

Alito stands alone on Supreme Court's First Amendment cases

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Supreme Court Justice Samuel A. Alito Jr.'s muscular dissent in the free speech case involving Westboro Baptist Church marked the second time in a year that he has stood apart from the rest of his colleagues in a [First Amendment](#) case.

His dissent Wednesday showed a justice some consider more willing than ever to strike out on his own, and points out the differences between Alito and President [George W. Bush's](#) other Supreme Court nominee, Chief Justice John G. Roberts Jr.

Roberts wrote for the rest of the court in a decision that has drawn outrage from veterans groups and set the court decidedly on the wrong side of public opinion. He expressed sympathy for those who are targets of the Rev. Fred Phelps and his family members but said the First Amendment protects the church from having to pay damages to a grieving father whose son's funeral was the site of their protest.

Alito said his colleagues were wrong.

In his condemnatory dissent in [Snyder v. Phelps](#), he said the Constitution's guarantee of free speech did not allow members of the fringe church to protest at the funeral of Albert Snyder's Marine son, Matthew, and to "brutalize" the family with their lewd and cruel messages even if they came in a public setting.

Alito said Snyder had an "elementary right" to bury his son in peace. Members of the church had no right to launch "a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability."

He added: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."

Last April, Alito stood alone when the court decided that a federal law that bans depictions of dog fighting and other violence against animals violated free speech guarantees.

That ruling in [U.S. v. Stevens](#), which like Wednesday's was written by Roberts, was another ringing endorsement of the First Amendment's protection of even distasteful expression. Roberts called "startling and dangerous" the government's argument that the value of certain categories of speech should be weighed against their societal costs when protecting free speech.

Alito did not.

"The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes," Alito wrote. Videos that depict acts of animal mutilation and death "present a highly unusual free speech issue because they are so closely linked with violent criminal conduct."

The dissents in *Snyder* and *Stevens* show Alito "pretty sharply departing from the rest of the court in a way that's different from any other area," said Doug Kendall of the liberal [Constitutional Accountability Center](#).

And it highlights a significant difference in approach between Alito and Roberts, who often end a term agreeing in cases more than any other pair of justices.

"Between this case and [*Stevens*], free speech is the area in which the split in their views is most stark," said Thomas C. Goldstein, a Supreme Court practitioner who runs [SCOTUSblog.com](#). "But I would expect to see more examples like this in the future."

He said he thinks Alito is on a "trajectory similar" to that of Justice Clarence Thomas.

"As he is on the court longer, he is developing independent views on a lot of issues," Goldstein said. "And he does not hesitate to stand alone on principle."

Some liberals have complained that Alito's view in the *Snyder* case is at odds with his vote in [Citizens United v. Federal Election Commission](#) that said corporations have a free speech right to play a larger role in election spending.

Goldstein and others disagree.

"I think the criticisms of Alito as being inconsistent in light of the campaign finance cases are wrong," he said. "In his view, the First Amendment has a core value relating to political speech. In his view, extending it to protect videos of animal cruelty and exploitation of a military funeral goes too far. The rest of the court obviously disagrees, but his position seems completely coherent."

Paul D. Clement, who was solicitor general in the Bush administration, said Alito's views on the First Amendment "strike me as defying easy categorization."

He added: "You can look at this decision and *Stevens* and say is he is the court's leading voice against First Amendment absolutism."

But in other cases involving the First Amendment, "he seems to have gone out of his way to express a view more protective of speech than the court's opinion."

In two of those cases, involving the privacy rights of those who sign petitions and the speech rights of a high school student, Roberts wrote the majority decision.

The court has another First Amendment decision pending, on whether California may ban the sale of violent video games to minors.

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During oral argument in that case, Alito seemed to show his hand.

"Your argument is that there is nothing that a state can do to limit minors' access to the most violent, sadistic, graphic video game that can be developed," Alito said to an attorney for the video game industry.

"That's your argument?"

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