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Passive Virtues versus Aggressive Litigants: The Prudence of Avoiding a Constitutional Decision in *Snyder v. Phelps**

INTRODUCTION

In his seminal work on the functions of the federal judiciary, Alexander M. Bickel advocated what he called the “passive virtues” of judicial restraint and the avoidance of unnecessary constitutional decision-making.¹ The avoidance doctrine is a prudential principle that instructs federal courts to refrain from ruling on a constitutional issue if non-constitutional grounds exist to dispose of the case.² Justifications for the doctrine are many, but often center on the “final and delicate nature” of judicial review, the need to maintain the legitimacy and credibility of the federal judiciary, and the “paramount importance of constitutional adjudication.”³ As Justice Brandeis famously quipped, “the most important thing we do is in ‘not

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1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111–29 (2d ed. 1986).

2. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”); *Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009) (endorsing unanimously the avoidance principle as articulated by Justice Brandeis in *Ashwander*); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009) (refusing to reach a constitutional claim in a controversial case because petitioners’ statutory claim would provide relief and noting that “[n]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case” (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam))); *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (discussing the avoidance canon in the context of statutory interpretation and noting “one of the canon’s chief justifications is that it allows courts to *avoid* the decision of constitutional questions”). For a detailed analysis of the avoidance doctrine and a critique of its inconsistent application, see generally LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* (2001).

3. Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994); *see also* *Rescue Army v. Mun. Court*, 331 U.S. 549, 571 (1947) (discussing the various justifications of the constitutional avoidance doctrine); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 857 (2005) (“The principle of constitutional avoidance has a long and distinguished pedigree and is grounded in the recognition that constitutional interpretation and judicial review are delicate functions.”).

doing.’”⁴ Thus, avoidance is a fundamental tenet in the jurisprudential canon.⁵

Against such passive virtues, however, must be balanced the traditional precept that litigants are “masters of their complaints,” wielding a great deal of autonomy and control over which issues to bring before the court.⁶ The question thus arises: to what extent should federal courts permit aggressive litigants to deliberately manipulate the issues on appeal and thereby control whether a federal court decides a constitutional question?

In *Snyder v. Phelps*,⁷ the United States Court of Appeals for the Fourth Circuit reviewed a five million dollar plaintiff’s verdict in an action brought by the father of a soldier killed in Iraq against Fred Phelps and his fundamentalist Westboro Baptist Church (“WBC”) alleging intentional infliction of emotional distress, intrusion upon seclusion, and conspiracy after the church picketed the soldier’s funeral with signs stating “Fag Troops,”⁸ “Thank God for Dead Soldiers,” and “You’re Going to Hell.”⁹ The court reversed the judgment, concluding that imposing tort liability contravened the defendants’ constitutionally protected speech under the First Amendment.¹⁰ In reaching its decision, however, the court specifically refused to address whether reversal was warranted on the non-constitutional grounds of insufficiency of the evidence.¹¹ Although insufficiency was raised by amicus,¹² the court reasoned that because the Phelps only pressed the constitutional question in their

4. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 17 (1957).

5. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 49–53 (3d ed. 2006).

6. Kloppenberg, *supra* note 3, at 1034; *see also* Greenlaw v. United States, 554 U.S. 237, 243 (2008) (“In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”).

7. 580 F.3d 206 (4th Cir. 2009). The United States Supreme Court recently granted certiorari. *See Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

8. Phelps’s picketers were not accusing the deceased soldier of being a homosexual, but rather “used [Synder’s] funeral to spread their message that God is punishing the United States for its tolerance of homosexuality by killing its soldiers.” Adam Liptak, *Justices Take Up Funeral-Protest Case*, N.Y. TIMES, Oct. 7, 2010, at A21, *available at* http://www.nytimes.com/2010/10/07/us/07scotus.html?_r=1.

9. *Snyder*, 580 F.3d at 212–14.

10. *Id.* at 226.

11. *Id.* at 216.

12. *See* Amicus Curiae Brief of the Thomas Jefferson Ctr. for the Protection of Free Expression at 15–30, *Snyder*, 580 F.3d 206 (No. 08-1026).

appellate briefs, the sufficiency issue had been waived and it was therefore “absolutely necessary” to resolve the First Amendment question to dispose of the appeal.¹³ Thus, the Phelps’ aggressive litigation strategy, rather than the court’s own prudential obligations, ultimately determined whether the federal court would reach a difficult and controversial constitutional question.

This Recent Development argues that the court’s refusal to consider non-constitutional grounds for disposing of this case was unjustified and constituted an abdication of the court’s self-imposed jurisprudential obligation to avoid unnecessary constitutional adjudication. As the defendant-appellants deliberately did not brief the non-constitutional issues, the Phelps were able to force a ruling on whether their widespread funeral protests and anti-homosexual demonstrations were protected by the First Amendment.¹⁴ By refusing to apply the avoidance principle, the court effectively handed over to the litigants the discretionary power to control if and when the federal courts will expend their judicial capital in deciding a constitutional issue.¹⁵ This poses serious dangers where litigants such as the Phelps, notorious for their long history of abusive litigation practices¹⁶ and repeated proclamations that “God Hates America,” “America is Doomed,” and “Thank God for 9/11,”¹⁷ have demonstrated little or no interest in preserving the integrity of our nation’s modern institutions, including the federal judiciary.¹⁸ Thus,

13. *Snyder*, 580 F.3d at 217 n.9.

14. As explained *infra* notes 29–35 and accompanying text, Fred Phelps and his Westboro congregation have conducted similar protests at soldiers’ funerals all over the country to draw attention to their message that “God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military.” *Id.* at 211.

15. See Kloppenberg, *supra* note 3, at 1033–34; Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 471 (2009) (“[C]ourts must retain control of the interpretive process and thus cannot cede to the parties the sources and arguments that will be used to interpret statutory or constitutional texts, particularly when doing so could expand the judicial role beyond its constitutional parameters. . . . An inflexible norm against party presentation would threaten this judicial independence by giving the parties, and not the courts, control over judicial pronouncements.”).

16. See S. Poverty Law Ctr., *Halting Abusive Lawyers*, INTELLIGENCE REP., Spring 2001, at 60, 60, 64, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/halting-abusive-lawyers> (describing abusive litigation practices by Fred Phelps and others in the Phelps family).

17. Westboro Baptist Church, *Thank God for 10.9 Million Verdict*, GODHATESFAGS.COM (Oct. 31, 2007), http://www.godhatesfags.com/fliers/archive/20071031_thank-god-for-verdict.pdf.

18. See Kloppenberg, *supra* note 3, at 1033–34 (“By not pressing nonconstitutional claims on appeal, litigants can easily evade the last resort rule and force courts to render constitutional rulings. . . . Litigants, however, will have no incentive (and certainly no

the decision in *Snyder* reflected an abdication of the court's prudential duty of self-restraint in avoiding constitutional questions,¹⁹ and it ultimately provided WBC the perverse opportunity to extract from the court an opinion on the constitutional legitimacy of their outrageous demonstrations at military funerals across the nation.

Analysis proceeds in four parts. Part I provides background on the Phelps family and the controversial activities of WBC, including its national campaign to picket military funerals in protest of America's tolerance of homosexuality and to spread its message that "God Hates America." Part II summarizes the facts and holding of *Snyder v. Phelps* and addresses the general character of the allegations that gave rise to the suit. Further, this section briefly outlines the contours of First Amendment freedoms in the context of civil liability. Part III addresses the doctrine of constitutional avoidance and, more specifically, the prudential "last resort rule"²⁰ that cautions federal courts to avoid ruling on a constitutional issue if the case can be disposed of on a non-constitutional basis. Part IV provides analysis of the *Snyder* decision and argues, as Justice Shedd did in his concurring opinion,²¹ that the majority was unjustified in refusing to address the non-constitutional sufficiency issue simply

duty) to selflessly evaluate the institutional concerns underlying the rule, including concerns of comity and separation of powers, in order to determine whether nonconstitutional grounds merit consideration prior to a constitutional issue.").

19. As Justice Blackmun stated, "[T]he obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a 'self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies.'" *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 16 (1993) (Blackmun, J., dissenting) (alteration in original) (quoting *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 294 (1982)).

20. The term "last resort rule" was coined by Lisa A. Kloppenberg. See Kloppenberg, *supra* note 3, at 1004 ("The 'last resort rule' dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis."). This Recent Development focuses on the narrower "last resort" component of the constitutional avoidance doctrine rather than the broader application of avoidance principles in the context of statutory construction. For a discussion of the canon of federal statutory construction, see, for example, Alexander M. Bickel & Harry Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 8-9 (1957); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839-40 (1991); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1202-09 (2006); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 71-74.

21. *Snyder v. Phelps*, 580 F.3d 206, 227 (4th Cir. 2009) (Shedd, J., concurring) ("I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims. Because the appeal can be decided on this non-constitutional basis, I would not reach the First Amendment issue addressed by the majority."), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

because the Phelps pressed the constitutional question in their appellate briefs. By reaching the First Amendment issues in this case unnecessarily, the court jeopardized its own autonomy and credibility by handing over to the litigants, parties unconcerned with the broader institutional legitimacy of judicial review, the ability to control when a federal court decides controversial constitutional questions. Given the “paramount importance of constitutional adjudication,”²² prudence demands that courts be far more cautious of attempts by aggressive litigants to out-manuever the passive virtues of constitutional avoidance.

I. HATING GAYS,²³ LOVING PUBLICITY²⁴: A BRIEF HISTORY OF WESTBORO BAPTIST CHURCH

Westboro Baptist Church is a self-proclaimed “Primitive” Baptist Church²⁵ located in Topeka, Kansas that advocates, to put to it gently, a rather peculiar style of Christian charity.²⁶ As its congregants describe it, WBC’s ministry involves staging “daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth.”²⁷ The church’s octogenarian pastor, Fred W. Phelps, founded WBC in 1955 and continues to lead its congregation, populated almost entirely by Phelps’s thirteen children, their spouses, fifty-four grandchildren, and seven great-grandchildren.²⁸ On the church website, tactfully branded “godhatesfags.com,” WBC expounds upon its anti-gay platform, explaining that the “modern militant homosexual movement . . . pose[s] a clear and present danger to the survival of America.”²⁹ As a result, WBC claims it has been called to a “unique picketing ministry” where church members gather

22. *Rescue Army v. Mun. Court*, 331 U.S. 549, 571 (1947).

23. “Anyone who hates his brother is a murderer, and you know that no murderer has eternal life in him.” 1 *John* 3:15 (New International Version).

24. “Be careful not to do your ‘acts of righteousness’ before men, to be seen by them. If you do, you will have no reward from your Father in heaven.” *Matthew* 6:1 (New International Version).

25. WBC appears to be unaffiliated with other Baptist conventions and organizations. See Chelsea Brown, Note, *Not Your Mother’s Remedy: A Civil Action Response to the Westboro Baptist Church’s Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 210 (2009).

26. *God Hates Fags, Westboro Baptist Church FAQs*, GODHATESFAGS.COM, <http://www.godhatesfags.com/faq.html> (last visited Nov. 9, 2010).

27. *Id.*

28. *Id.*

29. *Id.*

not at the river,³⁰ but at the funerals of strangers, brandishing colorful placards with crude slogans like “Aids Cures Fags,” “Fags Doom Nations,” “God Blew Up The Troops,” and “Thank God for Dead Soldiers.”³¹ As a grief-stricken family’s “sorrows like sea billows roll,”³² WBC boorishly floods the streets with their outlandish vulgarities to decry the alleged moral deterioration of our country. Since 1991, WBC has orchestrated over 42,760 demonstrations “at homosexual parades and other events, including funerals of impenitent sodomites (like Matthew Shepard) and over 200 military funerals of troops whom God has killed in Iraq/Afghanistan in righteous judgment against an evil nation.”³³ WBC’s tactics are deliberately shocking, offensive, and extreme, representing a calculated effort to attract international media attention and spread its message to the world.³⁴ From all accounts, the Phelps family has enjoyed monstrous success in their ploys for attention: hate, it seems, breeds plenty of press.³⁵

30. See Robert Lowry, *Shall We Gather at the River*, in THE BAPTIST HYMNAL 518 (Convention Press 1991) (1864) (beloved Baptist hymn frequently sung at church funerals).

31. *God Hates Fags*, *supra* note 26. WBC members also include young children in their protests. See *Kids with Horrible Signs Protesting America, Hockey*, DALLAS OBSERVER, <http://www.dallasobserver.com/slideshow/kids-with-horrible-signs-protesting-america-hockey-29219999/> (last visited Nov. 9, 2010).

32. Horatio G. Spafford, *It Is Well with My Soul*, in THE BAPTIST HYMNAL 410 (Convention Press 1991) (1873) (beloved hymn frequently sung at church funerals).

33. *God Hates Fags*, *supra* note 26; see also Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, Apr. 17, 2006, at A14, available at <http://www.nytimes.com/2006/04/17/us/17picket.html> (discussing WBC’s protesting tactics).

34. *God Hates Fags*, *supra* note 26 (“WBC teams have picketed all over the United States, and internationally (including Canada, Jordan and Iraq). The unique picketing ministry of Westboro Baptist Church has received international attention, and WBC believes this gospel message to be this world’s last hope.”); Westboro Baptist Church, *supra* note 17 (“Not only did you fail to stop our preaching, but our message has gone forth to the ENTIRE WORLD this day, because of your folly, like never before!”).

35. See, e.g., *Westboro Baptist Church: A Publicity-Hungry Group*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/ext_us/WBC/publicity.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=WBC (last visited Nov. 9, 2010) (“The primary goal of the Westboro Baptist Church (WBC), led by Fred Phelps, appears to be garnering publicity for itself and its message. For this reason, the group directs its efforts at events that have attracted heavy news coverage, like the deaths of soldiers killed in wars or the victims of well-publicized accidents, or at venues, such as high schools, which are likely to generate large counter-protests and community outrage.”); Judy Keen, *Funeral Protestors Say Laws Can’t Silence Them*, USA TODAY, Sept. 13, 2006, at A5, available at http://www.usatoday.com/news/nation/2006-09-13-funeral-protests_x.htm; Sara Bonisteel, *Anti-Gay Kansas Church Cancels Protests at Funerals for Slain Amish Girls*, FOX NEWS (Oct. 4, 2006), <http://www.foxnews.com/story/0,2933,217760,00.html> (discussing Phelps’s agreement to cancel protests in exchange

Unsurprisingly, WBC's conduct has sparked enormous outrage as well as swift responses by over half of the nation's state legislatures to limit or ban such protests during funeral ceremonies.³⁶ In 2006, Congress enacted the Respect for America's Fallen Heroes Act which makes any disruptive demonstration within 300 feet of a national cemetery during a specified time before, during, and after a military funeral a misdemeanor offense punishable by one year in prison or a \$100,000 fine.³⁷ Following the federal example, Maryland enacted a similar statute regulating Phelps-style demonstrations by prohibiting "speech to a person attending a funeral, burial, memorial service, or funeral procession that is likely to incite or produce an imminent breach of the peace" and imposed a 100 foot buffer zone around the burial, service, and funeral procession.³⁸

Regrettably, the "many dangers, toils and snares"³⁹ of threatened criminal sanctions did little to deter the Phelps family. Fred Phelps, as well as eleven of his children, are trained lawyers with a keen appreciation for the publicity generated by high-profile litigation.⁴⁰

for one hour of radio time on a syndicated talk show to further spread their message); see also *Snyder v. Phelps*, 533 F. Supp. 2d 567, 578 (D. Md. 2008) ("Defendants essentially acknowledged in their testimony that their choice of military funerals was driven by the publicity the demonstrations generated."), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

36. See, e.g., Brown, *supra* note 25, at 214 & n.39 (cataloguing the twenty-eight funeral picketing laws passed by state legislatures in response to WBC's demonstrations); Lauren M. Miller, *A Funeral For Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097, 1104-09 (2007) (reviewing state and federal legislation); Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 161-74 (2008) (discussing variations in state funeral picketing laws).

37. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (2006) (codified at 38 U.S.C. § 2413 (2006); 18 U.S.C. § 1387 (2006)); see also *5 Arrested for Attacks on Anti-Gay Protesters at Military Funeral*, FOX NEWS (May 22, 2006), <http://www.foxnews.com/story/0,2933,196487,00.html> ("The protests by the Kansas church group led by the Rev. Fred Phelps prompted the U.S. House of Representatives earlier this month to pass a measure to restrict demonstrations at military funerals at federal burial grounds. The measure urged states to pass similar legislation to cover nonfederal cemeteries, and more than a dozen states are considering laws aimed at funeral protesters.").

38. MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis Supp. 2009); see also Jason M. Dorsky, Note, *A New Battleground for Free Speech: The Impact of Snyder v. Phelps*, 7 PIERCE L. REV. 235, 238-39 (2009) (discussing the Maryland statute and noting that the regulation was modeled after the "'fighting words' exception from *Chaplinsky v. New Hampshire*: words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace'" (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

39. John Newton, *Amazing Grace! How Sweet the Sound*, in THE BAPTIST HYMNAL 330 (Convention Press 1991) (1779) (beloved hymn frequently sung at church funerals).

40. See John Blake, *"Most Hated" Anti-gay Preacher Once Fought for Civil Rights*, CNN (May 14, 2010), <http://www.cnn.com/2010/US/05/05/hate.preacher/index.html>?

Before embarking on his anti-gay crusade, Pastor Phelps gained notoriety (and reportedly very large fees) as an aggressive civil rights attorney in Kansas filing frequent discrimination lawsuits against local businesses on behalf of African Americans.⁴¹ Phelps was later disbarred for “using his position as a lawyer as a weapon,”⁴² but his litigious legacy endures in a new, albeit twisted form: his adult children, now licensed attorneys themselves, form a family law firm⁴³ and personally file lawsuits across the nation to promote, defend, and even fund⁴⁴ WBC’s picketing activities.⁴⁵ Margie Phelps and Shirley

section=cnn_latest. Fred Phelps graduated from Washburn University School of Law in 1964. See Fred Mann, *Westboro Baptist Church: Road to Westboro*, WITCHITA EAGLE, Apr. 2, 2006, at A1, available at America’s Newspapers, Record No. 060430169.

41. See Blake, *supra* note 40.

42. State v. Phelps, 598 P.2d 180, 186–87 (Kan. 1979) (per curiam); see also *Intelligence Files: Fred Phelps*, S. POVERTY L. CENTER, <http://www.splcenter.org/getinformed/intelligence-files/profiles/fred-phelps> (last visited Nov. 9, 2010) (“Since 1951, Phelps has been arrested repeatedly for assault, battery, threats, trespassing, disorderly conduct, and contempt of court. He has been convicted four times, as well as disbarred, but has successfully avoided prison.”).

43. S. Poverty Law Ctr., *supra* note 16 at 60 (“[Eleven] of Fred Phelps, Sr.’s children followed in their father’s footsteps by becoming attorneys. Nine of these remain loyal to their father, working for Phelps Chartered, the family firm. Although Fred Phelps, Sr. has been barred from practicing law in Kansas for ‘using his position as a lawyer as a weapon,’ Kansas v. Phelps, 598 P.2d 180, 185 (Kan. 1979), some of his children carry on his campaign of abusive litigation . . .”).

44. Fred Phelps’s children, most notably daughters Shirley Phelps-Roper and Margie Phelps, vigorously seek attorney’s fees and other damages following the various lawsuits they personally file and defend. See, e.g., Sean Gregory, *The Price of Free Speech*, TIME, Oct. 4, 2010, at 30, 32 (explaining that after the Phelpses won their appeal in *Snyder*, the court ordered Albert Snyder to pay the Phelpses \$16,510 in legal fees, prompting much public outrage); *Neb. to Foot Phelps’ Legal Fees*, TOPEKA CAP.-J., (Sept. 3, 2010, 4:04 PM), http://cjonline.com/news/local/2010-09-03/neb_to_foot_phelps_legal_fees (reporting that the Phelpses were awarded \$8,000 in legal fees, to be paid by taxpayers, after the Phelpses successfully challenged a Nebraska flag-desecration law they allegedly violated during one of their funeral protests); S. Poverty Law Ctr., *A City Held Hostage*, INTELLIGENCE REP., Spring 2001, at 19, 25, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/a-city-held-hostage/fred-phelps-time> (describing a \$7 million suit filed by Phelps against the city of Topeka for its alleged failure to provide WBC picketers adequate protection).

45. See, e.g., Phelps-Roper v. Bruning, No. 4:10CV3131, 2010 WL 2723202, at *1–3 (D. Neb. July 6, 2010) (enjoining enforcement of a Nebraska flag desecration statute after Phelps-Roper challenged the law on First Amendment grounds following a funeral protest); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 977–78 (E.D. Ky. 2006) (challenging a Kentucky funeral protest statute specifically aimed at WBC and granting preliminary injunction in favor of WBC), *rev’d on other grounds*, *McQueary v. Conway*, 614 F.3d 591(6th Cir. 2010); *Hockenbarger v. Schisseur*, No. 98-3342-DES, 1998 WL 918846, at *1–2, *5 (D. Kan. Dec. 23, 1998) (denying habeas petition for WBC picketer charged with misdemeanor); *State v. Phelps*, 967 P.2d 304, 311–12 (Kan. 1998) (reviewing criminal charges against Fred Phelps); S. Poverty Law Ctr., *A City Held Hostage*, INTELLIGENCE REP., Spring 2001, at 19, 21, available at <http://www.splcenter.org/get-informed/>

Phelps-Roper, Phelps's daughters and WBC's lead attorneys, have been embroiled in litigation for years suing various individuals and local governments opposed to their activities and challenging a range of state funeral protest statutes across the country.⁴⁶ The outcome of the Phelps' high-profile legal battles is often uncertain, but the publicity is guaranteed.

II. A UNIQUELY "CIVIL" RESPONSE TO WBC: *SNYDER V. PHELPS*

In March of 2006, two uniformed United States Marines appeared at the doorstep of Albert Snyder's home to deliver the solemn message military families fear most: Snyder's son, Marine Lance Corporal Matthew A. Snyder, had fallen in the line of duty while fighting in Iraq.⁴⁷ Snyder planned to put his son to rest at a burial ceremony at St. John's Catholic Church in Westminster, Maryland.⁴⁸ The grieving father placed the customary obituary notices in the local papers, no doubt anticipating that news of Matthew's death would prompt friends and family to gather at the graveside to

intelligence-report/browse-all-issues/2001/spring/a-city-held-hostage?page=0,1 (discussing various retaliatory civil lawsuits filed by the Phelps against police officers, prosecutors, and private citizens who filed criminal complaints arising from WBC's protests); S. Poverty Law Ctr., *A City Held Hostage*, INTELLIGENCE REP., Spring 2001, at 19, 20–26, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-allissues/2001/spring/a-city-held-hostage/fred-phelps-timel> (outlining WBC's activities and discussing abusive lawsuits filed by the Phelps family).

46. See, e.g., *Phelps-Roper v. Nixon*, 545 F.3d 685, 689, 694 (8th Cir. 2008) (holding Missouri statute prohibiting funeral protests should be preliminarily enjoined on First Amendment grounds); *Phelps-Roper v. Strickland*, 2008 FED App. 0312P at 1, 14, 539 F.3d 356, 358, 373 (6th Cir. 2008) (finding Ohio statute prohibiting funeral pickets did not violate the First Amendment); *Phelps v. Hamilton*, 122 F.3d 1309, 1327–28 (10th Cir. 1997) (dismissing Kansas anti-stalking statute claim and affirming finding that “plaintiffs lacked standing to challenge the telefacsimile amendment to the Kansas Telephone Harassment Statute”); *Phelps-Roper v. City of Manchester, Mo.*, No. 4:09-CV-1298 CDP, 2010 WL 3614182, at *11 (E.D. Mo. Sept. 8, 2010) (finding ordinance prohibiting protesting and picketing within 300 feet of a funeral unconstitutional); *Bruning*, 2010 WL 2723202, at *1–3 (entering restraining order regarding enforcement of flag desecration statute); S. Poverty Law Ctr., *A City Held Hostage*, INTELLIGENCE REP., Spring 2001, at 19, 25, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/a-city-held-hostage/fred-phelps-timel> (describing a \$7 million suit filed by Phelps against the city of Topeka for its alleged failure to provide WBC picketers adequate protection); *Westboro Baptist Church: Pickets Inspire Legislation and Legal Action*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/ext_us/WBC/legislation.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=WBC (last visited Nov. 9, 2010) (describing lawsuits in Ohio, Maryland, and Nebraska).

47. *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009) (citing *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571–72 (D. Md. 2008)), cert. granted, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

48. *Id.*

celebrate his son's life and pay their final respects.⁴⁹ Unbeknownst to Snyder, however, news of the upcoming ceremony also reached Fred Phelps in Topeka, and WBC soon issued its own press release announcing its intention to pack up its arsenal of signs and slogans and travel to Maryland to picket Matthew's funeral "in order to publicize their message of God's hatred of America for its tolerance of homosexuality . . . whether they want to hear it or not."⁵⁰

Aware of Maryland's newly minted funeral protest statute and other local ordinances, Phelps contacted law enforcement in advance and WBC fully complied with police instructions to keep its distance from the church during the ceremony.⁵¹ On the day of the funeral, Fred Phelps, his daughters, and four of his grandchildren took to the streets in their now familiar routine with signs proclaiming "Fag Troops," "God Hates You," and "Thank God for Dead Soldiers."⁵² Although he did not see the signs during the ceremony, Albert Snyder was shocked and sickened when he saw footage of the Phelps' protests later that evening on a television news report.⁵³ In Snyder's view, the Phelps had capitalized on his family's grief and transformed the solemnity of a patriot's burial into a "media circus for their benefit."⁵⁴ Even after returning home to Topeka, the Phelps family continued its usurpation of Matthew's memorial. Phelps-Roper penned a self-styled "epic" about Matthew's death entitled "The Burden of Marine Lance Cpl. Matthew Snyder" that claimed Matthew's Catholic parents had "raised him for the devil," that their son had fought for "the United States of Sodom, a filthy country that is in lock step with his evil, wicked and sinful manner of life," and that God "killed Matthew so that His servants would have an opportunity to preach His words to . . . the whorehouse called St. John Catholic Church."⁵⁵ After running an internet search for his son's name, Albert Snyder came across the "epic" on the godhatesfags.com website and became physically ill.⁵⁶

In June 2006, Albert Snyder filed a complaint in United States District Court for the District of Maryland against WBC and members of the Phelps family alleging five tort claims under

49. *Id.*

50. *Id.* at 211–12.

51. *Id.* at 212.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 224–25.

56. *Id.* at 212–13.

Maryland law: (1) defamation, (2) intrusion upon seclusion, (3) publicity given to private life, (4) intentional infliction of emotional distress (“IIED”), and (5) civil conspiracy.⁵⁷ The district court granted summary judgment to the defendants on the defamation⁵⁸ and publicity claims;⁵⁹ however, the parties proceeded to trial on the three remaining claims of IIED, intrusion upon seclusion, and conspiracy.⁶⁰ Throughout the litigation, the Phelps contended that their actions were “entitled to absolute First Amendment protection.”⁶¹ However, the district court permitted the tort claims to reach the jury, emphasizing that the First Amendment “does not afford absolute protection to individuals committing acts directed at other private individuals” and that “[constitutional] protection of particular types of speech must be balanced against a state’s interest in protecting its residents from wrongful injury.”⁶² Following a trial on the merits, a jury found that WBC’s outrageous conduct during the funeral was intentionally designed to inflict emotional distress upon the plaintiff and that its actions constituted tortious intrusion upon the seclusion of the Snyder family.⁶³ Accordingly, the jury returned a plaintiff’s verdict on all counts, awarding Snyder a total of \$10.9 million in both compensatory and punitive damages.⁶⁴ The district court later remitted the total award to \$5 million,⁶⁵ but not before Phelps-Roper found a way to turn their misfortune into additional publicity: WBC quickly issued a press release entitled “Thank God for the 10.9 Million Dollar Verdict!” warning that the jury’s decision further condemned a “Doomed America.”⁶⁶

57. *Id.* at 212.

58. The district court held that Snyder’s defamation claim failed because “the content of the ‘epic’ posted on the church’s website was essentially Phelps-Roper’s religious opinion and would not realistically tend to expose Snyder to public hatred or scorn.” *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572–73 (D. Md. 2008), *rev’d*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

59. As to the publicity given to private life claim, the district court held that “no private information was made public” by WBC because they “learned that Snyder was divorced and that his son was Catholic from the obituary in the newspaper.” *Id.* at 573. As the information about the family was already a matter of public record, Snyder’s claim failed because “any publication of this information would not be highly offensive to a reasonable person.” *Id.*

60. *Id.* at 573.

61. *Id.* at 576.

62. *Id.* at 570 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–43 (1974)).

63. *Id.*

64. *Id.* at 571.

65. *Id.*

66. *Westboro Baptist Church*, *supra* note 17.

Apparently, the Phelps' doomsday vision failed to materialize because WBC soon sought a far more earthly method of escaping liability. In 2008, the defendants filed an appeal with the United States Court of Appeals for the Fourth Circuit that sought reversal as a matter of law.⁶⁷ In their appellate briefs to the court, the Phelps' argument had a narrow focus: the judgment below violated their First Amendment rights to free speech and free exercise of religion.⁶⁸ Notably absent was any contention that the evidence was insufficient to warrant liability for the torts of IIED, intrusion upon seclusion, and conspiracy as a matter of law.⁶⁹ Although the court acknowledged that the sufficiency issue was raised by amicus,⁷⁰ the majority refused to consider it as a possible ground for reversal stating that "defendants and their counsel have exercised their discretion and voluntarily waived the sufficiency issue."⁷¹ Moreover, the majority specifically rejected any contention that jurisprudential concerns obligated the court to consider non-constitutional grounds for decision, arguing that "[b]ecause the sufficiency of the evidence issue was waived, the *Ashwander* principle—that a court should not 'decide questions of a constitutional nature unless absolutely necessary'—is inapplicable here" and therefore "resolution of the First Amendment issues is absolutely necessary, as it is the sole appropriate means for disposing of this appeal."⁷²

In addressing the merits of the Phelps' constitutional claims,⁷³ the court of appeals first considered whether the content of the

67. *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

68. Brief of Appellant at 9–31, *Snyder*, 580 F.3d 206 (No. 08-1026).

69. *Snyder*, 580 F.3d at 216.

70. Amicus Curiae Brief, *supra* note 12, at 15–30.

71. *Snyder*, 580 F.3d at 216. As explained in more detail *infra* at Part IV, Judge Shedd, in a concurring opinion, argued that the court should have reversed on the basis of the insufficiency argument raised by amicus. *Id.* However, the majority replied by stating "[w]e respectfully reject our good friend's reliance on the amicus contention, because the evidentiary issue has plainly been waived by the only party entitled to pursue it. As a result, the First Amendment contention must be addressed." *Id.*

72. *Id.* at n.9 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

73. As a preliminary matter, the court addressed the defendant's claim that the district court's jury instructions were in error because they permitted the jury to decide matters of law regarding the applicability of the First Amendment. *Id.* at 217. The court held that the district court's instruction was in error because it left to the jury preliminary questions of law regarding the nature of the speech involved in this case, questions that should have been decided by the court. *Id.* at 221. The court concluded, "At the least, therefore, the judgment must be vacated and a new trial awarded, in that Instruction No. 21 authorized the jury to determine a purely legal issue, namely, the scope of protection afforded to speech under the First Amendment." *Id.*

defendant's protest signs involved speech protected by the First Amendment.⁷⁴ The court's analysis began with the recognition that "tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment."⁷⁵ Relying heavily on the United States Supreme Court's opinion in *Milkovich v. Lorain Journal Co.*,⁷⁶ the court explained that even though the defendant's signs targeted a private rather than a public figure,⁷⁷ the First Amendment nonetheless protected the speech at issue here because it regarded matters of public concern and involved "rhetorical statements employing 'loose, figurative, or hyperbolic language.'" ⁷⁸ The protest signs may have employed vulgar and offensive phrases, but the slogans nevertheless regarded constitutionally protected matters of public concern such as homosexuality and deteriorating national morality.⁷⁹

The court next addressed whether the language employed in the "epic" was entitled to First Amendment protections so as to preclude civil tort liability.⁸⁰ Although the court acknowledged that the epic posed a closer question (because the title of the epic, unlike the slogans on the signs, referred to Matthew Snyder specifically by name), the court nevertheless held that the epic was also worthy of constitutional protection because it involved rhetorical language on issues of public concern and did not assert verifiable facts about Matthew Snyder or his family.⁸¹ The court stated that the epic "cannot be divorced from the general context of the funeral protest" but rather was similarly "patterned after the hyperbolic and figurative language used on the various signs . . . which would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein."⁸² As tort liability cannot attach to such

74. *Id.* at 222.

75. *Id.* at 217 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988)).

76. 497 U.S. 1, 21 (1990) (holding that the First Amendment protects speech regarding matters of public concern that is not "susceptible of being proved true or false").

77. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-46 (1974) (concluding that although the First Amendment protects speech regarding public figures from tort liability, the rule does not extend to speech regarding private figures).

78. *Snyder*, 580 F.3d at 220.

79. *Id.* at 223. The court went on to hold that the defendants' speech was also protected because "a reasonable reader would not interpret the signs that could be perceived as including verifiable facts, such as 'Fag Troops' . . . as asserting actual facts about Snyder or his son," but rather constituted "hyperbolic rhetoric designed to spark controversy and debate." *Id.*

80. *Id.* at 224.

81. *Id.* at 224-25.

82. *Id.* at 225.

constitutionally protected speech, the court of appeals concluded that the judgment of the district court must be reversed.⁸³

In a remarkably thoughtful and thorough concurring opinion, Judge Shedd argued that the majority's extended constitutional analysis was unnecessary because Snyder had failed to prove at the trial level that the jury's verdict was supported by sufficient evidence.⁸⁴ As non-constitutional grounds existed to dispose of this appeal, Judge Shedd would not have reached the First Amendment issues, but would have reversed on the issue of sufficiency raised by *amicus*.⁸⁵ What follows picks up where Judge Shedd left off by examining in some detail the doctrine of constitutional avoidance, exploring the operative rationales supporting the avoidance doctrine, and arguing that prudence demanded application of the doctrine in *Snyder*.

III. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE

The powers of the federal judiciary are limited by a series of justiciability doctrines that derive from the "case and controversy" requirement of Article III of the United States Constitution.⁸⁶ Among these self-imposed limits on judicial decision-making are the constitutional requirements of standing, the prohibition on advisory opinions, and the political question doctrine.⁸⁷ These doctrines are imposed in order to further certain jurisprudential virtues such as separation of powers, the conservation of judicial resources, and the preservation of the institutional legitimacy of the federal courts (notably populated by unelected federal judges⁸⁸) through careful, calculated, and limited use of judicial review.⁸⁹ The doctrine of constitutional avoidance cautions federal courts to avoid deciding constitutional questions when other non-constitutional grounds exist

83. *Id.* at 226.

84. *Id.* at 227 (Shedd, J., concurring) ("Although I agree with the majority that the judgment below must be reversed . . . I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims. Because the appeal can be decided on this non-constitutional basis, I would not reach the First Amendment issue addressed by the majority.").

85. *Id.*

86. U.S. CONST. art. III, § 2; see CHEMERINSKY, *supra* note 5, at 49–53.

87. See CHEMERINSKY, *supra* note 5, at 49–53; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 2.12–2.15 (7th ed. 2004).

88. See Healy, *supra* note 3, at 924–25.

89. See CHEMERINSKY, *supra* note 5, at 49–53; NOWAK & ROTUNDA, *supra* note 87, §§ 2.12–2.15.

for disposing of the case.⁹⁰ The principle underlying avoidance has early roots. In 1833, Justice Marshall, the preeminent architect of judicial review,⁹¹ urged caution in reaching decisions of constitutional magnitude, particularly when separation of powers was implicated.⁹² However, the avoidance doctrine was most famously articulated by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*.⁹³ Brandeis “characterized judicial review . . . as a grave and delicate power for use by fallible, human judges only when its use cannot conscientiously be avoided.”⁹⁴ In *Ashwander*, Brandeis described a set of prudential rules governing “the practice in constitutional cases”⁹⁵ including the following:

1. “The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions ‘is legitimate only in the last resort’ ”⁹⁶
2. “The Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it.’ ”⁹⁷

90. See *Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009) (endorsing the “general rule of constitutional avoidance” and calling it “the ‘older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable’ ” (quoting *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring))); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (describing the “fundamental principle of judicial restraint that courts should neither ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ nor ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied’ ” (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J. concurring))); *Erickson v. United States*, 976 F.2d 1299, 1301 (9th Cir. 1992) (“Fundamental principles of judicial restraint require federal courts to consider nonconstitutional grounds for decision prior to reaching constitutional questions. . . . Thus, a federal court should decide constitutional questions only when it is impossible to dispose of the case on some other ground.”); CHEMERINSKY, *supra* note 5, at 53.

91. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); CHEMERINSKY, *supra* note 5, at 39–47.

92. See *Ex Parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (stating that if constitutional questions “become indispensably necessary to the case,” they must be addressed, but “if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed”).

93. 297 U.S. 288 (1936).

94. Kloppenberg, *supra* note 3, at 1015–16.

95. *Ashwander*, 297 U.S. at 345 (Brandeis, J., concurring).

96. *Id.* at 346 (internal citations omitted).

97. *Id.* at 346–47 (internal citations omitted).

3. “The Court will not ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’”⁹⁸

4. “The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”⁹⁹

In the decades that followed, the avoidance doctrine as articulated in *Ashwander* has become an integral part of the jurisprudential canon.¹⁰⁰ Justice Stevens called Brandeis’ concurring opinion “one of the most respected opinions ever written by a Member of this Court.”¹⁰¹ Further, the rule that courts should only consider a constitutional basis of decision as a last resort has received substantial scholarly support.¹⁰² Bickel has argued persuasively that

98. *Id.* at 347 (internal citations omitted).

99. *Id.*

100. See *Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009) (unanimously endorsing the “general rule of constitutional avoidance” as articulated in *Ashwander*); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993) (Blackmun, J., dissenting) (calling the avoidance doctrine “deeply rooted” and a “fundamental rule of judicial restraint” (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Three Affiliated Tribes v. Wold Eng’g, P.C.*, 467 U.S. 138, 157 (1984))); *Three Affiliated Tribes v. Wold Eng’g, P.C.*, 467 U.S. 138, 157 (1984) (“It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.”); *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (“The best teaching of this Court’s experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.” (quoting *Parker v. Cnty. of L.A.*, 338 U.S. 327, 333 (1949))); *Rescue Army v. Mun. Court*, 331 U.S. 549, 572 (1947) (“Time and experience have given [the avoidance doctrine] sanction. They have also verified . . . that the choice was wisely made.”); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”); *Bell Atl. Md., Inc. v. Prince George’s Cnty.*, 212 F.3d 863, 866 (4th Cir. 2000) (“[B]y deciding the constitutional question of preemption in advance of considering the state law questions upon which the case might have been disposed of, the district court committed reversible error.”); KLOPPENBERG, *supra* note 2, *passim* (discussing and critiquing several important cases in which the Supreme Court has applied the avoidance doctrine); Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 182 (1970) (“The logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last.”).

101. *Delaware v. Van Arsdall*, 475 U.S. 673, 693 (1986) (Stevens, J., dissenting).

102. See, e.g., BICKEL, *supra* note 1, at 111–98 (advocating the “passive virtues” of judicial restraint including adherence to the avoidance doctrine); LOUIS LUSKY, OUR

the avoidance doctrine is essential to the preservation of the creditability of the federal courts, and the power of unelected federal judges, in our political system.¹⁰³ Unlike the executive branch, which wields the power of the sword, or the legislative branch, which may rely on the power of the purse, the judicial branch has little power to enforce its rulings except through the cooperation of the coordinate branches, the raw mythos of its institutional credibility, and the general public's willingness to accept the court's wisdom as authoritative.¹⁰⁴ Thus, judicial restraint generally, and the avoidance doctrine particularly, promote the conservation of the judiciary's limited political capital and ensure the continued vitality of the "least dangerous" branch.¹⁰⁵ If constitutional rulings are frequent and haphazard, courts may jeopardize the public's widespread acceptance of its decisions, particularly on controversial topics.¹⁰⁶ In a democracy with interests as diverse as our own, the resolution of difficult and contested public policy questions requires healthy public debate and

NINE TRIBUNES (1993) (arguing for a limited scope of judicial review); CASS R. SUNSTEIN, ONE CASE AT A TIME 3–60 (1999) (advocating a judicial policy of "democracy-promoting minimalism"); Trevor W. Morrison, *supra* note 20, at 1202–08 (2006) (describing the underlying rationales and arguments for the avoidance canon). *But see* KLOPPENBERG, *supra* note 2, *passim* (arguing that the avoidance doctrine has been implemented in inconsistent and manipulative ways by courts eager to reach a particular result).

103. BICKEL, *supra* note 1, at 201–68; *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 39 (1989) (noting that scholars "contend that federal courts generally depend on the other branches to voluntarily comply with judicial orders and that such acquiescence depends on the judiciary's credibility"); Healy, *supra* note 3, at 924–25 ("Because federal judges are not elected, they derive their legitimacy from the people's acceptance of their decisions. . . . Therefore, in order to maintain their legitimacy and credibility, courts should exercise judicial review only when absolutely necessary.").

104. *See* BICKEL, *supra* note 1, at vi ("Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be the least in capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgments." (quoting THE FEDERALIST No. 78 (Alexander Hamilton))).

105. *Id.*; *see also* Paul A. Freund, *Introduction to ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS xvii* (1957) (noting that judicial restraint preserved the judiciary's credibility due to "the indispensability of husbanding what powers one had, of keeping within bounds if action is not to outrun wisdom").

106. *See* BICKEL, *supra* note 1, at 240; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 681 (1993).

even compromise, yet the finality of constitutional rulings¹⁰⁷ often cuts short political solutions.¹⁰⁸ By observing the passive virtues of the avoidance doctrine, however, courts can carefully calculate the timing and propriety of a difficult or unpopular constitutional decision to ensure a receptive reaction.¹⁰⁹ Even more importantly, the avoidance doctrine protects against a “policy, of accelerated decision” which could render important individual rights less certain and less stable.¹¹⁰ If lower federal courts are too eager to reach constitutional questions unnecessarily, the resulting proliferation of variable constitutional interpretations would lead to a lack of uniformity in the protection and qualification of constitutionally protected rights.¹¹¹ Thus, there are powerful interests at stake in preserving the essential functions of a vibrant judiciary that should not be put at risk by unnecessary constitutional decision-making.

The rationales supporting the avoidance principle are not without critics. First, some commentators dismiss as overstated the concerns about judicial credibility.¹¹² After all, in recent years, the

107. See Healy, *supra* note 3, at 925–26 (explaining that “constitutional rulings are final in a way that other rulings are not” because judicial interpretations of constitutional principles can only be overruled by the coordinate branches through the “notoriously difficult” amendment process).

108. See BICKEL, *supra* note 1, at 147 (“[T]he ‘tendency of a common and easy resort to this great function [of judicial review] . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.’” (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901))); Healy, *supra* note 3, at 927; Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 8 (1996). Cass Sunstein is described as “[t]he most prominent contemporary defender and refiner of the passive virtues.” Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 134 (2009). Sunstein argues in favor of a democracy-promoting “judicial minimalism” and advocates such an approach particularly “when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise).” Sunstein, *supra* at 7–8. Sunstein argues that courts should promote public debate and majoritarian decision-making by avoiding (when possible) entangling themselves in such highly contested issues “first because courts may resolve the relevant issues incorrectly, and second because courts may be ineffective or create serious problems even if their answers are right.” *Id.* at 8.

109. See *Rescue Army v. Mun. Court*, 331 U.S. 549, 572 n.38 (1947) (“It is not without significance for the [avoidance] policy’s validity that the periods when the power [of judicial review] has been exercised most readily and broadly have been the ones in which this Court and the institution of judicial review have had their stormiest experiences.”); BICKEL, *supra* note 1, at 111–98; Friedman, *supra* note 106, at 681; Healy, *supra* note 3, at 924–25.

110. *Rescue Army*, 331 U.S. at 572; Kloppenberg, *supra* note 3, at 1034.

111. See *Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (emphasizing the need for “doctrinal consistency” through uniformity in federal law); Kloppenberg, *supra* note 3, at 1034.

112. See, e.g., CHEMERINSKY, *supra* note 103, at 45–46 n.3 (“[C]onserving judicial credibility should not be a primary objective in constitutional interpretation.”).

Supreme Court has successfully weathered political firestorms following highly polarizing decisions such as *Bush v. Gore*¹¹³ with its institutional credibility intact.¹¹⁴ Others argue that rigid adherence to avoidance techniques, particularly by the Supreme Court, retards the evolution of constitutional rights by postponing indefinitely judicial review of thorny constitutional questions.¹¹⁵ Yet even the critics of avoidance do not propose abandoning the doctrine completely. Rather, they challenge the wisdom of absolute adherence to the avoidance principle in the face of needed clarification of constitutional principles and expansion of minority rights.¹¹⁶ Further, their criticisms are usually levied directly at the United States Supreme Court,¹¹⁷ an institution possessing not only more prestige than lower federal courts, but also a mandate to promote uniformity in federal constitutional law by saying with finality “what the law is.”¹¹⁸ Thus, the argument condemning an inflexible policy of absolute avoidance by the Supreme Court has merit, but it does little to undermine the general “presumption¹¹⁹ against unnecessary constitutional rulings” for lower federal courts in the absence of compelling, clearly articulated reasons.¹²⁰

113. 531 U.S. 98 (2000) (per curiam).

114. See Healy, *supra* note 3, at 926; Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 35–36 (2001) (summarizing survey data on public perceptions of the Court following the *Bush v. Gore* decision ending the Florida recount in the 2000 presidential election and noting “the net effect on the public’s evaluation of the Court was essentially nil; increases in negative evaluations were almost exactly offset by increases in positive evaluations”).

115. See generally KLOPPENBERG, *supra* note 2 (discussing and critiquing the Supreme Court’s “sidestepping” of important constitutional questions through inconsistent invocations of the avoidance doctrine).

116. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 310 (1979) (“One reason . . . for allowing courts to review legislation is that minority groups and unpopular points of view may not be adequately represented in the processes of democratic decisionmaking.”); Kloppenberg, *supra* note 3, at 1041.

117. See generally KLOPPENBERG, *supra* note 2 (critiquing the avoidance doctrine, but focusing that critique on the United States Supreme Court’s use of avoidance techniques).

118. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). The United States Supreme Court has long declared itself to be the “ultimate interpreter of the Constitution.” *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

119. In essence, interpreting the avoidance principle as a kind of presumption against constitutional decision-making absent necessity seems already inherent in the concept of a “prudential” doctrine. See Kloppenberg, *supra* note 3, at 1025 (describing the last resort rule as “largely prudential”).

120. Healy, *supra* note 3, at 927; see also Kloppenberg, *supra* note 3, at 1034 (“Alternatively, proliferation of federal constitutional law may lead to nonuniformity in protection of federal interests. The Supreme Court may better achieve uniformity in

Moreover, one might question whether encouraging courts to reach out and tackle complex constitutional questions in the absence of strict necessity is really boon or bane for the expansion of minority rights. As one commentator explained, when federal courts “reach out to decide constitutional questions unnecessarily, they do not always reach decisions that expand the universe of recognized rights” but instead often “use the opportunity to contain the body of recognized rights and to deny the existence of new rights.”¹²¹ Thus, those that justify “avoiding” avoidance as a means to ensure the continued evolution of minority rights in our majoritarian system may find themselves disheartened by the results. Regardless of political orientation, however, one thing is clear: the decision to render a constitutional adjudication in a given case is a solemn and weighty judicial task that should not be taken up capriciously. As explained more fully below, it is for this reason that it should be the responsibility of the court and the court alone, even when faced with aggressive litigants, to control determinations of when constitutional rulings become a necessity.

IV. AVOIDING A CONSTITUTIONAL DECISION IN *SNYDER v. PHELPS*

Against this theoretical backdrop, the majority’s refusal to consider non-constitutional grounds to dispose of the appeal in *Snyder* becomes all the more troubling. The majority reasoned that it was “absolutely necessary” to address the constitutional question because the defendants chose not to argue that the evidence was insufficient to support the verdict, thereby waiving the issue on appeal.¹²² What follows argues that the majority was unjustified in refusing to address the non-constitutional sufficiency issue simply because the Phelps pressed only the constitutional question in their

federal law if it addresses constitutional issues but urges the lower federal courts and state courts faced with federal constitutional questions to use avoidance techniques.”); *id.* at 1066 (“Whatever their value choices, courts should offer reasoned explanations of necessity. If a court relies on the last resort rule to avoid a constitutional issue, it should do so expressly and explain its decision. . . . If a court reaches a constitutional issue when nonconstitutional grounds remain, it should similarly explain why that action was appropriate.”).

121. Healy, *supra* note 3, at 928–30 (citing examples where a conservative Court restricted rather than expanded rights when it reached out to tackle a difficult constitutional question and cautioning that “there is nothing uniquely liberal about judicial activism”); *see also* Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 (detailing the Court’s recent conservative activism as compared with earlier eras).

122. *Snyder v. Phelps*, 580 F.3d 206, 217 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

briefs and explains why avoidance was the most prudent course of action under the facts and circumstances of this case.

A. *The Insufficiency of Snyder's Tort Claims Under Maryland Law*

First, Snyder failed to present sufficient evidence to support his tort claims under Maryland law, thus non-constitutional grounds of decision existed to dispose of this appeal. Snyder's substantive claims alleged that the Phelps' conduct at the funeral protest and the subsequent posting of the "epic" on the WBC website constituted both the tort of "invasion of privacy by intrusion upon seclusion" and the tort of "intentional infliction of emotional distress."¹²³ However, a survey of Maryland case law reveals that the facts Snyder alleged are insufficient to warrant a finding of civil liability on either claim. Thus, the majority could have resolved this case on purely non-constitutional grounds and avoided a constitutional ruling condoning the Phelps' outrageous conduct as protected speech.

Under Maryland law, the tort of "intrusion" requires a showing that the defendant has committed an act that interferes "into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person."¹²⁴ Where Maryland courts have found "intrusion," the alleged action almost always involves some type of physical invasion of a plaintiff's private home or other protected area, such as peering into windows, or eavesdropping on private conversations.¹²⁵ The courts have repeatedly stated that "there is no liability for observing [the plaintiff] in public places, since he is not then in seclusion."¹²⁶ Further, the Maryland Court of Appeals has held there is no "intrusion" where no private facts are revealed, stating "[t]he plaintiff cannot complain when . . . publicity is given to matters such as the date of his birth or marriage, or his military service record, which are a matter of public record, and open to public inspection."¹²⁷ Thus, as Judge Shedd explained, Snyder's claim fails as a matter of law: "Phelps did not 'intrude' or 'pry' upon any private seclusion" during the funeral protest because the demonstration occurred on a public street, the Phelps never disrupted the ceremony itself, and Snyder admitted at trial he did not

123. *Id.*

124. *Furman v. Sheppard*, 744 A.2d 583, 586 (Md. App. 2000).

125. *See Hollander v. Lubow*, 351 A.2d 421, 425-26 (Md. 1976).

126. *Furman*, 744 A.2d at 586; *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1116-17 (Md. App. 1986).

127. *Hollander*, 351 A.2d at 426.

even see the signs until he viewed a news report on television.¹²⁸ Neither could the posting of the “epic” give rise to a claim of “intrusion” under Maryland law because “[i]n posting the ‘epic’, the Phelps did not do anything to direct it to Snyder’s attention, such as email or transmit it to him.”¹²⁹ Rather, Snyder only discovered the epic by running a Google search and browsing WBC’s website to find the posting.¹³⁰

Similarly, the evidence presented at trial was insufficient to support a claim for IIED under Maryland law.¹³¹ In order to sustain a claim for IIED in Maryland, the plaintiff must meet a substantial burden, as courts have held that the tort “is rarely viable, and is to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct.”¹³² The plaintiff must show that the defendant’s intentional conduct was “so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”¹³³ Further, the plaintiff must show that the conduct caused “severe” emotional distress, such as when a defendant encourages another to commit suicide or deliberately gives a sexual partner a sexually transmitted disease.¹³⁴ As Judge Shedd argued, the evidence clearly failed to establish that the Phelps’ funeral protest, which did not disturb the funeral procession and which Snyder did not even personally witness during the funeral, could support a claim for IIED as a matter of law.¹³⁵ Thus, reversal was warranted on non-constitutional grounds that would allow the court to avoid ruling unnecessarily on the First Amendment questions pressed by the Phelps.

128. *Snyder*, 580 F.3d at 230 (Shedd, J., concurring).

129. *Id.* at 231.

130. *Id.*

131. *See id.* at 232.

132. *Bagwell v. Peninsula Reg’l Med. Ctr.*, 665 A.2d 297, 319 (Md. App. 1995). Maryland courts have also stated the requirements for proving the tort of IIED are “‘rigorous’ ” and rarely satisfied. *Ky. Fried Chicken Nat’l Mgmt. Co. v. Weathersby*, 607 A.2d 8, 11 (Md. 1992) (quoting PROSSER & KEETON ON THE LAW OF TORTS § 12, at 60–61 (5th ed. 1984)); *see also Batson v. Shiflett*, 602 A.2d 1191, 1216 (Md. 1992) (noting that Maryland courts have only rarely upheld claims for IIED and stating “recovery [for IIED] will be meted out sparingly”).

133. *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. App. 1986).

134. *See B.N. v. K.K.*, 538 A.2d 1175, 1177 (Md. 1988); *Young v. Hartford Accident & Indem. Co.*, 492 A.2d 1270, 1278 (Md. 1985).

135. *Snyder*, 580 F.3d at 232–33.

B. The Court Was Permitted to Rely on Non-Constitutional Grounds Raised Solely by Amicus Curiae

Secondly, although the Phelpses only addressed constitutional defenses in their appellate briefs, the insufficiency of Snyder's underlying tort claims was in fact raised by amicus curiae.¹³⁶ Thus, a legal analysis of the issue that showed Snyder failed to present sufficient evidence to support his claims as a matter of law was before the court, providing the court with non-constitutional grounds for decision. Further, the fact that insufficiency was raised solely by amicus and not by the appellants did not oblige the court to reach the constitutional issues pressed by the Phelpses. In rejecting Justice Shedd's contention that the court should dispose of this case on the non-constitutional grounds outlined above, the *Snyder* majority maintained that precedent precluded the court from reaching an issue raised solely by an amicus brief and erroneously concluded that "the resolution of the First Amendment issues is absolutely necessary, as it is the sole appropriate means for disposing of this appeal."¹³⁷ On the contrary, ample precedent supports the view that the court was free to base its decision on an issue raised only by amicus, to raise the issue *sua sponte*, or to request further briefing on the issue.¹³⁸

Although courts often decline to consider grounds for decision raised solely by amici for prudential or fairness reasons,¹³⁹ federal

136. See Amicus Curiae Brief, *supra* note 12, at 15–30.

137. *Snyder*, 580 F.3d at 217 (majority opinion).

138. See, e.g., *Davis v. United States*, 512 U.S. 452, 457 (1994) (noting that the Court may take up contentions raised only by amicus); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing an issue raised solely by amicus and not by petitioner because "that question is not foreign to the parties" and because the Court's "*sua sponte* consideration . . . is far from novel"); *Spicer v. Hilton*, 618 F.2d 232, 240 (3d Cir. 1980) (finding that although the non-constitutional basis for decision was not raised by the parties, the court would forgo a constitutional adjudication and decide the case on the non-constitutional basis); Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 815 (2004) (discussing the influence of amicus briefs on the Supreme Court's opinions and describing how amicus briefs often contain information and arguments not contained in the briefs submitted by the parties themselves); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 690–92 (2008) ("[J]udges at all three levels of the federal bench find amici curiae helpful in offering new legal arguments that are absent from the parties' briefs."). Even the appellate rules of the United States Supreme Court suggest that one of the central purposes of permitting amicus briefs to be filed is to bring before the Court arguments and factual matters that were not already raised by the parties. See SUP. CT. R. 37.1 (noting the Court finds amicus briefs more helpful when they bring "to the attention of the Court relevant matter not already brought to its attention by the parties").

139. See *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 497 (2003) (declining to consider a constitutional issue raised by only amicus because the petitioners had not

courts nonetheless retain the power to consider such alternatives and have exercised that power *sua sponte* on multiple occasions.¹⁴⁰ As scholars have noted, “the Supreme Court has based some of its most important holdings on arguments raised only in amicus briefs.”¹⁴¹ Perhaps the most famous example is *Mapp v. Ohio*,¹⁴² in which the United States Supreme Court held the exclusionary rule applicable to the states—a ground for decision raised not by the parties, but solely by *amicus curiae*.¹⁴³ Therefore, contrary to the *Snyder* majority’s contention, there is authority for a court to address an issue raised only by amicus, particularly where, as here, countervailing jurisprudential obligations are implicated.¹⁴⁴

addressed the question); *Carter v. Lee*, 283 F.3d 240, 252 n.11 (4th Cir. 2002) (“[T]his Court normally views contentions not raised in an opening brief to be waived.”); *United States v. Buculei*, 262 F.3d 322, 333 n.11 (4th Cir. 2001) (“[A]n appellant and an amicus may not split up the issues and expect the court to consider that they have all been raised on appeal.”); *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) (noting that the court would not address issues not raised in the opening brief in fairness to the appellee).

140. See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (“[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)) (internal quotation marks omitted); *Teague*, 489 U.S. at 300; *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n.8 (4th Cir. 1995) (“The normal rule of course is that the failure to raise an issue for review in the prescribed manner constitutes a waiver. But the rule is not an absolute one and review may proceed (even completely *sua sponte*) when the equities require.”) (citation omitted); *Spicer*, 618 F.2d at 240; see also Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 253–59 (2002) (discussing multiple examples of courts basing their decisions on arguments from amici curiae or by raising an issue *sua sponte*).

141. *Frost*, *supra* note 15, at 466 (discussing noteworthy cases where the United States Supreme Court based its rulings on arguments presented solely by *amicus curiae* and citing *Romer v. Evans*, 517 U.S. 620 (1996), *Teague*, 489 U.S. at 288, and *Mapp v. Ohio*, 367 U.S. 643 (1961)).

142. 367 U.S. 643 (1961).

143. *Mapp*, 367 U.S. at 646 n.3 (“Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that Wolf be overruled, the *amicus curiae*, who was also permitted to participate in the oral argument, did urge the Court to overrule Wolf.”). Another famous example is *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938), which overturned the long established precedent of *Swift v. Tyson*, 41 U.S. 1 (1842), *sua sponte*, though neither party briefed or even argued the issue. See Milani & Smith, *supra* note 140, at 254–55.

144. See *Frost*, *supra* note 15, at 464 (“[T]he Supreme Court has long assumed the power to amend or add to the questions presented by the parties for resolution. Frequently, the Court rewrites those questions to clarify, narrow, or simplify the issues framed by the parties. On occasion, the Court has even made substantive changes to the issues the parties ask it to review, or has added entirely new questions.”); see also *Davis v. United States*, 512 U.S. 452, 457 (1994) (noting that the Court may take up contentions raised only by amicus); *Spicer*, 618 F.2d at 240 (finding that although the non-

Moreover, the court retained the inherent power to raise the sufficiency issue on its own motion or request that the parties brief such non-constitutional grounds for decision more fully.¹⁴⁵ As the Supreme Court has stated elsewhere, “a court may consider an issue ‘antecedent to . . . and ultimately dispositive of’ the dispute before it, even an issue the parties fail to identify and brief.”¹⁴⁶ Such “independent power”¹⁴⁷ has been exercised even where important constitutional questions are in play.¹⁴⁸ Lastly, there was little risk of unfairness to the appellees in this case, as Snyder specifically addressed the sufficiency issue raised by amicus in his own reply brief.¹⁴⁹ Thus, the Snyder majority was simply incorrect in concluding that tackling the First Amendment questions pressed by the Phelps was “absolutely necessary” to dispose of this appeal.¹⁵⁰

C. *The Imprudence of Permitting Litigants to Control the Court’s Constitutional Decision-Making*

Third, by reaching the First Amendment issues in this case when non-constitutional grounds for decision existed, the court unnecessarily jeopardized its own autonomy and credibility by handing over to the litigants, parties unconcerned with the broader

constitutional basis for decision was not raised by the parties, the court would forgo a constitutional adjudication and decide the case on the non-constitutional basis).

145. See *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (stating that the Supreme Court has “on occasion rephrased the question presented by a petitioner or requested the parties to address an important question of law not raised in the petition for certiorari”) (citation omitted).

146. *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). The Court also maintained that a court “is not limited to the particular legal theories advanced by the parties” but may exercise an inherent power to raise another legal theory for disposing of the case on its own motion. *Id.* at 446. As Justice Souter explained, “[T]he contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on . . . dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory.” *Id.*

147. *Id.* at 446.

148. See, e.g., *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51–52 (1984) (declining to address the constitutional question presented by the parties and instead remanding the case to consider a statutory ground for decision that the parties failed to brief); Milani & Smith, *supra* note 140, *passim* (discussing cases where the Court has raised constitutional issues sua sponte); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997) (discussing “procedural avoidance” principles and stating that “the core tenet is that courts should order the issues for adjudication . . . with an eye to obviating the need to render constitutional rulings” and “decide an antecedent statutory issue, even one waived by the parties, if its resolution could preclude a constitutional claim”).

149. See *Snyder v. Phelps*, 580 F.3d 206, 228 (4th Cir. 2009) (Shedd, J., concurring), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

150. *Snyder*, 580 F.3d at 217 n.9 (majority opinion).

institutional legitimacy of the judiciary and well practiced in abusive litigation techniques,¹⁵¹ the power to control when a federal court decides controversial constitutional questions.¹⁵² Although the appellant-defendants, as masters of their complaint, were free to frame the issues on their appeal as they saw fit, the Phelps deliberately pressed only the constitutional question to force the court's hand in rendering a ruling on whether the First Amendment offered blanket protection for their outrageous conduct.¹⁵³ Given the narrow scope of the Phelps' appellate briefs, the majority concluded that it was "absolutely necessary" to address the Phelps' First Amendment contentions.¹⁵⁴ Thus, it was the Phelps, and not the court, that ultimately controlled the determination of whether a constitutional adjudication was necessary and appropriate in this context.

As commentators have opined, however, there is much potential for mischief if litigants are empowered, by deliberately pressing only constitutional claims on appeal, to manipulate the federal courts into rendering constitutional decisions on demand.¹⁵⁵ The problem is that "[l]itigants . . . will have no incentive (and certainly no duty) to selflessly evaluate the institutional concerns . . . in order to determine whether non-constitutional grounds merit consideration prior to a constitutional issue."¹⁵⁶ This is particularly troubling where, as here, the delicate powers of the least dangerous branch were placed in the most dangerous hands. By repeatedly proclaiming that "God Hates America" and "Thank God for 9[//]11,"¹⁵⁷ the Phelps family has made its disdain and disrespect for our nation's modern institutions quite clear. It is thus highly unlikely that the Phelps family of lawyers, with their long and sullied history of exploiting the court system with

151. See *supra* notes 40–46 and accompanying text.

152. See Kloppenberg, *supra* note 3, at 1033–34; Frost, *supra* note 15, at 479–80.

153. See Brief of Appellant, *supra* note 68, at 8–9.

154. *Snyder*, 580 F.3d at 217 n.9.

155. See Frost, *supra* note 15, at 479–80 ("Litigants will not always share the judiciary's interest in promoting the values underlying the constitutional avoidance doctrine, however. If a litigant prefers the constitutionally suspect interpretation, then that party has no incentive to argue for the alternative, constitutionally sound construction. Indeed, sometimes litigants turn to the courts precisely because they distrust the political branches and believe that their interests can best be served by independent judges, who they hope will declare the scope of their constitutional rights in the broadest possible terms. Nor will litigants have any particular interest in avoiding conflict between the courts and the political branches, or in cabinining judicial decisions about the meaning of the Constitution. For all of these reasons, sometimes no party will argue in favor of the most constitutionally conservative interpretation, forcing judges to do so on their own motion.").

156. Kloppenberg, *supra* note 3, at 1033–34.

157. *God Hates Fags*, *supra* note 26.

frivolous lawsuits,¹⁵⁸ had the best interests of the federal judiciary in mind when framing their appeal. Entrenched in ideology and craving publicity, the Phelps family would readily commandeer the institutional integrity of the court to further their message and lend constitutional legitimacy to their activities.¹⁵⁹ Therefore, it is unwise indeed to leave to the Phelps family's discretion whether it was "absolutely necessary"¹⁶⁰ that the court reach the constitutional questions they raised.

As courts and commentators have made clear, the discretionary power to determine when a court should render an important and controversial constitutional decision should rest with the court itself, not with the litigants.¹⁶¹ Justice Blackmun explained, "[t]he obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a 'self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies.'" ¹⁶² In the common law tradition, an appellate court's resolution of a particular dispute affects more than the parties before it; rather, the decision creates binding precedent that affects the rights and duties of all subsequent parties.¹⁶³ Courts must therefore carefully control which of the issues raised by the parties are properly presented for adjudication.¹⁶⁴ Acquiescence to

158. See *S. Poverty Law Ctr.*, *supra* note 16, at 60, 64; see also *Glass v. Pfeiffer*, 849 F.2d 1261, 1265 (10th Cir. 1988) (imposing sanctions on the Phelps family law firm, Phelps Chartered, for advancing "groundless and patently frivolous litigation").

159. The Phelps family has publicly stated that it is most eager to argue its case to the United States Supreme Court because of the additional publicity that will result. See *High Court Will Hear Anti-Gay Funeral Protest Case*, NAT'L PUB. RADIO (Mar. 8, 2010), <http://www.wbur.org/2010/03/08/supreme-court-funeral-2> ("Shirley Phelps-Roper, a defendant in the lawsuit and one of Phelps' daughters, said she is pleased the case is going to the Supreme Court. 'We get to preach to the conscience of doomed America,' she said in an interview Monday. 'I am so excited that I can't tell you how good it is.'").

160. *Snyder v. Phelps*, 580 F.3d 206, 217 n.9 (4th Cir. 2008), *cert. granted*, 78 U.S.L.W. 3395 (U.S. Mar. 8, 2010) (No. 09-751).

161. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 16 (1993) (Blackmun, J., dissenting); *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) ("[W]e follow the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties."); *Kloppenborg*, *supra* note 3, at 1033-34.

162. *Zobrest*, 509 U.S. at 16 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982)).

163. See *Frost*, *supra* note 15, at 517 ("[D]ecisions by federal courts of appeals create binding precedent that must be followed in subsequent litigation within that jurisdiction. To preserve their role in law exposition, judges must maintain control over case presentation when the parties fail to fully and accurately describe the meaning of legal standards.").

164. *Id.*

aggressive litigation strategy designed to force an unnecessary constitutional ruling disrupts this process and conflicts with the core premise of federal court jurisdiction under Article III—the resolution of *actual* cases and controversies, rather than abstractions.¹⁶⁵

Here, by pressing only the constitutional question, the Phelps were able to extract a judicial opinion (and binding precedent) regarding whether the First Amendment immunized WBC's protest activities from civil tort liability when such an opinion was not required to overturn the verdict below. Moreover, as Snyder's underlying cause of action lacked evidentiary support,¹⁶⁶ the court did not have the sharpest possible claims before it through which to appraise the merits of a constitutional defense both thoroughly and thoughtfully. Instead, flimsy state law tort claims gave rise to an extended, abstract interpretation of First Amendment protections in a delicate and highly controversial context. Aggressive litigation strategy thus evoked a precipitate constitutional ruling. Prudence dictates, however, that a court should guard far more jealously the precious judicial capital expended in a needless constitutional adjudication.¹⁶⁷

D. Foreclosing an Effective Deterrent to WBC's Outrageous Conduct

Lastly, the court's eagerness to reach the First Amendment issues in this appeal foreclosed a potentially effective deterrent to WBC's conduct that may be preferable to the onslaught of criminal sanctions recently imposed by state legislatures in the form of funeral protest statutes.¹⁶⁸ In contrast to the heavy handed criminalization of

165. See Healy, *supra* note 3, at 853 (“In its rejection of advisory opinions, its refusal to adjudicate political questions, and its stringent standing requirements, the Supreme Court traditionally has rejected the view of federal courts as roving expositors of constitutional norms in favor of a dispute resolution model in which the exclusive function of the federal courts—at least at the lower levels—is to decide cases and controversies.”).

166. See discussion *supra* Part IV.A.

167. See Frost, *supra* note 15, at 483 (“Judicial independence, and the respect for judicial decisionmaking that accompanies it, would be compromised if courts were required to rule on the law as it is presented to them, rather than as they believe it to be. Life tenure and salary protection ensure that federal judges cannot be threatened or coerced by litigants who want them to ignore specific statutes or interpret constitutional provisions as the litigants prefer. Yet litigants could accomplish the same result simply by omitting sources, claims, and arguments if courts were not free to raise overlooked statutes or adopt new interpretations of the law they are asked to apply. Furthermore, if judges are not permitted to question litigants' articulation of the law, then courts can be co-opted by litigants seeking to benefit from the credibility of a judicial decision that describes the law as they see it.”).

168. See, e.g., John Loran Kiel, Jr., *Crossing the Line: Reconciling the Right to Picket Military Funerals with the First Amendment*, 198 MIL. L. REV. 67, 79–109 (2008)

private conduct by the state, the flexible principles of tort law are “frequently said to preserve public order by providing a dispute resolution mechanism when private persons believe themselves to have been harmed by other individuals or groups.”¹⁶⁹ At least one scholar has advocated tort liability as a particularly well balanced and effective remedy against WBC, arguing that “emotional distress claims are well suited to suggest the outer limits of civil tolerance for religious activity [and] serve socially valuable punitive and prophylactic functions, providing vulnerable individuals with a remedy against the most offensive and intrusive forms of religious conduct.”¹⁷⁰ Even if a claim for IIED arising out of the Phelps’ funeral protests ultimately could not survive constitutional scrutiny, the mere threat of civil tort liability resulting in multi-million dollar verdicts provides a powerful private disincentive.¹⁷¹ Bankruptcy, after all, poses a far greater risk to WBC’s continued operations nationwide than does criminal sanction, including arrest and incarceration.¹⁷²

Moreover, the threat of tort liability might serve as the preferable deterrent to the Phelps’ unique brand of outrageous conduct as compared with the proliferation of rigid funeral protest statutes that may sweep too broadly, over-regulating freedom of expression in unanticipated contexts and imposing harsh criminal penalties that have yet to pass constitutional challenge themselves.¹⁷³ The threat of tort liability is a far more flexible deterrent that avoids the need for direct state action.¹⁷⁴ Further, efforts by state legislatures

(describing various state-sponsored funeral protest statutes); Miller, *supra* note 36, at 1104–09 (same).

169. Howard O. Hunter & Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 BYU L. REV. 537, 555–56 (2001).

170. Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN. ST. L. REV. 381, 381 (2008).

171. See Brown, *supra* note 25, at 232–36.

172. See generally Anna Zwierz Messar, Note, *Balancing Freedom of Speech With the Right to Privacy: How to Legally Cope with the Funeral Protest Problem*, 28 PACE L. REV. 101 (2007) (arguing that bankrupting WBC through tort verdicts may be an effective way to stop WBC’s outrageous conduct); Chris Weigant, *Fred Phelps’ Hatemongering and the First Amendment*, HUFFINGTONPOST.COM (Mar. 8, 2010, 8:47 PM), http://www.huffingtonpost.com/chris-weigant/fred-phelps-hatemongering_b_490995.html (“If the door is opened up on lawsuits against Phelps by this case, it wouldn’t take long for Phelps and his church to be stripped of the means of traveling around the country promulgating hatred (the group boasts it stages 40 pickets a week, and over 30,000 pickets total), because so many people would be lining up to sue him . . .”).

173. See Miller, *supra* note 36, at 1116–30; see also *supra* note 46 (outlining the lawsuits filed by the Phelps family challenging, with mixed success, various state-sponsored funeral protest statutes).

174. See Shulman, *supra* note 170, at 406–07.

to criminalize Phelps-style protests at military funerals often prove problematic.¹⁷⁵ Although these funeral statutes are passed in direct reaction to WBC's activities, criminal laws cannot explicitly single out WBC as their target.¹⁷⁶ Further, a criminal statute must anticipate *ex ante* what specific conduct will be prohibited, thereby risking an overly inclusive regulatory regime that may burden other rights unintentionally.¹⁷⁷ Thus, legislatures must continually struggle to find the right fit. In contrast, the threat of tort liability may attach *ex post*, making it easier to target WBC's protests specifically and deter a wider range of WBC's outrageous conduct potentially interfering with private military funerals.¹⁷⁸

However, by finding the Phelps' funeral protests worthy of First Amendment protection despite the paucity of facts supporting the underlying cause of action, the court prematurely eliminated the possibility that WBC's "picketing ministry"¹⁷⁹ could ever give rise to tort liability, even under a different, more compelling set of underlying facts. Had the court exercised the proper restraint and disposed of this case on non-constitutional grounds, the threat of potential tort liability attaching to future funeral protests would remain intact, providing a powerful private deterrent against particularly egregious conduct by WBC.¹⁸⁰ Thus, in reaching a constitutional decision unnecessarily, the court removed the privately enforceable checks on the Phelps' behavior that tort law otherwise provides.¹⁸¹ Secure in their new found immunity from tort liability, the Phelps now have less incentive to avoid direct contact with mourners during funeral ceremonies and more opportunities to inflict emotional distress with relative impunity. As a result, future victims of WBC's conduct have lost a uniquely flexible and effective private deterrent that ultimately strikes a better balance between the rights of

175. See Miller, *supra* note 36, at 1108–30; Wells, *supra* note 36, at 174–233.

176. See Wells, *supra* note 36, at 158–59, 174–233.

177. See Brown, *supra* note 25, at 232–33.

178. See Hunter & Price, *supra* note 169, at 556 ("The law of torts is a powerful weapon in society's suppression of intolerable activities; its doctrines are flexible and open-ended and the contours of those doctrines often are filled in by juries rather than by legal elites. Tort law is thus extraordinarily responsive to and reflective of societal mores, and serves a useful function in allowing persons who are harmed by another's actions to sue to recover damages for their injuries, judged by a common-sense standard of social tolerance.").

179. *God Hates Fags*, *supra* note 26.

180. See generally Shulman, *supra* note 170 (discussing tort liability as the preferable remedy to WBC's conduct at military funerals).

181. See *id.*

mourners and the rights of protestors than state sponsored criminal alternatives.

CONCLUSION

The majority opinion in *Snyder v. Phelps* represents a dangerous abdication of the court's prudential obligation to protect and preserve the vital functions of the judiciary in our constitutional system. By refusing to apply the avoidance doctrine, the court effectively handed over to the litigants the discretionary power to control if and when the federal courts will expend precious judicial capital in deciding a constitutional issue. As vividly exemplified in this case, however, litigants rarely if ever have the best interests of the judiciary in mind when they decide to press only a constitutional issue on appeal when non-constitutional grounds for decision remain. Litigants may be masters of their complaints, but should not be masters of the jurisprudential discretion of the federal courts. Courts must be more zealous than the majority in *Snyder* in guarding their passive virtues from attacks by aggressive litigants.

JONATHAN S. CARTER