of anti-discrimination.[27]

It is no accident that the opinion quotes from *Texas v. Johnson* and *Terminiello v. City of Chicago*.[28] Neither of those opinions, written by Justices Brennan and Douglas respectively, was

[24] 137 S. Ct. 1744, 1751 (2017).

[25] 240 F.3d 200 (3d Cir. 2001).

[26] *Id*. at 203.

[27] *Id*. at 210.

[28] Texas v. Johnson, 491 U.S. 397 (1989); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

likely to be beloved by conservatives at the time it was issued, but both were landmark statements in the battle against the "heckler's veto." The ability of the offended mob to enlist the assistance of the state to shut down speech that the mob finds intolerable through the threat of violence is an old problem and one to which the courts were slow to respond. The demand of the mob to silence speakers that offend remains a serious problem throughout civil society, even if the government is somewhat less quick than it once was to cater to the will of the mob. The fact that conservatives are now more likely to be the speaker that offends might make the courts more sensitive to the problem these days. It is surely the case that conservatives will often still find themselves part of the offended audience, and in some circumstances that has certainly encouraged conservatives to embark on their own cancellation campaigns. But one hopes for more principled consistency from the courts than from legislators or media personalities, and Judge Alito's opinion in *Saxe* was an appeal to principle that still needs to be heard.

In *Matal*, Alito returned to this theme. The disparagement clause, like the school's anti-bullying policy, "offends a bedrock First Amendment principle: Speech may not be banned on the grounds that it expresses ideas that offend."[29] No matter how much we might not like it, for constitutional purposes, "[g]iving offense is a viewpoint" and the Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'"[30] The idea that the government "has an interest in preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment."[31] The "proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[32] "Hateful" speech is still free speech.

DISSENTING FROM SPEECH PROTECTIONS

Justice Alito is no William O. Douglas, however. Indeed, he was characterized by Neil Siegel as "the least free-speech libertarian on the Roberts Court."[33] Siegel's phrase is an interesting one because it would seem to recognize that the Roberts Court is, in general, a free-speech libertarian Court, and so to be the least free-speech libertarian on this Court is still to be quite libertarian. But Siegel quite persuasively points to cases in which Justice Alito seems more reluctant to defend the hateful and offensive speech we hate. Siegel has little to say about Justice Alito's opinions in those cases, but they are worth unpacking. It is quite notable that Justice Alito has been willing to stand alone among his colleagues in voting to sustain government restrictions on speech, but it is also interesting how he sought to explain those votes.

The first of these is *United States v. Stevens*,[34] in which the Court struck down a federal statute seeking to prohibit commercial videos of acts of cruelty to animals, most notoriously "crush videos" of animals harmed for sexual titillation. Justice Alito alone tried to salvage what he

[29] *Tam*, 137 S. Ct. at 1751.

[30] *Id*. at 1763 (quoting Street v. New York, 394 U.S. 576, 592 (1969)).

[31] *Tam*, 137 S. Ct. at 1764.

[32] *Id*. (quoting United States v. Schwimmer, 279 U.S. 644, 644 (1929) (Holmes, J., dissenting)).

[33] Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164, 172 (2016).

[34] 559 U.S. 460 (2010).

characterized as a "valuable statute," but his approach was a fairly limited one.[35] Rather than striking down the statute as a whole, Justice Alito would have preferred the more modest approach of asking whether the statute was unconstitutional as applied to particular the video at issue in the case, reflecting some skepticism about the overbreadth doctrine as a general approach to First Amendment cases. Rather than leaping to striking down the statute as a whole because it might touch on some constitutionally protected content, Justice Alito would have preferred to narrow the statute through interpretation so as to try to limit its scope to videos that are outside the bounds of constitutional protection. Congress in fact responded to the Court's ruling by passing such a narrow statute, the Animal Crush Video Prohibition Act of 2010, with one circuit court rejecting a constitutional challenge to it.[36] Whether the Court should prefer to strike down overly broad laws in their entirety and leave it to Congress to modify the terms of the statute or to narrow the scope of the statute through interpretation is an interesting and important question, but one that reduces the distance between Justice Alito and his colleagues in the *Stevens* case.

Justice Alito's suggested approach would have limited the scope of the original statute "to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law."[37] In doing so, Justice Alito would have leaned on *New York v. Ferber*, which upheld a child pornography statute.[38] Chief Justice Roberts objected to the government seeking to use *Ferber* to create "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment," but he does little to grapple with Justice Alito's point that *Ferber* rests on the view that the First Amendment "does not protect violent criminal conduct, even if engaged in for expressive purposes."[39] A narrow set of applications to films of illegal animal torture that serve no educational or scientific purpose would seem to hew to the logic of *Ferber* regarding the intimate link between some illegal conduct and the monetization of that conduct through the commercial sale of videos of the criminal acts. Rather than adding new categories of unprotected speech, the Alito dissent in *Stevens* would seem limited to applying a framework already established by the Court. The application may or may not be a good one, but it is not a radical attack on the Court's exiting free speech jurisprudence.

A second significant dissent came in *Snyder v. Phelps*, in which the Court rejected an intentional inflection of emotional distress claim based on the actions of the Westboro Baptist Church at a military funeral.[40] State legislatures have responded to the Court's decision by creating time, place and manner statutes to keep protestors at a distance from funerals, which have had a more favorable reception in the courts.[41] Of course, in this context the question was not one that could be resolved through a narrowing statutory interpretation. The buffer zone statutory scheme is surely the safer path to take from the perspective of preserving robust protections for protest activity. Allowing the intentional infliction of emotional distress tort in this context would leave open the door to vexatious suits against many other protestors, and the

[35] *Id.* at 482 (Alito, J., dissenting).

[36] 18 U.S.C. § 48; United States v. Richards, 755 F.3d 269 (5th Cir. 2014).

[37] *Stevens*, 559 U.S. at 486 (Alito, J., dissenting).

[38] New York v. Ferber, 458 U.S. 747 (1982).

[39] *Stevens*, 559 U.S. at 493 (Alito, J., dissenting).

[40] Snyder v. Phelps, 562 U.S. 443 (2011).

[41] Phelps-Roper v. City of Manchester, 697 F.3d 678 (8th Cir. 2012).

Phelps majority reinforced the broad principle highlighted by Justice Alito in *Saxe* and *Matal* that hateful and offensive speech is still constitutionally protected speech.

But again it is worth noting how Justice Alito tries to limit the implications of upholding the suit against the Westboro Baptist Church. He would seek to distinguish between "free and open debate" and a license for "vicious verbal assault."[42] To do so, Justice Alito reached back to *Chaplinsky v. New Hampshire* for the proposition that some words "by their very utterance inflict injury" and are not an "essential part of any exposition of ideas."[43] Though never formally overruled, *Chaplinsky* is fairly moribund and sits uneasily with the Court's more recent jurisprudence that recognizes that even hurtful speech can express ideas. More troubling, this argument drawn from *Chaplinsky* has potentially sweeping implications for a host of hate speech, harassment, and anti-bullying policies of the type that was at issue in *Saxe*. In *Saxe*, the school argued that the speech covered by the policy was likewise merely injurious and no essential part of the exposition of ideas, but Judge Alito disagreed. In *Snyder*, by contrast, Justice Alito characterizes the protestors' conduct as "outrageous," "vicious," and the "brutalization of innocent victims."[44] If Justice Alito had written for the majority in *Snyder*, it is not hard to see that many schools would seek shelter under that opinion to defend their harassment policies.

How to reconcile the two opinions? In *Snyder*, Justice Alito argues that the tort of intentional infliction of emotional distress is already ringed by doctrinal limitations that render it safe under the First Amendment. Perhaps the fact that this is "a very narrow tort"[45] that is difficult to satisfy in practice is sufficient to render it safe in the way that a school anti-bullying policy is not. Certainly the procedural safeguards surrounding the typical school harassment policy are less than robust. Perhaps the speech in question in *Snyder* is particularly brutalizing. If so, it invites further reflection on how speech that might be beyond the pale can be safely identified and put into policy. Perhaps some weight can be placed on "the fundamental point that funerals are unique events at which special protection against emotional assaults is in order."[46] That would be a very narrow exception indeed, but it would certainly invite different judges and policymakers to reach different conclusions about what counts as a particularly emotionally sensitive context that should not be a "free-fire zone" for "verbal attacks." In the few short years since *Snyder* was handed down, a culture of "safetyism" has taken off.[47] Justice Alito might think a funeral is uniquely a safe space but opening that door would invite many others to look for analogous spaces where they would like to exclude offensive speech. Less appealing is the prospect that Justice Alito simply finds the bereaved parents of a marine killed in the line of duty to be particularly sympathetic victims. Of course, other observers might find other targets of bullying to be quite sympathetic as well. If the boundaries of the First Amendment turn on how sympathetic an offended party might be, then the scope of protected speech is likely to be fairly unpredictable and much more restricted.

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[42] *Snyder*, 562 U.S. at 463 (Alito, J., dissenting).

[43] *Id*. at 465 (Alito, J., dissenting) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[44] *Snyder*, 562 U.S. at 475 (Alito, J., dissenting).

[45] *Id*. at 464.

[46] *Id*. at 473.

[47] GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND (2018); FRANK FUREDI, WHAT'S HAPPENED TO THE UNIVERSITY? (2017).

Alternatively, we might turn back to Judge Alito's opinion in *Saxe*. That opinion gets quite a bit of rhetorical leverage from an unusual feature of the school's harassment policy. School administrators in that case had cast an extremely wide net and happened to include the critical term "values" within the scope of protected categories. That inclusion made it particularly easy to highlight the ways in which offensive speech could also be speech that advanced or expressed a set of ideas. Perhaps a slightly more carefully crafted bullying policy would satisfy Justice Alito's sense that some words merely injure and do not usefully convey ideas. If so, the "no hate speech" crowd might have an unlikely ally in Justice Alito if they play their cards right. I have to admit that this would seem to be an unlikely outcome and one that *Matal* was designed in part to reject, but the *Snyder* dissent seems to leave the door ajar in ways that I would not prefer.

Siegel might have pointed to the dissent in *United States v. Alvarez* as well.[48] He did not, and Justice Alito was joined in that dissent by Justice Thomas and Scalia, but here too Justice Alito would allow a statutory restriction on speech to stand. Once again, however, Justice Alito endeavors to argue that upholding the Stolen Valor Act of 2005 would have limited consequences for broader First Amendment protection.[49] Here too Justice Alito thought that statute was a natural extension of earlier doctrine and came with robust safeguards against expansion or abuse. Justice Alito begins with the notion that this case could fit within "a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[50] That is not a very promising start. In the age of social media, we are now buffeted by claims that the public sphere is filled with misinformation. There are innumerable proposals to restrict false factual statements that inflict real harm and serve no legitimate interest on matters ranging from election interference and the pandemic to the health of politicians and the prevalence of child trafficking. If *Alvarez* had come out the other way, it might well have given additional life to legislative proposals to empower government regulators to root out what they regard as misinformation.

Justice Alito attempts to cut off that possibility by pointing to unique features of the "stolen valor" context that would distinguish it from the wider world of damaging false statements. Justice Alito points to five crucial limiting features: the statute applies only to "a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty"; the act "concerns facts that are squarely within the speaker's personal knowledge"; knowledge of the falsity of the speech was an element of the offense; the act only applies to the communication of actual facts; and the facts at issue "are highly unlikely to be tied to any particular political or ideological message."[51] As a consequence, Justice Alito thinks that the suppression of false statements in this context can be readily distinguished from disputed factual claims in scientific, religious, philosophical, political or other social debates where state intervention is likely to cause real harm.[52]

[48] United States v. Alvarez, 567 U.S. 709 (2012).

[49] *Id.* at 739 (Alito, J., dissenting).

[50] *Id*.

[51] *Id*. at 740–41.

[52] *Id*. at 751.

Justice Alito has departed from his colleagues in concurrences as well as dissents. The third case to which Siegel points is Justice Alito's concurrence in *Brown v. Entertainment Merchants Association*, in which the Court struck down California's effort to restrict the sale of violent video games to minors.[53] Here Justice Alito urged the Court to be more cautious about assuming "that new technology is fundamentally the same as some older thing with which we are familiar."[54] The immersive and interactive nature of video games—and perhaps future virtual reality environments—might make them qualitatively different, and more dangerous, than other media. The justices should at least accept that the jury might still be out on the empirical assumption that fictional violence is essentially harmless regardless of the form in which it is presented and consumed. In the meantime, Justice Alito was willing to join in striking down the law on due process grounds that addressed the chilling effect of a vague law while leaving the core First Amendment issue unresolved. It might not be practically possible to design a statute that could meet those requirements, but Justice Alito was at least open to a law that would reinforce "parental decisionmaking" over the media consumption of their children.[55] This solicitude for parental control over children and caution in the face of technological innovation reflect a conservative sensibility that would at least nibble around the edges of First Amendment jurisprudence.

SEPARATING OUT PRIVATE SPEECH

A final set of cases show Justice Alito grappling with how to identify and protect private speech when governmental and private action are entangled. These opinions all evince a civil libertarian commitment to securing a sphere for protected speech by private individuals, but they recognize the challenges of identifying such speech in many modern contexts of sprawling governmental activity and they reflect interesting efforts to think through the rationale for when speech restrictions might be appropriate.

Justice Alito wrote for the Court in *Pleasant Grove City v. Summum* but wrote for four dissenters in *Walker v. Texas Division, Sons of Confederate Veterans*.[56] Both required separating governmental speech from private speech. The Court recognized that when the government speaks with its own voice, First Amendment restrictions do not apply and the government can choose to convey some messages but not others. When it comes to messages conveyed on governmental property, however, it is not always evident when the government is speaking and when the government is allowing favored private actors to express themselves. If a city allows activists to paint "Black Lives Matters" on the street but does not allow other activists to similarly paint other messages, is that because the government is playing favorites among private speakers or is it because the government has adopted some street graffiti as its own? In *Summum*, the Court accepted that the government may "express its views when it receives assistance from private sources for the

[53] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).

[54] *Id*. at 806 (Alito, J., concurring).

[55] *Id*. at 815 (Alito, J., concurring).

[56] Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015).

purpose of delivering a government-controlled message."[57] The majority thought permanent public monuments displayed in a public park necessarily became governmental speech. Dissenting in *Walker*, however, Justice Alito thought specialized license plates were distinguishable given the factors at play in *Summum*. By failing to adequately distinguish governmental from private speech, the dissenters in *Walker* thought the Court was establishing "a precedent that threatens private speech that government finds displeasing."[58] For the dissenters in *Walker*, *Summum* pointed to such factors as whether the government had long used these means for expressing exclusively governmental messages, whether this type of property had been and could reasonably be used by third parties to express their own messages, and whether a multitude of messages could be reasonably accommodated by the physical space in question.[59] When it came to monuments, the public would necessarily view any message as governmental.[60] Customizable license plates, on the other hand, were tiny portable billboards and could only properly be read as expressing personal messages rather than governmental messages given how they had been used over time.[61] Given the nature of license plates, the government could no more exclude messages it found offensive here than it could in the context of approving trademarks.

This past term, Justice Alito wrote separately in the Boston flag-raising case to emphasize that the Court should not rely on mechanical tests to separate government from non-governmental speech but should focus clearly on the important question of "whether the government is *speaking*."[62] Alito is particularly concerned about situations in which "a government claims that speech by one or more private speakers is actually government speech" and as a result using government-speech doctrine "as a cover for censorship."[63] As he often does, Alito wants judges to focus far more on fact-specific, nuanced judgments and far less on doctrinal tests. Even so, he does provide some guidance of his own. The category of government speech should be restricted to a relatively small class of cases in which the government has specifically authorized an individual to speak on behalf of the government and that person is conveying a governmentally determined message and does so without abridging the speech of others acting in a private capacity.[64]

Justice Alito wrote separately in other cases to express similar nuanced judgments about how best to characterize how the government was affecting the speech environment. In a concurring opinion, Justice Alito thought a buffer zone around an abortion clinic put its thumb on the scale in ways that the majority did not fully appreciate.[65] In a concurring opinion in the "Bong Hits 4 Jesus" case, Justice Alito, while agreeing with the majority that the school could restrict speech that could be perceived as advocating illegal drug use, took pains to reject the government's

[57] *Summum*, 555 U.S. at 468.

[58] *Walker*, 576 U.S. at 221 (Alito, J., dissenting).

[59] *Id*. at 228–29.

[60] *Id*. at 229.

[61] *Id*. at 230–31.

[62] Shurtleff v. City of Boston, 142 S. Ct. 1583, 1595 (2022) (Alito, J., concurring).

[63] *Id*.

[64] *Id*. at 1598.

[65] McCullen v. Coakley, 573 U.S. 464 (2014).

argument that public schools might restrict student speech in order to advance its "educational mission."[66] The "educational mission," he feared, might creep into "including the inculcation of whatever political and social views are held by the members" of the administration and faculty or public officials.[67] Such an expansive view of the mission of schools would inevitably lead school officials to "suppress speech on political and social issues based on disagreement with the viewpoint expressed."[68] The "substantial disruption" test of *Tinker v. Des Moines Independent Community School District* should be narrowly construed to allow school official to head off "a threat of violence."[69] In the more recent vulgar cheerleader case, Justice Alito seems to recognize a more elaborate set of circumstances in which speech can be restricted in schools.[70] There Justice Alito emphasized even more strongly that "public school students, like all other Americans, have the right to express 'unpopular' ideas on public issues, even when those ideas are expressed in language that some find 'inappropriate' or 'hurtful.'"[71] When trying to identify the circumstances in which schools can reasonably restrict student speech, Justice Alito goes beyond his earlier point about preventing violence. The functioning of a school necessitates that teachers be able to "regulate on-premises student speech, including by imposing content-based restrictions in the classroom."[72] Likewise, a concern with protecting students while out of their parents' care includes a proper interest in prohibiting "threatening and harassing speech."[73] But once again, speech "may not be suppressed simply because it expresses ideas that are 'offensive or disagreeable.'"[74] School authorities bear the same duty as public official generally to prevent rather than facilitate a heckler's veto.

The entanglement of government and private speakers raised its head again in the context of mandatory fees to support union activities.[75] In critiquing the Court's earlier decision in *Abood v. Detroit Board of Education*, Justice Alito took pains to lay out how the Court had expressed concerns about the First Amendment implications of government requirements that worker contribute dues to labor unions.[76] Those concerns got brushed aside in *Abood*, but a Roberts Court majority was prepared to revisit the earlier concerns (once again Justice Douglas gets a sympathetic hearing in an Alito opinion).[77] The Court in the past had failed to fully appreciate "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."[78] But now the majority recognized that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most

[66] Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring).
[67] *Id*.
[68] *Id.*
[69] Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503 (1969).
[70] Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021).
[71] *Id*. at 2049 (Alito, J., concurring).
[72] *Id*. at 2050.
[73] *Id*. at 2052.
[74] *Id*. at 2055 (internal citations removed).
[75] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).
[76] *Id*. at 2463–64 (discussing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).
[77] *See* Lathrop v. Donohue, 367 U.S. 820, 877 (1961) (Douglas, J., dissenting).
[78] Harris v. Quinn, 573 U.S. 616 (2014).

contexts, any such effort would be universally condemned."[79] Hashing out the implications of this invigorated compelled speech doctrine will likely require some further work by the Court, but it is reflective of Justice Alito's sensitivity to the ways in which majority pressures can impinge on individual conscience and how governmental interventions into society can gradually circumscribe the sphere of private speech unless the implications of those interventions are carefully thought through.

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The ACLU is probably less happy with Justice Alito's record on free speech now than it was in 2005, but that may say more about the ACLU than Justice Alito. Unlike conservative jurists of old, Justice Alito is not inclined to adopt a broadly deferential posture to government officials who wish to suppress speech that they find threatening to public order. Although a traditional conservative concern with the proper care and socialization of children—and the parental authority to raise children—has affected his approach to some free speech disputes, there is no desire to carve out broad exceptions to First Amendment protections or subordinate individual views to social consensus. A driving force in his free speech opinions is a traditional civil libertarian one—how best to secure the expression of individual speech and belief no matter how unpopular or offensive those ideas might be to the broader community or to government officials and how best to avoid empowering government officials to suppress views with which they disagree. We seem to be entering a new period in which conservative activists and politicians are once again pushing policies targeting disagreeable speech. These initiatives will put new pressures on the conservative justices, including Justice Alito, who may find themselves sympathetic to the sentiments of the censorious policymakers, if not necessarily to their methods. Over the next few years, the Court's civil libertarian record on free speech will be put to the test.

[79] *Janus*, 138 S. Ct. at 2463.