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Opinion

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $ 500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. *273 Ala. 656, 144 So. 2d 25*.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. [1] Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the *Bill of Rights*." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:

"Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times -- for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury' -- a *felony* under which they could imprison him for *ten years. . . .*"

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with

[1] A copy of the advertisement is printed in the Appendix.

police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. [3] One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately $ 4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability Department testified that he had approved the advertisement for

[3] Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.

publication because he knew nothing to cause him to believe that anything in it was false, and because bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we . . . are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with "grave misconduct and . . . improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not for respondent, the Secretary of the Times testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman . . . ." On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous *per se*, "the law . . . implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages -- as distinguished from "general" damages, which are compensatory in nature -- apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the *First* and *Fourteenth Amendments*.

In affirming the judgment, the Supreme Court of Alabama . . . .

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the *Times. 371 U.S. 946*. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the *First* and *Fourteenth Amendments* in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court -- that "The *Fourteenth Amendment* is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of

law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, *e. g.*, Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See *Ex parte Virginia, 100 U.S. 339, 346-347*; *American Federation of Labor v. Swing, 312 U.S. 321*.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on *Valentine v. Chrestensen, 316 U.S. 52*, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the *First Amendment* freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for "the freedom of communicating information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N. A. A. C. P.* v. *Button, 371 U.S. 415, 435*. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith v. California, 361 U.S. 147, 150*; cf. *Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 64, n. 6*. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities -- who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. Griffin, 303 U.S. 444, 452*; *Schneider v. State, 308 U.S. 147, 164*. The effect would be to shackle the *First Amendment* in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States, 326 U.S. 1, 20*. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

II.

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . . ." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. *Alabama Ride Co.* v. *Vance, 235 Ala. 263, 178 So. 438 (1938)*; *Johnson Publishing Co.* v. *Davis, 271 Ala. 474, 494-495, 124 So. 2d 441, 457-458 (1960)*. His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. *Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 450, 61 So. 345, 350 (1913)*. Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co.* v. *Davis, supra, 271 Ala., at 495, 124 So. 2d, at 458*.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the *First* and *Fourteenth Amendments*.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution

does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in *Pennekamp v. Florida, 328 U.S. 331, 348-349*, that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In *Beauharnais v. Illinois, 343 U.S. 250*, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Id., at 263-264*, and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. *Schenectady Union Pub. Co*. v. *Sweeney, 316 U.S. 642*. In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. *N. A. A. C. P*. v. *Button, 371 U.S. 415, 429*. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the *First Amendment*.

The general proposition that freedom of expression upon public questions is secured by the *First Amendment* has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States, 354 U.S. 476, 484*. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California, 283 U.S. 359, 369*. "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California, 314 U.S. 252, 270*, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N. A. A. C. P*. v. *Button, 371 U.S. 415, 429*. The *First Amendment*, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943)*. Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California, 274 U.S. 357, 375-376*, gave the principle its classic formulation:

"Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello v. Chicago, 337 U.S. 1, 4*; *De Jonge v. Oregon, 299 U.S. 353, 365*. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the *First Amendment* guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall, 357 U.S. 513, 525-526*. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P*. v. *Button, 371 U.S. 415, 445*.

As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." . . .

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive," *N. A. A. C. P.* v. *Button, 371 U.S. 415, 433*, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson, 76 U.S. App. D. C. 23, 24, 128 F.2d 457, 458 (1942)*, cert. denied, *317 U.S. 678*. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. . . . [13]

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California, 314 U.S. 252*. This is true even though the utterance contains "half-truths" and "misinformation." *Pennekamp v. Florida, 328 U.S. 331, 342, 343, n. 5, 345*. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the *First Amendment*. See Levy, Legacy of Suppression (1960), at 258 *et seq.*; Smith, Freedom's Fetters (1956), at 426, 431, and *passim*. That statute made it a crime, punishable by a $ 5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

"doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress . . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto -- a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates, *supra*, pp. 553-554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" *Id., pp. 569-570*. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every

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[13] See also Mill, On Liberty (Oxford: Blackwell, 1947), at 47:

". . . To argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . ." 4 Elliot's Debates, *supra*, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the *First Amendment*.

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the *First Amendment* was originally addressed only to action by the Federal Government, and that Jefferson, for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in *Dennis v. United States, 341 U.S. 494, 522, n. 4* (concurring opinion). But this distinction was eliminated with the adoption of the *Fourteenth Amendment* and the application to the States of the *First Amendment's* restrictions. See, *e. g., Gitlow v. New York, 268 U.S. 652, 666*; . . . .

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the *First Amendment* freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 70*.

The state rule of law is not saved by its allowance of the defense of truth. . . . A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall, supra, 357 U.S., at 526*. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the *First* and *Fourteenth Amendments*.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . . We conclude that such a privilege is required by the *First* and *Fourteenth Amendments*.

III.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, [23] the rule requiring proof of actual malice is applicable. . . .

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. . . .

Applying these standards, we consider that the proof presented to show actual malice lacks the clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they

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[23] We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule . . . .

were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct" -- although respondent's own proofs tend to show that it was -- that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. *First*, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second*, it was not a final refusal, since it asked for an explanation on this point -- a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. . . .

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. . . .There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements -- the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him -- did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police

Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been. This reliance on the bare fact of respondent's official position was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the Times] in the aspect that the libelous was not of and concerning the [plaintiff,]" based its ruling on the proposition that:

"We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." *273 Ala., at 674-675, 144 So.2d, at 39*.

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N. E. 86, 88 (1923)*. The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Concur

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Ante*, p. 283. I base my vote to reverse on the belief that the *First* and *Fourteenth Amendments* not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the *First Amendment*. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof,

however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. . . .Moreover, this technique for harassing and punishing a free press -- now that it has been shown to be possible -- is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction -- by granting the press an absolute immunity for criticism of the way public officials do their public duty. . . .

I agree with the Court that the *Fourteenth Amendment* made the First applicable to the States. This means to me that since the adoption of the *Fourteenth Amendment* a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United States to do that is, in my judgment, precisely nil. Such was the general view held when the *First Amendment* was adopted and ever since. Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798, which made it a crime -- "seditious libel" -- to criticize federal officials or the Federal Government. As the Court's opinion correctly points out, however, *ante*, pp. 273-276, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the *First Amendment*. Since the *First Amendment* is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the *First Amendment* by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as "obscenity," *Roth v. United States, 354 U.S. 476*, and "fighting words," *Chaplinsky v. New Hampshire, 315 U.S. 568*, are not expression within the protection of the *First Amendment*, freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the *First Amendment* was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the *First Amendment*.

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Ante*, at 279-280. The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the *First* and *Fourteenth Amendments to the Constitution* afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. . . .

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of

press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the *First Amendment*. [4] This, of course, cannot be said "where public officials are concerned or where public matters are involved. . . . One main function of the *First Amendment* is to ensure ample opportunity for the people to determine and resolve public issues. . . .

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech . . . ." *Wood v. Georgia, 370 U.S. 375, 389*. The public official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut, 310 U.S. 296, 310*. As Mr. Justice Brandeis correctly observed, "sunlight is the most powerful of all disinfectants."

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

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[4] In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. . . .

Snyder v. Phelps

Supreme Court of the United States
October 6, 2010, Argued; March 2, 2011, Decided
No. 09-751

Reporter

562 U.S. 443 *; 131 S. Ct. 1207 **; 179 L. Ed. 2d 172 ***; 2011U.S. LEXIS 1903 ****; 79 U.S.L.W. 4135; 39 Media L. Rep. 1353; 22 Fla. L. Weekly Fed. S. 836

Opinion

Chief Justice **Roberts** delivered the opinion of the Court.

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the *First Amendment* shields the church members from tort liability for their speech in this case.

I

A

Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals. Brief for Institute as *Amicus Curiae* 7, n. 14.

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. Lance Corporal Snyder's father selected the Catholic church in the Snyders' hometown of Westminster, Maryland, as the site for his son's funeral. Local newspapers provided notice of the time and location of the service.

Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence. App. to Brief for Appellants in No. 08-1026 (CA4), pp. 2282-2285 (hereinafter App.). That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. *Id.*, at 3758. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing. *Id.*, at 2168, 2371, 2286, 2293.

The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event. *Id.*, at 2084-2086.

B

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church (collectively Westboro or the church) in the United States District Court for the District of Maryland under that court's diversity jurisdiction. Snyder alleged five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Westboro moved for summary judgment contending, in part, that the church's speech was insulated from liability by the *First Amendment*. See *533 F. Supp. 2d 567, 570 (2008)*.

The District Court awarded Westboro summary judgment on Snyder's claims for defamation and publicity given to private life, concluding that Snyder could not prove the necessary elements of those torts. *Id., at 572-573*. A trial was held on the remaining claims. At trial, Snyder described the severity of his emotional injuries. He

testified that he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it. *Id., at 588-589*. Expert witnesses testified that Snyder's emotional anguish had resulted in severe depression and had exacerbated pre-existing health conditions.

A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for $2.9 million in compensatory damages and $8 million in punitive damages. Westboro filed several post-trial motions, including a motion contending that the jury verdict was grossly excessive and a motion seeking judgment as a matter of law on all claims on *First Amendment* grounds. The District Court remitted the punitive damages award to $2.1 million, but left the jury verdict otherwise intact. *Id., at 597*.

In the Court of Appeals, Westboro's primary argument was that the church was entitled to judgment as a matter of law because the *First Amendment* fully protected Westboro's speech. The Court of Appeals agreed. *580 F.3d 206, 221 (CA4 2009)*. The court reviewed the picket signs and concluded that Westboro's statements were entitled to *First Amendment* protection because those statements were on matters of public concern, were not provably false, and were expressed solely through rhetoric. *Id., at 222-224*.

We granted certiorari. . . .

II

To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. See *Harris v. Jones, 281 Md. 560, 565-566, 380 A.2d 611, 614 (1977)*. The Free Speech Clause of the *First Amendment* --"Congress shall make no law . . . abridging the freedom of speech"--can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. See, *e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-51, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)*.[3]

Whether the *First Amendment* prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "[S]peech on 'matters of public concern' . . . is 'at the heart of the *First Amendment's* protection.' *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985)* (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978))*. The *First Amendment* reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)*. That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)*. Accordingly, "speech on public issues occupies the highest rung of the hierarchy of *First Amendment* values, and is entitled to special protection." *Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)* (internal quotation marks omitted).

" '[N]ot all speech is of equal *First Amendment* importance,' " however, and where matters of purely private significance are at issue, *First Amendment* protections are often less rigorous. *Hustler, supra, at 56, 108 S. Ct. 876, 99 L. Ed. 2d 41* (quoting *Dun & Bradstreet, supra, at 758, 105 S. Ct. 2939, 86 L. Ed. 2d 593*); see *Connick, supra, at 145-147, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import. *Dun & Bradstreet, supra, at 760, 105 S. Ct. 2939, 86 L. Ed. 2d 593* (internal quotation marks omitted).

We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that "the boundaries of the public concern test are not well

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[3] The dissent attempts to draw parallels between this case and hypothetical cases involving defamation or fighting words. *Post, at ___ - ___, 179 L. Ed. 2d, at 193* (opinion of Alito, J.). But, as the court below noted, there is "no suggestion that the speech at issue falls within one of the categorical exclusions from *First Amendment* protection, such as those for obscenity or 'fighting words.' . . .

defined." *San Diego v. Roe, 543 U.S. 77, 83, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004)* (*per curiam*). Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors.

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick, supra, at 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708*, or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," . . . The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)*.

Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual's credit report "concerns no public issue." *472 U.S., at 762, 105 S. Ct. 2939, 86 L. Ed. 2d 593*. The content of the report, we explained, "was speech solely in the individual interest of the speaker and its specific business audience." *Ibid.* That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further. *Ibid.* To cite another example, we concluded in *San Diego* v. *Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos "did nothing to inform the public about any aspect of the [employing agency's] functioning or operation." *543 U.S., at 84, 125 S. Ct. 521, 160 L. Ed. 2d 410*.

Deciding whether speech is of public or private concern requires us to examine the " 'content, form, and context' " of that speech, " 'as revealed by the whole record.' . . . In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." *Dun & Bradstreet, supra, at 759, 105 S. Ct. 2939, 86 L. Ed. 2d 593*. The placards read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." App. 3781-3787. While these messages may fall short of refined social or political commentary, the issues they highlight--the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy--are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs--such as "You're Going to Hell" and "God Hates You"--were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.

Apart from the content of Westboro's signs, Snyder contends that the "context" of the speech--its connection with his son's funeral--makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech. Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is "fairly characterized as constituting speech on a matter of public concern," *Connick, 461 U.S., at 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708*, and the funeral setting does not alter that conclusion.

Snyder argues that the church members in fact mounted a personal attack on Snyder and his family, and then attempted to "immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church." Reply Brief for Petitioner 10. We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its "honestly believed" views on public issues. *Garrison, 379 U.S., at 73, 85 S. Ct. 209, 13 L. Ed. 2d 125*. There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter. Contrast *Connick, 461 U.S. at 153, 103*

S. Ct. 1684, 75 L. Ed. 2d 708 (finding public employee speech a matter of private concern when it was "no coincidence that [the speech] followed upon the heels of [a] transfer notice" affecting the employee).

Snyder goes on to argue that Westboro's speech should be afforded less than full *First Amendment* protection "not only because of the words" but also because the church members exploited the funeral "as a platform to bring their message to a broader audience." Brief for Petitioner 44, 40. There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views--in the case of the military funeral, because Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies.

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term--"emotional distress"--fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of *First Amendment* protection." *United States v. Grace, 461 U.S. 171, 180, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983)*. "[W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that " '[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate." *Frisby v. Schultz, 487 U.S. 474, 480, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)*.

That said, "[e]ven protected speech is not equally permissible in all places and at all times." *Id., at 479, 108 S. Ct. 2495, 101 L. Ed. 2d 420* (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 799, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)*). Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach--it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's precedents. *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)*. Maryland now has a law imposing restrictions on funeral picketing, *Md. Crim. Law Code Ann. § 10-205* (Lexis Supp. 2010), as do 43 other States and the Federal Government. See Brief for American Legion as *Amicus Curiae* 18-19, n. 2 (listing statutes). To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.[5]

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing "before or about" a particular residence, *487 U.S., at 477, 108 S. Ct. 2495, 101 L. Ed. 2d 420*. In *Madsen* v. *Women's Health Center, Inc.*, we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. *512 U.S. 753, 768, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994)*. The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the *First Amendment*. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the *First Amendment*, it is that the government may not prohibit the expression of an idea

[5] The Maryland law prohibits picketing within 100 feet of a funeral service or funeral procession; Westboro's picketing would have complied with that restriction.

simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)*. Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)*.

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler, 485 U.S., at 55, 108 S. Ct. 876, 99 L. Ed. 2d 41* (internal quotation marks omitted). In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasan[t]' " expression. *Bose Corp., 466 U.S., at 510, 104 S. Ct. 1949, 80 L. Ed. 2d 502* (quoting *New York Times, 376 U.S., at 270, 84 S. Ct. 710, 111 L. Ed. 2d 686*). Such a risk is unacceptable; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the *First Amendment*." *Boos v. Barry, 485 U.S. 312, 322, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)* (some internal quotation marks omitted). What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the *First Amendment*, and that protection cannot be overcome by a jury finding that the picketing was outrageous.

For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

III

The jury also found Westboro liable for the state law torts of intrusion upon seclusion and civil conspiracy. The Court of Appeals did not examine these torts independently of the intentional infliction of emotional distress tort. Instead, the Court of Appeals reversed the District Court wholesale, holding that the judgment wrongly "attache[d] tort liability to constitutionally protected speech." *580 F.3d, at 226*.

Snyder argues that even assuming Westboro's speech is entitled to *First Amendment* protection generally, the church is not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at his son's funeral. Brief for Petitioner 45-46. We do not agree. In most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Erznoznik v. Jacksonville, 422 U.S. 205, 210-211, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)* (internal quotation marks omitted). As a result, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California, 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971)*.

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan v. Post Office Dept., 397 U.S. 728, 736-738, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970)*, and an ordinance prohibiting picketing "before or about" any individual's residence, *Frisby, 487 U.S., at 477, 484-485, 108 S. Ct. 2495, 101 L. Ed. 2d 420*.

Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here.

Because we find that the *First Amendment* bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion--the alleged unlawful activity Westboro conspired to accomplish--we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.

IV

Our holding today is narrow. We are required in *First Amendment* cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. As we have noted, "the sensitivity and significance of the interests presented in clashes between *First Amendment* and [state law] rights counsel

relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star v. B. J. F., 491 U.S. 524, 533, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989)*.

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and--as it did here inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course--to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Concur

Justice **Breyer**, concurring

I agree with the Court and join its opinion. That opinion restricts its analysis here to the matter raised in the petition for certiorari, namely, Westboro's picketing activity. The opinion does not examine in depth the effect of television broadcasting. Nor does it say anything about Internet postings. The Court holds that the *First Amendment* protects the picketing that occurred here, primarily because the picketing addressed matters of "public concern."

While I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our *First Amendment* analysis can stop at that point. A State can sometimes regulate picketing, even picketing on matters of public concern. See *Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)*. Moreover, suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected. See *Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)* ("fighting words").

The dissent recognizes that the means used here consist of speech. But it points out that the speech, like an assault, seriously harmed a private individual. Indeed, the state tort of "intentional infliction of emotional distress" forbids only conduct that produces distress "so severe that no reasonable man could be expected to endure it," and which itself is "so outrageous in character, and 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." *Post, at - , 179 L. Ed. 2d, at 188-189* (opinion of Alito, J.) (quoting *Harris v. Jones, 281 Md. 560, 567, 571, 380 A.2d 611, 614, 616 (1977)*; internal quotation marks omitted). The dissent requires us to ask whether our holding unreasonably limits liability for intentional infliction of emotional distress--to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm. Does our decision leave the State powerless to protect the individual against invasions of, *e.g.*, personal privacy, even in the most horrendous of such circumstances?

As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where *First Amendment* values and state-protected (say, privacy-related) interests seriously conflict. Cf. *Florida Star v. B. J. F., 491 U.S. 524, 533, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989)*; *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)*. That review makes clear that Westboro's means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions. The picketing could not be seen or heard from the funeral ceremony itself. And Snyder testified that he saw no more than the tops of the picketers' signs as he drove to the funeral. To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on

matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm. Consequently, the *First Amendment* protects Westboro. As I read the Court's opinion, it holds no more.

Dissent

Justice **Alito**, dissenting.

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

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the *First Amendment* protected respondents' right to brutalize Mr. Snyder. I cannot agree.

I

Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the *First Amendment* ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are "uninhibited," "vehement," and "caustic." *New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)*.

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, "most if not all jurisdictions" permit recovery in tort for the intentional infliction of emotional distress (or IIED). *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)*.

This is a very narrow tort with requirements that "are rigorous, and difficult to satisfy." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 12, p. 61 (5th ed. 1984). To recover, a plaintiff must show that the conduct at issue caused harm that was truly severe. . . .

A plaintiff must also establish that the defendant's conduct was " 'so outrageous in character, and 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.' *Harris, supra, at 567, 380 A. 2d, at 614* (quoting *Restatement (Second) of Torts § 46, Comment d*).

Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here. On appeal, they chose not to contest the sufficiency of the evidence. See *580 F.3d 206, 216 (CA4 2009)*. They did not dispute that Mr. Snyder suffered " 'wounds that are truly severe and incapable of healing themselves.' *Figueiredo-Torres, supra, at 653, 584 A. 2d, at 75*. Nor did they dispute that their speech was " 'so outrageous in character, and 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.' *Harris, supra, at 567, 380 A. 2d, at 614*. Instead, they maintained that the *First Amendment* gave them a license to engage in such conduct. They are wrong.

II

It is well established that a claim for the intentional infliction of emotional distress can be satisfied by speech. Indeed, what has been described as "[t]he leading case" recognizing this tort involved speech. Prosser and Keeton, *supra,* § 12, at 60 (citing *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57); see also *Restatement (Second) of Torts § 46, Illustration 1*. And although this Court has not decided the question, I think it is clear that the *First Amendment* does not entirely preclude liability for the intentional infliction of emotional distress by means of speech.

This Court has recognized that words may "by their very

utterance inflict injury" and that the *First Amendment* does not shield utterances that form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)*; . . . .

III

In this case, respondents brutally attacked Matthew Snyder, and this attack, which was almost certain to inflict injury, was central to respondents' well-practiced strategy for attracting public attention.

On the morning of Matthew Snyder's funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.) But of course, a small group picketing at any of these locations would have probably gone unnoticed.

The Westboro Baptist Church, however, has devised a strategy that remedies this problem. As the Court notes, church members have protested at nearly 600 military funerals. *Ante, at ___, 179 L. Ed. 2d, at 178*. They have also picketed the funerals of police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes. And in advance of these protests, they issue press releases to ensure that their protests will attract public attention.

This strategy works because it is expected that respondents' verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson--proclaiming that she was "better off dead"--their announcement was national news, and the church was able to obtain free air time on the radio in exchange for canceling its protest. Similarly, in 2006, the church got air time on a talk radio show in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman.

In this case, respondents implemented the Westboro Baptist Church's publicity-seeking strategy. Their press release stated that they were going "to picket the funeral of Lance Cpl. Matthew A. Snyder" because "God Almighty killed Lance Cpl. Snyder. He died in shame, not honor--for a fag nation cursed by God . . . . Now in Hell--sine die." Supp. App. in No. 08-1026 (CA4), p. 158a. This announcement guaranteed that Matthew's funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.

On the day of the funeral, respondents, true to their word, displayed placards that conveyed the message promised in their press release. Signs stating "God Hates You" and "Thank God for Dead Soldiers" reiterated the message that God had caused Matthew's death in retribution for his sins. App. to Brief for Appellants in No. 08-1026 (CA4), pp. 3787, 3788 (hereinafter App.). Others, stating "You're Going to Hell" and "Not Blessed Just Cursed," conveyed the message that Matthew was "in Hell--sine die." *Id.,* at 3783.

Even if those who attended the funeral were not alerted in advance about respondents' intentions, the meaning of these signs would not have been missed. . . .

After the funeral, the Westboro picketers reaffirmed the meaning of their protest. They posted an online account entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!" *Id.,* at 3788.[15] Belying any suggestion that they had simply made general comments about homosexuality, the Catholic Church, and the United States military, the "epic" addressed the Snyder family directly:

> "God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare

[15] The Court refuses to consider the epic because it was not discussed in Snyder's petition for certiorari. . . .

> that child to serve the LORD his GOD--PERIOD! You did JUST THE OPPOSITE--you raised him for the devil.
>
> . . . . .
>
> "Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.
>
> . . . . .
>
> "Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?" *Id.,* at 3791.

In light of this evidence, it is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not.

Justice Breyer provides an apt analogy to a case in which the *First Amendment* would permit recovery in tort for a verbal attack:

> "[S]uppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected." *Ante, at , 179 L. Ed. 2d, at 187* (concurring opinion).

This captures what respondents did in this case. Indeed, this is the strategy that they have routinely employed--and that they will now continue to employ--inflicting severe and lasting emotional injury on an ever growing list of innocent victims.

IV

The Court concludes that respondents' speech was protected by the *First Amendment* for essentially three reasons, but none is sound.

First--and most important--the Court finds that "the overall thrust and dominant theme of [their] demonstration spoke to" broad public issues. *Ante, at , 179 L. Ed. 2d, at 182*. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The *First Amendment* allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently.

Second, the Court suggests that respondents' personal attack on Matthew Snyder is entitled to *First Amendment* protection because it was not motivated by a private grudge, . . . but I see no basis for the strange distinction that the Court appears to draw. Respondents' motivation--"to increase publicity for its views," *ibid.*--did not transform their statements attacking the character of a private figure into statements that made a contribution to debate on matters of public concern. Nor did their publicity-seeking motivation soften the sting of their attack. And as far as culpability is concerned, one might well think that wounding statements uttered in the heat of a private feud are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to slash a stranger as a means of attracting public attention.

Third, the Court finds it significant that respondents' protest occurred on a public street, but this fact alone should not be enough to preclude IIED liability. . . . A physical assault may occur without trespassing; it is no defense that the perpetrator had "the right to be where [he was]." See *ante, at , 179 L. Ed. 2d, at 184*. And the same should be true with respect to unprotected speech. Neither classic "fighting words" nor defamatory statements are immunized when they occur in a public place, and there is no good reason to treat a verbal assault based on the conduct or character of a private figure like Matthew Snyder any differently.

One final comment about the opinion of the Court is in order. The Court suggests that the wounds inflicted by vicious verbal assaults at funerals will be prevented or at least mitigated in the future by new laws that restrict

picketing within a specified distance of a funeral. See *ante, at ___ - ___, 179 L. Ed. 2d, at 183-184*. It is apparent, however, that the enactment of these laws is no substitute for the protection provided by the established IIED tort; according to the Court, the verbal attacks that severely wounded petitioner in this case complied with the new Maryland law regulating funeral picketing. See *ante, at ___, 179 L. Ed. 2d, at 184, n. 5*. And there is absolutely nothing to suggest that Congress and the state legislatures, in enacting these laws, intended them to displace the protection provided by the well-established IIED tort.

The real significance of these new laws is not that they obviate the need for IIED protection. Rather, their enactment dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order. At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. See *National Archives and Records Admin. v. Favish, 541 U.S. 157, 168, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004)*. Exploitation of a funeral for the purpose of attracting public attention "intrud[es] upon their . . . grief," *ibid.*, and may permanently stain their memories of the final moments before a loved one is laid to rest. Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the *First Amendment* permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.

V

. . . .

Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent.

United States v. Stevens

Supreme Court of the United States
October 6, 2009, Argued ; April 20, 2010, Decided
No. 08-769

Reporter
559 U.S. 460 *; 130 S. Ct. 1577 **; 176 L. Ed. 2d 435 ***; 2010 U.S. LEXIS 3478 ****; 78 U.S.L.W. 4267; 38 Media L. Rep. 1577; 22 Fla. L. Weekly Fed. S 221

Opinion

Chief Justice **Roberts** delivered the opinion of the Court.

Congress enacted *18 U.S.C. § 48* to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the *First Amendment*.

I

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. *§ 48(a)*. A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." *§ 48(c)(1)*. In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *§ 48(b)*.

The legislative background of *§ 48* focused primarily on the interstate market for "crush videos." According to the House Committee Report on the bill, such videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. H. R. Rep. No. 106-397, p. 2 (1999) (hereinafter H. R. Rep.). Crush videos often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes," sometimes while "talking to the animals in a kind of dominatrix patter" over "[t]he cries and squeals of the animals, obviously in great pain." *Ibid.* Apparently these depictions "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *Id.,* at 2-3. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. See Brief for United States 25, n. 7 (listing statutes). But crush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct. See H. R. Rep., at 3; accord, Brief for State of Florida et al. as *Amici Curiae* 11.

This case, however, involves an application of *§ 48* to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, see Brief for United States 26, n. 8 (listing statutes), and has been restricted by federal law since 1976. Animal Welfare Act Amendments of 1976, § 17, 90 Stat. 421, *7 U.S.C. § 2156*. Respondent Robert J. Stevens ran a business, "Dogs of Velvet and Steel," and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960's and 1970's.[2] A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a "gruesome" scene of a pit bull attacking a domestic farm pig. *533 F.3d 218, 221 (CA3 2008)* (en banc). On the basis of these videos, Stevens was indicted on three counts of violating *§ 48*. . . .

We granted certiorari. *556 U.S. 1181, 129 S. Ct. 1984, 173 L. Ed. 2d 1083 (2009)*.

II

The Government's primary submission is that *§ 48* necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the *First Amendment*. We disagree.

The *First Amendment* provides that "Congress shall make no law . . . abridging the freedom of speech." "[A]s a general matter, the *First Amendment* means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union, 535 U.S. 564,*

[2] The Government contends that these dogfights were unlawful at the time they occurred, while Stevens disputes the assertion. Reply Brief for United States 25, n. 14 (hereinafter Reply Brief); Brief for Respondent 44, n. 18.

573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002) (internal quotation marks omitted). Section 48 explicitly regulates expression based on content: The statute restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, § 48 is " 'presumptively invalid,' and the Government bears the burden to rebut that presumption." United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (quoting R. A. V. v. St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); citation omitted).

"From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." Id., at 382-383, 112 S. Ct. 2538, 120 L. Ed. 2d 305These "historic and traditional categories long familiar to the bar," Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (Kennedy, J., concurring in judgment)--including obscenity, Roth v. United States, 354 U.S. 476, 483, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), defamation, Beauharnais v. Illinois, 343 U.S. 250, 254-255, 72 S. Ct. 725, 96 L. Ed. 919 (1952), fraud, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), incitement, Brandenburg v. Ohio, 395 U.S. 444, 447-449, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (*per curiam*), and speech integral to criminal conduct, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 69 S. Ct. 684, 93 L. Ed. 834 (1949) -- are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

The Government argues that "depictions of animal cruelty" should be added to the list. It contends that depictions of "illegal acts of animal cruelty" that are "made, sold, or possessed for commercial gain" necessarily "lack expressive value," and may accordingly "be regulated as *unprotected* speech." Brief for United States 10 (emphasis added). The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether--that they fall into a " 'First Amendment Free Zone.' Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. . . . But we are unaware of any similar tradition excluding *depictions* of animal cruelty from "the freedom of speech" codified in the First Amendment, and the Government points us to none.

The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," Reply Brief 12, n. 8, and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's " 'legislative judgment that . . . depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,' " Brief for United States 23 (quoting 533 F.3d, at 243 (Cowen, J., dissenting)), and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Brief for United States 8; see also *id.,* at 12.

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 178, 2 L. Ed. 60 (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being " 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' R. A. V., supra, at 383, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (quoting Chaplinsky, supra, at 572, 62 S. Ct. 766, 86 L. Ed. 1031). In New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d

1113 (1982), we noted that within these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because "the balance of competing interests is clearly struck," *id., at 763-764, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. The Government derives its proposed test from these descriptions in our precedents. See Brief for United States 12-13.

But such descriptions are just that--descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

When we have identified categories of speech as fully outside the protection of the *First Amendment*, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, *458 U.S., at 763, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. *Id., at 756-757, 762, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. But our decision did not rest on this "balance of competing interests" alone. *Id., at 764, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Id., at 759, 761, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. As we noted, " '[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' *Id., at 761-762, 102 S. Ct. 3348, 73 L. Ed. 2d 1113* (quoting *Giboney, 336 U.S., at 498, 69 S. Ct. 684, 93 L. Ed. 2d 834*). *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding. See *Osborne v. Ohio, 495 U.S. 103, 110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)* (describing *Ferber* as finding "persuasive" the argument that the advertising and sale of child pornography was "an integral part" of its unlawful production (internal quotation marks omitted)); *Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249-250, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)* (noting that distribution and sale "were intrinsically related to the sexual abuse of children," giving the speech at issue "a proximate link to the crime from which it came" (internal quotation marks omitted)).

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the *First Amendment*. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

III

Because we decline to carve out from the *First Amendment* any novel exception for *§ 48*, we review Stevens's *First Amendment* challenge under our existing doctrine.

A

. . . In the *First Amendment* context, however, this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449, n. 6, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)* (internal quotation marks omitted). Stevens argues that *§ 48* applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. Brief for Respondent 22-25. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of *§ 48* rests on interpreting the statute as narrowly limited to specific types of "extreme" material. Brief for United States 8. As the parties have presented the issue, therefore, the constitutionality of *§ 48* hinges on how broadly it is construed. It is to that question that we now turn.

B

As we explained two Terms ago,[7] "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams, 553 U.S. 285, 293, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)*. Because *§ 48* is a federal statute, there is no need to defer to a state

court's authority to interpret its own law.

We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "'depiction of animal cruelty'" nowhere requires that the depicted conduct be cruel. That text applies to "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." § 48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

The Government contends that the terms in the definition should be read to require the additional element of "accompanying acts of cruelty." Reply Brief 6; see also Tr. of Oral Arg. 17-19. (The dissent hinges on the same assumption. See post, at 486-487, 489, 176 L. Ed. 2d, at 455, 457.) The Government bases this argument on the definiendum, "depiction of animal cruelty," cf. Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004), and on " 'the commonsense canon of *noscitur a sociis*.' " Reply Brief 7 (quoting Williams, 553 U.S., at 294, 128 S. Ct. 1830, 170 L. Ed. 2d 650). As that canon recognizes, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." Id. at 294. Likewise, an unclear definitional phrase may take meaning from the term to be defined, see Leocal, supra, at 11, 125 S. Ct. 377, 160 L. Ed. 2d 271 (interpreting a " 'substantial risk' " of the "us[e]" of "physical force" as part of the definition of " 'crime of violence' ").

But the phrase "wounded . . . or killed" at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to " 'kill' is 'to deprive of life.' " Brief for United States 14 (quoting Webster's Third New International Dictionary 1242 (1993)). We agree that "wounded" and "killed" should be read according to their ordinary meaning. Cf. Engine Mfrs. Assn. v. South Coast Air Quality Management Dist., 541 U.S. 246, 252, 124 S. Ct. 1756, 158 L. Ed. 2d 529 (2004). Nothing about that meaning requires cruelty.

While not requiring cruelty, § 48 does require that the depicted conduct be "illegal." But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." § 48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.

What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the . . . wounding . . . or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be "a broad societal consensus" against cruelty to animals, Brief for United States 2, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. D. C. Code Munic. Regs., tit. 19, § 1560 (June 2004). Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, see Mediaweek, Sept. 29, 2008, p. 28, and hunting television programs, videos, and Web sites are equally popular, see Brief for Professional Outdoor Media Association et al. as *Amici Curiae* 9-10. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Compare *ibid.* and Brief for National Rifle Association of America, Inc., as *Amicus Curiae* 12 (hereinafter NRA Brief) (estimating that hunting magazines alone account for $135 million in annual retail sales) with Brief for United States 43-44, 46 (suggesting $1 million in crush video sales per year, and noting that Stevens earned $57,000 from his videos). Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate

jurisdictions. Some States permit hunting with crossbows, Ga. Code Ann. § 27-3-4(1) (2007); Va. Code Ann. § 29.1-519(A)(6) (Lexis 2008 Cum. Supp.), while others forbid it, Ore. Admin. Rule 635-065-0725 (2009), or restrict it only to the disabled, N. Y. Envir. Conserv. Law Ann. § 11-0901(16) (West 2005). Missouri allows the "canned" hunting of ungulates held in captivity, Mo. Code Regs. Ann., tit. 3, 10-9.560(1) (2009), but Montana restricts such hunting to certain bird species, Mont. Admin. Rule 12.6.1202(1) (2007). The sharp-tailed grouse may be hunted in Idaho, but not in Washington. Compare Idaho Admin. Code § 13.01.09.606 (2009) with Wash. Admin. Code § 232-28-342 (2009) .

The disagreements among the States--and the "commonwealth[s], territor[ies], or possession[s] of the United States," 18 U.S.C. § 48(c)(2) --extend well beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. Compare, *e.g.,* Fla. Stat. Ann. § 828.23(5) (West 2006) (excluding poultry from humane slaughter requirements) with Cal. Food & Agric. Code Ann. § 19501(b) (West 2001) (including some poultry). California has recently banned cutting or "docking" the tails of dairy cattle, which other States permit. 2009 Cal. Legis. Serv. Ch. 344 (S. B. 135) (West). Even cockfighting, long considered immoral in much of America, see Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (Scalia, J., concurring in judgment), is legal in Puerto Rico, see *15 Laws P. R. Ann. § 301* (Supp. 2008); Posadas de Puerto Rico Associates v. Tourism Co. of P. R., 478 U.S. 328, 342, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986), and was legal in Louisiana until 2008, see La. Rev. Stat. Ann. § 14:102.23 (West) (effective Aug. 15, 2008). An otherwise-lawful image of any of these practices, if sold or possessed for commercial gain within a State that happens to forbid the practice, falls within the prohibition of § 48(a).

C

The only thing standing between defendants who sell such depictions and five years in federal prison--other than the mercy of a prosecutor--is the statute's exceptions clause. Subsection (b) exempts from prohibition "any depiction that has serious religious, political, scientific, educational, journalistic, historical , or artistic value." The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have "journalistic" value; pictures of bullfights in Spain have "historical" value; and instructional hunting videos have "educational" value. Reply Brief 6. Thus, the Government argues, § 48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting, see Brief for United States 47-48), and perhaps other depictions of "extreme acts of animal cruelty." *Id.,* at 41.

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with "redeeming societal value," *id.*, at 9, 16, 23, " 'at least some minimal value,' " Reply Brief 6 (quoting H. R. Rep., at 4), or anything more than "scant social value," Reply Brief 11, is excluded under § 48(b). But the text says "serious" value, and "serious" should be taken seriously. We decline the Government's invitation--advanced for the first time in this Court--to regard as "serious" anything that is not "scant." (Or, as the dissent puts it, " 'trifling.' " Post, at 487, 176 L. Ed. 2d, at 456.) As the Government recognized below, "serious" ordinarily means a good bit more. The District Court's jury instructions required value that is "significant and of great import," App. 132, and the Government defended these instructions as properly relying on "a commonly accepted meaning of the word 'serious,' " Brief for United States in No. 05-2497 (CA3), p. 50.

Quite apart from the requirement of "serious" value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen's Foundation, many popular videos "have primarily entertainment value" and are designed to "entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community." Brief for Safari Club International et al. as *Amici Curiae* 12. The National Rifle Association agrees that "much of the content of hunting media . . . is merely *recreational* in nature." NRA Brief 28. The Government offers no principled explanation why these depictions of hunting or depictions of Spanish bullfights would be *inherently* valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. Post, at 487-488, 176 L. Ed. 2d, at 455-457. But § 48(b) addresses the value of the *depictions*, not of the underlying activity. There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.

The Government explains that the language of § 48(b)

was largely drawn from our opinion in *Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)*, which excepted from its definition of obscenity any material with "serious literary, artistic, political, or scientific value," *id., at 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419*. See Reply Brief 8, 9, and n. 5. According to the Government, this incorporation of the *Miller* standard into *§ 48* is therefore surely enough to answer any *First Amendment* objection. Reply Brief 8-9.

In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. *413 U.S., at 24-25, 93 S. Ct. 2607, 37 L. Ed. 2d 419*. Limiting *Miller*'s exception to "serious" value ensured that " '[a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication.' *Id., at 25, n. 7, 93 S. Ct. 2607, 37 L. Ed. 2d 419* (quoting *Kois v. Wisconsin, 408 U.S. 229, 231, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972)* (*per curiam*)). We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from Government regulation. Even " '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.' *Cohen v. California, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971)* (quoting *Winters v. New York, 333 U.S. 507, 528, 68 S. Ct. 665, 92 L. Ed. 840 (1948)* (Frankfurter, J., dissenting); alteration in original).

Thus, the protection of the *First Amendment* presumptively extends to many forms of speech that do not qualify for the serious-value exception of *§ 48(b)*, but nonetheless fall within the broad reach of *§ 48(c)*.

D

Not to worry, the Government says: The Executive Branch construes *§ 48* to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6-7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id., at 6-7, 10, and n. 6, 19, 22, 125 S. Ct. 377, 160 L. Ed. 2d 271*. But the *First Amendment* protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. Cf. *Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 473, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)*.

This prosecution is itself evidence of the danger in putting faith in Government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret *§ 48* as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." See Statement by President William J. Clinton upon Signing H. R. 1887, 34 Weekly Comp. of Pres. Doc. 2557 (1999). No one suggests that the videos in this case fit that description. The Government's assurance that it will apply *§ 48* far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." . . .

* * *

Our construction of *§ 48* decides the constitutional question; the Government makes no effort to defend the constitutionality of *§ 48* as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities--depictions that are presumptively protected by the *First Amendment* but that remain subject to the criminal sanctions of *§ 48*.

Nor does the Government seriously contest that the presumptively impermissible applications of *§ 48* (properly construed) far outnumber any permissible ones. However "growing" and "lucrative" the markets for crush videos and dogfighting depictions might be, see Brief for United States 43, 46 (internal quotation marks omitted), they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of *§ 48*, See *supra, at 13-14, 125 S. Ct. 377, 160 L. Ed. 2d 271*. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that *§ 48* is not so limited but is instead substantially overbroad, and therefore invalid under the *First Amendment*.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

Dissent

Justice **Alito**, dissenting

The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty--in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. The Court of Appeals--incorrectly, in my view--declined to decide whether § 48 is unconstitutional as applied to respondent's videos and instead reached out to hold that the statute is facially invalid. Today's decision does not endorse the Court of Appeals' reasoning, but it nevertheless strikes down § 48 using what has been aptly termed the "strong medicine" of the overbreadth doctrine, United States v. Williams, 553 U.S. 285, 293, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (internal quotation marks omitted), a potion that generally should be administered only as "a last resort," Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999) (internal quotation marks omitted).

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court's conclusion that § 48 bans a substantial quantity of protected speech.

I

A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights. . .

The "strong medicine" of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court. . . .

I see no reason to depart here from the generally preferred procedure of considering the question of overbreadth only as a last resort. Because the Court has addressed the overbreadth question, however, I will explain why I do not think that the record supports the conclusion that § 48, when properly interpreted, is overly broad.

II

The overbreadth doctrine "strike[s] a balance between competing social costs." Williams, 553 U.S., at 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650. Specifically, the doctrine seeks to balance the "harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional" against the possibility that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech." *Ibid.* "In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Ibid.*

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. See, *e.g.*, id., at 301-302, 128 S. Ct. 1830, 170 L. Ed. 2d 650; see also Ferber, supra, at 773, 102 S. Ct. 3348, 73 L. Ed. 2d 1113;Houston v. Hill, 482 U.S. 451, 466-467, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). Accordingly, we have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, "from the text of [the law] *and from actual fact*," that substantial overbreadth exists. Virginia v. Hicks, 539 U.S. 113, 122, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (quoting New York State Club Assn., supra, at 14, 108 S. Ct. 2225, 101 L. Ed. 2d 1; emphasis added; internal quotation marks omitted; alteration in original). Similarly, "there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (emphasis added).

III

In holding that § 48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, § 48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights. See ante, at 473, 481, 176 L. Ed. 2d, at 446, 452. Instead, the Court tacitly assumes for the sake of argument that § 48 is valid as applied to these depictions, but the Court concludes that § 48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

A

I turn first to depictions of hunting. As the Court notes, photographs and videos of hunters shooting game are common. See ante, at 476, 176 L. Ed. 2d, at 448-449. But hunting is legal in all 50 States, and § 48 applies only to a depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. §§ 48(a), (c). Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside § 48's reach.

Straining to find overbreadth, the Court suggests that § 48 prohibits the sale or possession in the District of Columbia of any depiction of hunting because the District--undoubtedly because of its urban character--does not permit hunting within its boundaries. Ante, at 475-476, 176 L. Ed. 2d, at 448. The Court also suggests that, because some States prohibit a particular type of hunting (*e.g.,* hunting with a crossbow or "canned" hunting) or the hunting of a particular animal (*e.g.*, the "sharp-tailed grouse"), § 48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place. See ante, at 475-477, 176 L. Ed. 2d, at 448-449.

The Court's interpretation is seriously flawed. . . .I would hold that § 48 does not apply to depictions of hunting. First, because § 48 targets depictions of "animal cruelty," I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. See ante, at 475, 176 L. Ed. 2d, at 448 (interpreting "[t]he text of § 48(c) to ban a depiction of "the humane slaughter of a stolen cow"). Virtually all state laws prohibiting animal cruelty either expressly define the term "animal" to exclude wildlife or else specifically exempt lawful hunting activities, so the statutory prohibition set forth in § 48(a) may reasonably be interpreted not to reach most if not all hunting depictions.

Second, even if the hunting of wild animals were otherwise covered by § 48(a), I would hold that hunting depictions fall within the exception in § 48(b) for depictions that have "serious" (*i.e.,* not "trifling") "scientific," "educational," or "historical" value. While there are certainly those who find hunting objectionable, the predominant view in this country has long been that hunting serves many important values, and it is clear that Congress shares that view. Since 1972, when Congress called upon the President to designate a National Hunting and Fishing Day, see S. J. Res. 117, 92d Cong., 2d Sess. (1972), *86 Stat. 133*, Presidents have regularly issued proclamations extolling the values served by hunting. See Presidential Proclamation No. 8421, 74 Fed. Reg. 49305 (Pres. Obama 2009) (hunting and fishing are "ageless pursuits" that promote "the conservation and restoration of numerous species and their natural habitats"); Presidential Proclamation No. 8295, 73 Fed. Reg. 57233 (Pres. Bush 2008) (hunters and anglers "add to our heritage and keep our wildlife populations healthy and strong," and "are among our foremost conservationists"); Presidential Proclamation No. 7822, 69 Fed. Reg. 59539 (Pres. Bush 2004) (hunting and fishing are "an important part of our Nation's heritage," and "America's hunters and anglers represent the great spirit of our country"); Presidential Proclamation No. 4682, 44 Fed. Reg. 53149 (Pres. Carter 1979) (hunting promotes conservation and an appreciation of "healthy recreation, peaceful solitude and closeness to nature"); Presidential Proclamation No. 4318, 39 Fed. Reg. 35315 (Pres. Ford 1974) (hunting furthers "appreciation and respect for nature" and preservation of the environment). Thus, it is widely thought that hunting has "scientific? value in that it promotes conservation, "historical" value in that it provides a link to past times when hunting played a critical role in daily life, and "educational" value in that it furthers the understanding and appreciation of nature and our country's past and instills valuable character traits. And if hunting itself is widely thought to serve these values, then it takes but a small additional step to conclude that depictions of hunting make a nontrivial contribution to the exchange of ideas. Accordingly, I would hold that hunting depictions fall comfortably within the exception set out in § 48(b). . . .

For these reasons, I am convinced that § 48 has no application to depictions of hunting. But even if § 48 did

impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho, see *ante, at 476-477, 176 L. Ed. 2d, at 449*), those isolated applications would hardly show that *§ 48* bans a substantial amount of protected speech.

B

Although the Court's overbreadth analysis rests primarily on the proposition that *§ 48* substantially restricts the sale and possession of hunting depictions, the Court cites a few additional examples, including depictions of methods of slaughter and the docking of the tails of dairy cows. See *ante, at 477, 176 L. Ed. 2d, at 449*.

Such examples do not show that the statute is substantially overbroad, for two reasons. First, as explained above, *§ 48* can reasonably be construed to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, and anticruelty laws do not ban the sorts of acts depicted in the Court's hypotheticals. See, *e.g.*, *Idaho Code § 25-3514* (Lexis 2000) ("No part of this chapter [prohibiting cruelty to animals] shall be construed as interfering with or allowing interference with . . . [t]he humane slaughter of any animal normally and commonly raised as food, or for production of fiber . . . [or] [n]ormal or accepted practices of . . . animal husbandry"); *Kan. Stat. Ann. § 21-4310(b)* (2007) ("The provisions of this section shall not apply . . . with respect to farm animals, normal or accepted practices of animal husbandry, including the normal and accepted practices for the slaughter of such animals"); *Md. Crim. Law Code Ann. § 10-603* (Lexis 2002) (sections prohibiting animal cruelty, "do not apply to . . . customary and normal veterinary and agricultural husbandry practices including dehorning, castration, tail docking, and limit feeding").

Second, nothing in the record suggests that anyone has ever created, sold, or possessed for sale a depiction of the slaughter of food animals or of the docking of the tails of dairy cows that would not easily qualify under the exception set out in *§ 48(b)*. Depictions created to show proper methods of slaughter or tail docking would presumably have serious "educational" value, and depictions created to focus attention on methods thought to be inhumane or otherwise objectionable would presumably have either serious "educational" or "journalistic" value or both. In short, the Court's examples of depictions involving the docking of tails and humane slaughter do not show that *§ 48* suffers from any overbreadth, much less substantial overbreadth.

The Court notes, finally, that cockfighting, which is illegal in all States, is still legal in Puerto Rico, *ante, at 477, 176 L. Ed. 2d, at 449*, and I take the Court's point to be that it would be impermissible to ban the creation, sale, or possession in Puerto Rico of a depiction of a cockfight that was legally staged in Puerto Rico. But assuming for the sake of argument that this is correct, this veritable sliver of unconstitutionality would not be enough to justify striking down *§ 48 in toto.*

In sum, we have a duty to interpret *§ 48* so as to avoid serious constitutional concerns, and *§ 48* may reasonably be construed not to reach almost all, if not all, of the depictions that the Court finds constitutionally protected. Thus, *§ 48* does not appear to have a large number of unconstitutional applications. Invalidation for overbreadth is appropriate only if the challenged statute suffers from *substantial* overbreadth--judged not just in absolute terms, but in relation to the statute's "plainly legitimate sweep." *Williams, 553 U.S., at 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650*. As I explain in the following Part, *§ 48* has a substantial core of constitutionally permissible applications.

IV

A

1

As the Court of Appeals recognized, "the primary conduct that Congress sought to address through its passage [of *§ 48*] was the creation, sale, or possession of 'crush videos.' *533 F.3d 218, 222 (CA3 2008)* (en banc). A sample crush video, which has been lodged with the Clerk, records the following event:

> "[A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone." Brief for Humane Society of United States as *Amicus Curiae* 2 (hereinafter Humane Society Brief).

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting

animal cruelty. See *533 F.3d, at 223*, and n. 4 (citing statutes); H. R. Rep., at 3. But before the enactment of *§ 48*, the underlying conduct depicted in crush videos was nearly impossible to prosecute. These videos, which "often appeal to persons with a very specific sexual fetish," *id.*, at 2, were made in secret, generally without a live audience, and "the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction," *id.*, at 3. Thus, law enforcement authorities often were not able to identify the parties responsible for the torture. See Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 106th Cong., 1st Sess., 1 (1999) (hereinafter Hearing on Depictions of Animal Cruelty). In the rare instances in which it was possible to identify and find the perpetrators, they "often were able to successfully assert as a defense that the State could not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in the State statute of limitations." H. R. Rep., at 3*;* see also 145 Cong. Rec. 25896 (Rep. Gallegly) ("[I]t is the prosecutors from around this country, Federal prosecutors as well as State prosecutors, that have made an appeal to us for this"); Hearing on Depictions of Animal Cruelty 21 ("If the production of the video is not discovered during the actual filming, then prosecution for the offense is virtually impossible without a cooperative eyewitness to the filming or an undercover police operation"); *id.*, at 34-35 (discussing example of case in which state prosecutor "had the defendant telling us he produced these videos," but where prosecution was not possible because the State could not prove where or when the tape was made).

In light of the practical problems thwarting the prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress' strategy appears to have been vindicated. We are told that "[b]y 2007, sponsors of *§ 48* declared the crush video industry dead. Even overseas websites shut down in the wake of *§ 48*. Now, after the Third Circuit's decision [facially invalidating the statute], crush videos are already back online." Humane Society Brief 5 (citations omitted).

2

The *First Amendment* protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the *First Amendment* commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is *Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that *Ferber*'s reasoning dictates a similar conclusion here.

In *Ferber,* an important factor--I would say the most important factor--was that child pornography involves the commission of a crime that inflicts severe personal injury to the "children who are made to engage in sexual conduct for commercial purposes." *Id., at 753, 102 S. Ct. 3348, 73 L. Ed. 2d 1113* (internal quotation marks omitted). The *Ferber* Court repeatedly described the production of child pornography as child "abuse," "molestation," or "exploitation." See, *e.g.*, *id., at 749, 102 S. Ct. 3348, 73 L. Ed. 2d 1113* ("In recent years, the exploitive use of children in the production of pornography has become a serious national problem"); *id., at 758, n. 9, 102 S. Ct. 3348, 73 L. Ed. 2d 1113* ("Sexual molestation by adults is often involved in the production of child sexual performances"). As later noted in *Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)*, in *Ferber* "[t]he production of the work, not its content, was the target of the statute." See also *535 U.S., at **[*494]** 250, 122 S. Ct. 1389, 152 L. Ed. 2d 403* (*Ferber* involved "speech that itself is the record of sexual abuse").

Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. As the Court put it, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *458 U.S., at 759, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. The Court added:

"[T]here is no serious contention that the legislature

> was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. . . . The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id., at 759-760, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*.

See also *id., at 761, 102 S. Ct. 3348, 73 L. Ed. 2d 1113* ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials").

Third, the *Ferber* Court noted that the value of child pornography "is exceedingly modest, if not *de minimis,"* and that any such value was "overwhelmingly outweigh[ed]" by "the evil to be restricted." *Id., at 762-763, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*.

All three of these characteristics are shared by *§ 48*, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. (For example, in some cases, crush videos were commissioned by purchasers who specified the details of the acts that they wanted to see performed. See H. R. Rep., at 3; Hearing on Depictions of Animal Cruelty 27.) To the extent that *§ 48* reaches such persons, it surely does not violate the *First Amendment*.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by *§ 48* --the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. *Section 48* reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And, unlike the child pornography statute in *Ferber* or its federal counterpart, *18 U.S.C. § 2252*, *§ 48(b)* provides an exception for depictions having any "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

It must be acknowledged that *§ 48* differs from a child pornography law in an important respect: Preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. It was largely for this reason that the Court of Appeals concluded that *Ferber* did not support the constitutionality of *§ 48*. *533 F.3d, at 228* ("Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm"). But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos.

The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country. In *Ferber*, the Court noted that "virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography,' " and the Court declined to "second-guess [that] legislative judgment."[6] *458 U.S., at 758, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. Here, likewise, the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals.

Section 48's ban on trafficking in crush videos also helps to enforce the criminal laws and to ensure that criminals do not profit from their crimes. See 145 Cong. Rec. 25897 (1999) (Rep. Gallegly) ("The state has an interest in enforcing its existing laws. Right now, the laws are not only being violated, but people are making huge profits from promoting the violations"); *id.,* at 10685 (1999) (same) (explaining that he introduced the House version of the bill because "criminals should not profit from [their] illegal acts"). We have already judged that taking the profit out of crime is a compelling interest. See *Simon &*

[6] In other cases, we have regarded evidence of a national consensus as proof that a particular government interest is compelling. . . .

Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 119, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress' effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are no t protected by the *First Amendment*.

B

Application of the *Ferber* framework also supports the constitutionality of *§ 48* as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia, Brief for United States 26-27, and n. 8 (citing statutes), and under federal law constitute a felony punishable by imprisonment for up to five years, *7 U.S.C. § 2156 et seq. (2006 ed. and Supp. II)*; *18 U.S.C. § 49 (2006 ed., Supp. II)*.

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be effectively controlled without targeting the videos. Like crush videos and child pornography, dogfight videos are very often produced as part of a "low-profile, clandestine industry," and "the need to market the resulting products requires a visible apparatus of distribution." *Ferber, 458 U.S., at 760, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. In such circumstances, Congress had reasonable grounds for concluding that it would be "difficult, if not impossible, to halt" the underlying exploitation of dogs by pursuing only those who stage the fights. *Id., at 759-760, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*; see *533 F.3d, at 246* (Cowen, J., dissenting) (citing evidence establishing "the existence of a lucrative market for depictions of animal cruelty," including videos of dogfights, "which in turn provides a powerful incentive to individuals to create [such] videos").

The commercial trade in videos of dogfights is "an integral part of the production of such materials," *Ferber, supra, at 761, 102 S. Ct. 3348, 73 L. Ed. 2d 1113*. As the Humane Society explains, "[v]ideotapes memorializing dogfights are integral to the success of this criminal industry" for a variety of reasons. Humane Society Brief 5. For one thing, some dogfighting videos are made "solely for the purpose of selling the video (and not for a live audience)." *Id., at 9, 108 S. Ct. 2225, 101 L. Ed. 2d 1*In addition, those who stage dogfights profit not just from the sale of the videos themselves, but from the gambling revenue they take in from the fights; the videos "encourage [such] gambling activity because they allow those reluctant to attend actual fights for fear of prosecution to still bet on the outcome." *Ibid.;* accord, Brief for Center on the Administration of Criminal Law as *Amicus Curiae* 12 ("Selling videos of dogfights effectively abets the underlying crimes by providing a market for dogfighting while allowing actual dogfights to remain underground"); *ibid.* ("These videos are part of a 'lucrative market' where videos are produced by a 'bare-boned, clandestine staff' in order to permit the actual location of dogfights and the perpetrators of these underlying criminal activities to go undetected" (citation omitted)). Moreover, "[v]ideo documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess--proof demanded by potential buyers and critical to the underground market." Humane Society Brief 9. Such recordings may also serve as " 'training' videos for other fight organizers." *Ibid.* In short, because videos depicting live dogfights are essential to the success of the criminal dogfighting subculture, the commercial sale of such videos helps to fuel the market for, and thus to perpetuate the perpetration of, the criminal conduct depicted in them.

Third, depictions of dogfights that fall within *§ 48*'s reach have by definition no appreciable social value. As noted, *§ 48(b)* exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess. As the Humane Society explains: "The abused dogs used in fights endure physical torture and emotional manipulation throughout their lives to predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with sticks, and electrocution. Dogs are conditioned never to give up a fight, even if th ey will be gravely hurt or killed. As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones. Losing dogs are routinely refused treatment, beaten further as 'punishment' for the loss, and executed by drowning, hanging, or incineration." *Id., at 5-6, 108 S. Ct. 2225, 101 L. Ed. 2d 1* (footnotes

omitted).

For these dogs, unlike the animals killed in crush videos, the suffering lasts for years rather than minutes. As with crush videos, moreover, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities. . . .

In sum, *§ 48* may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, for the reasons set forth above, the record does not show that *§ 48*, properly interpreted, bans a substantial amount of protected speech in absolute terms. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are "substantial" in relation to its "plainly legitimate sweep." *Williams, 553 U.S., at 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650*. Accordingly, I would reject respondent's claim that *§ 48* is facially unconstitutional under the overbreadth doctrine.

For these reasons, I respectfully dissent.

Brown v. Entm't Merchs. Ass'n

Supreme Court of the United States
November 2, 2010, Argued ; June 27, 2011, Decided
No. 08-1448

Reporter
564 U.S. 786 *; 131 S. Ct. 2729 **; 180 L. Ed. 2d 708 ***; 2011 U.S. LEXIS 4802 ****; 79 U.S.L.W. 4658; 22 Fla. L. Weekly Fed. S. 1259

Opinion

Justice **Scalia** delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the *First Amendment*.

I

California Assembly Bill 1179 (2005), *Cal. Civ. Code Ann. §§ 1746-1746.5 (West 2009)* (Act), prohibits the sale or rental of "violent video games" to minors, and requires their packaging to be labeled "18." The Act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *§ 1746(d)(1)(A)*. Violation of the Act is punishable by a civil fine of up to $1,000. *§ 1746.3*.

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the *First Amendment* and permanently enjoined its enforcement. *Video Software Dealers Assn. v. Schwarzenegger, No. C-05-04188, RMW, 2007 U.S. Dist. LEXIS 57472 (2007)*, App. to Pet. for Cert. 39a. The Court of Appeals affirmed, *Video Software Dealers Assn. v. Schwarzenegger, 556 F.3d 950 (CA9 2009)*, and we granted certiorari, *559 U.S. 1092, 130 S. Ct. 2398, 176 L. Ed. 2d 784 (2010)*.

II

California correctly acknowledges that video games qualify for *First Amendment* protection. The *Free Speech Clause* exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters v. New York, 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840 (1948)*. Like the protected books, plays, and movies that preceded them, video games communicate ideas--and even social messages--through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer *First Amendment* protection. Under our Constitution, "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)*. And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the *First Amendment's* command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S. Ct. 777, 96 L. Ed. 1098 (1952)*.

The most basic of those principles is this: "[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)* (internal quotation marks omitted). There are of course exceptions. " 'From 1791 to the present,' . . . the *First Amendment* has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *United States v. Stevens, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 444 (2010)* (quoting *R. A. V. v. St. Paul, 505 U.S. 377, 382-383, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992))*. These limited areas--such as obscenity, *Roth v. United States, 354 U.S. 476, 483, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)*, incitement, *Brandenburg v. Ohio, 395 U.S. 444, 447-449, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)* *(per curiam)*, and fighting words, *Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)*--represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id., at 571-572, 62 S. Ct. 766, 86 L. Ed. 1031*.

Last Term, in *Stevens*, we held that new categories of

unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. See 18 U.S.C. § 48 (amended 2010). The statute covered depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where "the creation, sale, or possession t[ook] place," § 48(c)(1). A saving clause largely borrowed from our obscenity jurisprudence, see Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value," § 48(b). We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the *depiction of* animal cruelty--though States have long had laws against *committing* it.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. Stevens, 559 U.S., at 470, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 445. We emphatically rejected that "startling and dangerous" proposition. *Ibid.* "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." Id., at 472, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 446. But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs." Id., at 470, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 445.

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct," Miller, supra, at 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419. . . .

Stevens was not the first time we have encountered and rejected a State's attempt to shoehorn speech about violence into obscenity. In *Winters*, we considered a New York criminal statute "forbid[ding] the massing of stories of bloodshed and lust in such a way as to incite to crime against the person," 333 U.S., at 514, 68 S. Ct. 665, 92 L. Ed. 840. . . . Our opinion in *Winters*, which concluded that the New York statute failed a heightened vagueness standard applicable to restrictions upon speech entitled to First Amendment protection, 333 U.S., at 517-519, 68 S. Ct. 665, 92 L. Ed. 840, made clear that violence is not part of the obscenity that the Constitution permits to be regulated. The speech reached by the statute contained "no indecency or obscenity in any sense heretofore known to the law." Id., at 519, 68 S. Ct. 665, 92 L. Ed. 840.

Because speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity for minors that we upheld in Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968). That case approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child. We held that the legislature could "adjus[t] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . .' of . . . minors." Id., at 638, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (quoting Mishkin v. New York, 383 U.S. 502, 509, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966)). And because "obscenity is not protected expression," the New York statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children "was not irrational." 390 U.S., at 641, 88 S. Ct. 1274, 20 L. Ed. 2d 195.

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works *to adults*--and it is wise not to, since that is but a hair's breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." Erznoznik v. Jacksonville, 422 U.S. 205, 212-213, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, Ginsberg, supra, at 640-641, 88 S. Ct. 1274, 20 L.

Ed. 2d 195; Prince v. Massachusetts, 321 U.S. 158, 165, 64 S. Ct. 438, 88 L. Ed. 645 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik, supra, at 213-214, 95 S. Ct. 2268, 45 L. Ed. 2d 125.

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the *books* we give children to read--or read to them when they are younger--contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." The Complete Brothers Grimm Fairy Tales 198 (2006 ed.). Cinderella's evil stepsisters have their eyes pecked out by doves. *Id.*, at 95. And Hansel and Gretel (children!) kill their captor by baking her in an oven. *Id.*, at 54.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. 22 The Odyssey of Homer, Book IX, p. 125 (S. Butcher & A. Lang transls. 1909) ("Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame"). In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. Canto XXI, pp. 187-189 (A. Mandelbaum transl. Bantam Classic ed. 1982). And Golding's Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island. W. Golding, Lord of the Flies 208-209 (1997 ed.).

This is not to say that minors' consumption of violent entertainment has never encountered resistance. In the 1800's, dime novels depicting crime and "penny dreadfuls" (named for their price and content) were blamed in some quarters for juvenile delinquency. See Brief for Cato Institute as *Amicus Curiae* 6-7. When motion pictures came along, they became the villains instead. "The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close. . . . They say that the moving picture machine . . . tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison." Moving Pictures as Helps to Crime, N.Y. Times, Feb. 21, 1909, quoted in Brief for Cato Institute, 8. For a time, our Court did permit broad censorship of movies because of their capacity to be "used for evil," see Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 242, 35 S. Ct. 387, 59 L. Ed. 552 (1915), but we eventually reversed course, Joseph Burstyn, Inc., 343 U.S., at 502, 72 S. Ct. 777, 96 L. Ed. 1098; see also Erznoznik, supra, at 212-214, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (invalidating a drive-in movies restriction designed to protect children). Radio dramas were next, and then came comic books. Brief for Cato Institute, 10-11. Many in the late 1940's and early 1950's blamed comic books for fostering a "preoccupation with violence and horror" among the young, leading to a rising juvenile crime rate. See Note, Regulation of Comic Books, 68 Harv. L. Rev. 489, 490 (1955). But efforts to convince Congress to restrict comic books failed. Brief for Comic Book Legal Defense Fund as *Amicus Curiae* 11-15. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. Cf. Interactive Digital Software Assn. v. St. Louis County, 329 F.3d 954, 957-958 (CA8 2003). As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." American Amusement Machine Assn. v. Kendrick, 244 F.3d 572, 577 (CA7 2001) (striking down a similar restriction on violent video games).

Justice Alito has done considerable independent research to identify, see post, at 818-819, nn. 13-18, 180 L. Ed. 2d, at 732-733, video games in which "the violence is astounding," post, at 818, 180 L. Ed. 2d, at 732. "Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools." *Ibid.* Justice Alito recounts

all these disgusting video games in order to disgust us--but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito's description, *post, at 819, 180 L. Ed. 2d, at 732-733*, of those video games he has discovered that have a racial or ethnic motive for their violence--" 'ethnic cleansing' [of] . . . African-Americans, Latinos, or Jews." To what end does he relate this? Does it somehow increase the "aggressiveness" that California wishes to suppress? Who knows? But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, Justice Alito's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech--whether it be violence, or gore, or racism--and not its objective effects, may be the real reason for governmental proscription.

III

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny--that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *R. A. V., 505 U.S., at 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305*. The State must specifically identify an "actual problem" in need of solving, *Playboy, 529 U.S., at 822-823, 120 S. Ct. 1878, 146 L. Ed. 2d 86*, and the curtailment of free speech must be actually necessary to the solution, see *R. A. V., supra, at 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305*. That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy, supra, at 818, 120 S. Ct. 1878, 146 L. Ed. 2d 86*.

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)*, the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation. *Id., at 661-662, 114 S. Ct. 2445, 129 L. Ed. 2d 497*. California's burden is much higher, and because it bears the risk of uncertainty, see *Playboy, supra, at 816-817, 120 S. Ct. 1878, 146 L. Ed. 2d 86*, ambiguous proof will not suffice.

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *556 F.3d, at 964*. They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

Even taking for granted Dr. Anderson's conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. . . .

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. See *City of Ladue v. Gilleo, 512 U.S. 43, 51, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994)*; *Florida Star v. B. J. F., 491 U.S. 524, 540, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989)*. Here, California has singled out the purveyors of video games for disfavored treatment--at least when compared to booksellers, cartoonists, and movie producers--and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect--and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child's or putative parent's, aunt's, or uncle's say-so suffices. That is not how one addresses a serious social problem.

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]." *Erznoznik, 422 U.S., at 212-213, 95 S. Ct. 2268, 45 L. Ed. 2d 125*.

But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. . . .This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest.

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of *First Amendment* rights requires.

* * *

California's effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them--concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a "well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky, 315 U.S., at 571-572, 62 S. Ct. 766, 86 L. Ed. 1031* (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect *First Amendment* rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)*. As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the *First Amendment* rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

We affirm the judgment below.

It is so ordered.

Concur

Justice **Alito**, with whom The **Chief Justice** joins, concurring in the judgment.

The California statute that is before us in this case represents a pioneering effort to address what the state legislature and others regard as a potentially serious social problem: the effect of exceptionally violent video games on impressionable minors, who often spend countless hours immersed in the alternative worlds that these games create. Although the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained.

I disagree, however, with the approach taken in the

Court's opinion. In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.

In the view of the Court, all those concerned about the effects of violent video games--federal and state legislators, educators, social scientists, and parents--are unduly fearful, for violent video games really present no serious problem. See *ante, at 798-801, 803-804, 180 L. Ed. 2d, at 719-721, 722-723*. Spending hour upon hour controlling the actions of a character who guns down scores of innocent victims is not different in "kind" from reading a description of violence in a work of literature. See *ante, at 798, 180 L. Ed. 2d, at 719-720*.

The Court is sure of this; I am not. There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.

I

Respondents in this case, representing the videogame industry, ask us to strike down the California law on two grounds: the broad ground adopted by the Court and the narrower ground that the law's definition of "violent video game," see *Cal. Civ. Code Ann. § 1746(d)(1)(A)* (West 2009), is impermissibly vague. See Brief for Respondents 23-61. Because I agree with the latter argument, I see no need to reach the broader *First Amendment* issues addressed by the Court.

A

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. *Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)*. The lack of such notice in a law that regulates expression "raises special *First Amendment* concerns because of its obvious chilling effect on free speech." *Reno v. American Civil Liberties Union, 521 U.S. 844, 871-872, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)*. Vague laws force potential speakers to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964)* (quoting *Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)*). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward v. Rock Against Racism, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*, "government may regulate in the area" of *First Amendment* freedoms "only with narrow specificity," *NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)*; see also *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)*. These principles apply to laws that regulate expression for the purpose of protecting children. See *Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968)*.

Here, the California law does not define "violent video games" with the "narrow specificity" that the Constitution demands. In an effort to avoid *First Amendment* problems, the California Legislature modeled its violent video game statute on the New York law that this Court upheld in *Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968)* --a law that prohibited the sale of certain sexually related materials to minors, see *id., at 631-633, 88 S. Ct. 1274, 20 L. Ed. 2d 195*. But the California Legislature departed from the *Ginsberg* model in an important respect, and the legislature overlooked important differences between the materials falling within the scope of the two statutes.

B

The law at issue in *Ginsberg* prohibited the sale to minors of materials that were deemed "harmful to minors," and the law defined "harmful to minors" simply by adding the words "for minors" to each element of the definition of obscenity set out in what were then the Court's leading obscenity decisions, see *Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)*, and *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966)*.

Seeking to bring its violent video game law within the protection of *Ginsberg*, the California Legislature began with the obscenity test adopted in *Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)*, a

decision that revised the obscenity tests previously set out in *Roth* and *Memoirs*. The legislature then made certain modifications to accommodate the aim of the violent video game law.

Under *Miller*, an obscenity statute must contain a threshold limitation that restricts the statute's scope to specifically described "hard core" materials. See *413 U.S., at 23-25, 27, 93 S. Ct. 2607, 37 L. Ed. 2d 419*. Materials that fall within this "hard core" category may be deemed to be obscene if three additional requirements are met:

> (1) An "average person, applying contemporary community standards [must] find . . . the work, taken as a whole, appeals to the prurient interest";
> (2) "the work [must] depic[t] or describ[e], in a patently offensive way, sexual conduct specifically defined by the applicable state law; and?
> (3) "the work, taken as a whole, [must] lac[k] serious literary, artistic, political, or scientific value." *Id., at 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419* (internal quotation marks omitted).

Adapting these standards, the California law imposes the following threshold limitation: "[T]he range of options available to a player [must] includ[e] killing, maiming, dismembering, or sexually assaulting an image of a human being." *§ 1746(d)(1)*. Any video game that meets this threshold test is subject to the law's restrictions if it also satisfies three further requirements:

> "(i) A reasonable person, considering the game as a whole, would find [the game] appeals to a deviant or morbid interest of minors.
> "(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
> "(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *§ 1746(d)(1)(A)*.

C

The first important difference between the *Ginsberg* law and the California violent video game statute concerns their respective threshold requirements. As noted, the *Ginsberg* law built upon the test for adult obscenity, and the current adult obscenity test, which was set out in *Miller,* requires an obscenity statute to contain a threshold limitation that restricts the statute's coverage to specifically defined "hard core" depictions. See *413 U.S., at 23-25, 27, 93 S. Ct. 2607, 37 L. Ed. 2d 419*. The *Miller* Court gave as an example a statute that applies to only "[p]atently offensive representations or descriptions of ultimate sexual acts," "masturbation, excretory functions, and lewd exhibition of the genitals." *Id., at 25, 93 S. Ct. 2607, 37 L. Ed. 2d 419*. The *Miller* Court clearly viewed this threshold limitation as serving a vital notice function. "We are satisfied," the Court wrote, "that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Id., at 27, 93 S. Ct. 2607, 37 L. Ed. 2d 419*; see also *Reno, 521 U.S.,, at 873, 117 S. Ct. 2329, 138 L. Ed. 2d 874* (observing that *Miller*'s threshold limitation "reduces the vagueness inherent in the open-ended term 'patently offensive' ").

By contrast, the threshold requirement of the California law does not perform the narrowing function served by the limitation in *Miller*. At least when *Miller* was decided, depictions of "hard core" sexual conduct were not a common feature of mainstream entertainment. But nothing similar can be said about much of the conduct covered by the California law. It provides that a video game cannot qualify as "violent" unless "the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being." *§ 1746(d)(1)*.

For better or worse, our society has long regarded many depictions of killing and maiming as suitable features of popular entertainment, including entertainment that is widely available to minors. The California law's threshold requirement would more closely resemble the limitation in *Miller* if it targeted a narrower class of graphic depictions.

Because of this feature of the California law's threshold test, the work of providing fair notice is left in large part to the three requirements that follow, but those elements are also not up to the task. In drafting the violent video game law, the California Legislature could have made its own judgment regarding the kind and degree of violence that is acceptable in games played by minors (or by minors in particular age groups). Instead, the legislature relied on undefined societal or community standards.

One of the three elements at issue here refers expressly to "prevailing standards in the community as to what is suitable for minors." *§ 1746(d)(1)(A)(ii)*. Another element points in the same direction, asking whether "[a] reasonable person, considering [a] game as a whole," would find that it "appeals to a *deviant* or *morbid* interest of minors." *§ 1746(d)(1)(A)(i)* (emphasis added).

The terms "deviant" and "morbid" are not defined in the statute, and California offers no reason to think that its courts would give the terms anything other than their

ordinary meaning. See Reply Brief for Petitioners 5 (arguing that "[a] reasonable person can make this judgment through . . . a common understanding and definition of the applicable terms"). I therefore assume that "deviant" and "morbid" carry the meaning that they convey in ordinary speech. The adjective "deviant" ordinarily means "deviating . . . from some accepted norm," and the term "morbid" means "of, relating to, or characteristic of disease." Webster's 618, 1469. A "deviant or morbid interest" in violence, therefore, appears to be an interest that deviates from what is regarded--presumably in accordance with some generally accepted standard--as normal and healthy. Thus,the application of the California law is heavily dependent on the identification of generally accepted standards regarding the suitability of violent entertainment for minors.

The California Legislature seems to have assumed that these standards are sufficiently well known so that a person of ordinary intelligence would have fair notice as to whether the kind and degree of violence in a particular game is enough to qualify the game as "violent." And because the *Miller* test looks to community standards, the legislature may have thought that the use of undefined community standards in the violent video game law would not present vagueness problems.

There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court's landmark obscenity cases in the 1960's, obscenity had long been prohibited, see *Roth, 354 U.S., at 484-485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498*, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.

There is no similar history regarding expression related to violence. As the Court notes, classic literature contains descriptions of great violence, and even children's stories sometimes depict very violent scenes. See *ante, at 795-797, 180 L. Ed. 2d, at 718*.

Although our society does not generally regard all depictions of violence as suitable for children or adolescents, the prevalence of violent depictions in children's literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite "deviant" or "morbid" impulses. See Edwards & Berman, Regulating Violence on Television, *89 Nw. U. L. Rev. 1487, 1523 (1995)* (observing that the *Miller* test would be difficult to apply to violent expression because "there is nothing even approaching a consensus on low-value violence").

Finally, the difficulty of ascertaining the community standards incorporated into the California law is compounded by the legislature's decision to lump all minors together. The California law draws no distinction between young children and adolescents who are nearing the age of majority.

In response to a question at oral argument, the attorney defending the constitutionality of the California law said that the State would accept a narrowing construction of the law under which the law's references to "minors" would be interpreted to refer to the oldest minors--that is, those just short of 18. Tr. of Oral Arg. 11-12. However, "it is not within our power to construe and narrow state laws." *Grayned, 408 U.S., at 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222*. We can only " 'extrapolate [their] allowable meaning' " from the statutory text and authoritative interpretations of similar laws by courts of the State. *Ibid*. (quoting *Garner v. Louisiana, 368 U.S. 157, 174, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961)* (Frankfurter, J., concurring in judgment)).

In this case, California has not provided any evidence that the California Legislature intended the law to be limited in this way, or cited any decisions from its courts that would support an "oldest minors" construction.

For these reasons, I conclude that the California violent video game law fails to provide the fair notice that the Constitution requires. And I would go no further. I would not express any view on whether a properly drawn statute would or would not survive *First Amendment* scrutiny. We should address that question only if and when it is necessary to do so.

II

Having outlined how I would decide this case, I will now briefly elaborate on my reasons for questioning the wisdom of the Court's approach. Some of these reasons are touched upon by the dissents, and while I am not prepared at this time to go as far as either Justice Thomas or Justice Breyer, they raise valid concerns.

A

The Court is wrong in saying that the holding in *United States v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)*, "controls this case." *Ante, at 792, 180 L. Ed. 2d, at 716*. First, the statute in *Stevens* differed sharply from the statute at issue here. *Stevens* struck down a law that broadly prohibited *any person* from

creating, selling, or possessing depictions of animal cruelty for commercial gain. The California law involved here, by contrast, is limited to the sale or rental of violent video games *to minors*. The California law imposes no restriction on the creation of violent video games, or on the possession of such games by anyone, whether above or below the age of 18. The California law does not regulate the sale or rental of violent games by adults. And the California law does not prevent parents and certain other close relatives from buying or renting violent games for their children or other young relatives if they see fit.

Second, *Stevens* does not support the proposition that a law like the one at issue must satisfy strict scrutiny. The portion of *Stevens* on which the Court relies rejected the Government's contention that depictions of animal cruelty were categorically outside the range of *any* First Amendment protection. 559 U.S., at 471-472, 130 S. Ct. 1577, 176 L. Ed. 2d 435. Going well beyond *Stevens*, the Court now holds that any law that attempts to prevent minors from purchasing violent video games must satisfy strict scrutiny instead of the more lenient standard applied in Ginsberg, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195, our most closely related precedent. As a result of today's decision, a State may prohibit the sale to minors of what *Ginsberg* described as "girlie magazines," but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.

Third, *Stevens* expressly left open the possibility that a more narrowly drawn statute targeting depictions of animal cruelty might be compatible with the First Amendment. See 559 U.S., at 482, 130 S. Ct. 1577, 176 L. Ed. 2d 435. In this case, the Court's sweeping opinion will likely be read by many, both inside and outside the video-game industry, as suggesting that no regulation of minors' access to violent video games is allowed--at least without supporting evidence that may not be realistically obtainable given the nature of the phenomenon in question.

B

The Court's opinion distorts the effect of the California law. I certainly agree with the Court that the government has no "free-floating power to restrict the ideas to which children may be exposed," ante, at 794-795, 180 L. Ed. 2d, at 717, but the California law does not exercise such a power. If parents want their child to have a violent video game, the California law does not interfere with that parental prerogative. Instead, the California law reinforces parental decisionmaking in exactly the same way as the New York statute upheld in *Ginsberg*. Under both laws, minors are prevented from purchasing certain materials; and under both laws, parents are free to supply their children with these items if that is their wish.

Citing the video-game industry's voluntary rating system, the Court argues that the California law does not "meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so." Ante, at 803, 180 L. Ed. 2d, at 722. The Court does not mention the fact that the industry adopted this system in response to the threat of federal regulation, Brief for Activision Blizzard, Inc., as *Amicus Curiae* 7-10, a threat that the Court's opinion may now be seen as largely eliminating. Nor does the Court acknowledge that compliance with this system at the time of the enactment of the California law left much to be desired--or that future enforcement may decline if the video-game industry perceives that any threat of government regulation has vanished. Nor does the Court note, as Justice Breyer points out, see post, at 849-850, 180 L. Ed. 2d, at 751 (dissenting opinion), that many parents today are simply not able to monitor their children's use of computers and gaming devices.

C

Finally, the Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. Any assessment of the experience of playing video games must take into account certain characteristics of the video games that are now on the market and those that are likely to be available in the near future.

Today's most advanced video games create realistic alternative worlds in which millions of players immerse themselves for hours on end. These games feature visual imagery and sounds that are strikingly realistic, and in the near future video-game graphics may be virtually indistinguishable from actual video footage. Many of the games already on the market can produce high definition images, and it is predicted that it will not be long before video-game images will be seen in three dimensions. It is also forecast that video games will soon provide sensory feedback. By wearing a special vest or other device, a player will be able to experience physical sensations supposedly felt by a character on the screen. Some *amici* who support respondents foresee the day when " 'virtual-reality shoot-'em-ups' " will allow children to " 'actually feel the splatting blood from the blown-off head' " of a victim.

Brief for Reporters Committee for Freedom of the Press et al. as *Amici Curiae* 29 (quoting H. Schechter, Savage Pastimes 18 (2005)).

Persons who play video games also have an unprecedented ability to participate in the events that take place in the virtual worlds that these games create. Players can create their own video-game characters and can use photos to produce characters that closely resemble actual people. A person playing a sophisticated game can make a multitude of choices and can thereby alter the course of the action in the game. In addition, the means by which players control the action in video games now bear a closer relationship to the means by which people control action in the real world. While the action in older games was often directed with buttons or a joystick, players dictate the action in newer games by engaging in the same motions that they desire a character in the game to perform. For example, a player who wants a video-game character to swing a baseball bat--either to hit a ball or smash a skull--could bring that about by simulating the motion of actually swinging a bat.

These present-day and emerging characteristics of video games must be considered together with characteristics of the violent games that have already been marketed.

In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machineguns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in "ethnic cleansing" and can choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.

If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.

The Court is untroubled by this possibility. According to the Court, the "interactive" nature of video games is "nothing new" because "all literature is interactive." *Ante, at 798, 180 L. Ed. 2d, at 719-720*. Disagreeing with this assessment, the International Game Developers Association (IGDA)--a group that presumably understands the nature of video games and that supports respondents--tells us that video games are "far more concretely interactive." Brief for IGDA et al. as *Amici Curiae* 3. And on this point, the game developers are surely correct.

It is certainly true, as the Court notes, that " '[l]iterature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.' " *Ante, at 798, 180 L. Ed. 2d, at 719* (quoting *American Amusement Machine Assn. v. Kendrick, 244 F.3d 572, 577 (CA7 2001)*). But only an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game. To take an example, think of a person who reads the passage in Crime and Punishment in which Raskolnikov kills the old pawnbroker with an ax. See F. Dostoyevsky, Crime and Punishment 78 (Modern Library ed. 1950). Compare that reader with a video-game player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an ax, to raise it above the head of the victim, and then to bring it down; who hears the thud of the ax hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands. For most people, the two experiences will not be the same.

When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different.

The Court acts prematurely in dismissing this possibility out of hand.

* * *

For all these reasons, I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.

Dissent

Justice **Thomas**, dissenting.

The Court's decision today does not comport with the original public understanding of the *First Amendment*. The majority strikes down, as facially unconstitutional, a state law that prohibits the direct sale or rental of certain video games to minors because the law "abridg[es] the freedom of speech." *U.S. Const., Amdt. 1*. But I do not think the *First Amendment* stretches that far. The practices and beliefs of the founding generation establish that "the freedom of speech," as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians. I would hold that the law at issue is not facially unconstitutional under the *First Amendment*, and reverse and remand for further proceedings.

I

When interpreting a constitutional provision, "the goal is to discern the most likely public understanding of [that] provision at the time it was adopted." *McDonald v. Chicago, 561 U.S. 742, 828, 130 S. Ct. 3020, 177 L. Ed. 2d 894, 952 (2010)* (Thomas, J., concurring in part and concurring in judgment). Because the Constitution is a written instrument, "its meaning does not alter." *McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 359, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995)* (Thomas, J., concurring in judgment) (internal quotation marks omitted). "That which it meant when adopted, it means now." *Ibid.* (internal quotation marks omitted).

As originally understood, the *First Amendment's* protection against laws "abridging the freedom of speech" did not extend to *all* speech. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)*; see also *United States v. Stevens, 559 U.S. 460, 468-469, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)*. Laws regulating such speech do not "abridg[e] the freedom of speech" because such speech is understood to fall outside "the freedom of speech." See *Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-246, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)*.

In my view, the "practices and beliefs held by the Founders" reveal another category of excluded speech: speech to minor children bypassing their parents. *McIntyre, supra, at 360, 115 S. Ct. 1511, 131 L. Ed. 2d 426*. The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents. Cf. Brief for Common Sense Media as *Amicus Curiae* 12-15. The founding generation would not have considered it an abridgment of "the freedom of speech" to support parental authority by restricting speech that bypasses minors' parents.

A

Attitudes toward children were in a state of transition around the time that the States ratified the *Bill of Rights*. A complete understanding of the founding generation's views on children and the parent-child relationship must therefore begin roughly a century earlier, in colonial New England.

In the Puritan tradition common in the New England Colonies, fathers ruled families with absolute authority. "The patriarchal family was the basic building block of Puritan society." S. Mintz, Huck's Raft 13 (2004) (hereinafter Mintz); see also R. MacDonald, Literature for Children in England and America From 1646 to 1774, p. 7 (1982) (hereinafter MacDonald). The Puritans rejected many customs, such as godparenthood, that they considered inconsistent with the patriarchal structure. Mintz 13.

Part of the father's absolute power was the right and duty "to fill his children's minds with knowledge and . . . make

them apply their knowledge in right action." E. Morgan, The Puritan Family 97 (rev. ed. 1966) (herein-after Morgan). Puritans thought children were "innately sinful and that parents' primary task was to suppress their children's natural depravity." S. Mintz & S. Kellogg, Domestic Revolutions 2 (1988) (hereinafter Mintz & Kellogg); see also B. Wadsworth, The Well-Ordered Family 55 (1712) ("Children should not be left to themselves . . . to do as they please; . . . not being fit to govern themselves"); C. Mather, A Family Well-Ordered 38 (1699). Accordingly, parents were not to let their children read "vain Books, profane Ballads, and filthy Songs" or "fond and amorous Romances, . . . fabulous Histories of Giants, the bombast Achievements of Knight Errantry, and the like." The History of Genesis, pp. vi-vii (3d ed. corrected 1708).

This conception of parental authority was reflected in laws at that time. In the Massachusetts Colony, for example, it was unlawful for tavern keepers (or anyone else) to entertain children without their parents' consent. 2 Records and Files of the Quarterly Courts of Essex County, Massachusetts, p. 180 (1912); 4 *id.,* at 237, 275 (1914); 5 *id.,* at 143 (1916); see also Morgan 146. And a "stubborn or REBELLIOUS SON" of 16 years or more committed a capital offense if he disobeyed "the voice of his Father, or the voice of his Mother." The Laws and Liberties of Massachusetts 6 (1648) (reprint M. Farrand ed. 1929); see also J. Kamensky, Governing the Tongue 102, n. 14 (1997) (citing similar laws in the Connecticut, New Haven, Plymouth, and New Hampshire Colonies in the late 1600's).

B

In the decades leading up to and following the Revolution, attitudes toward children changed. See, *e.g.,* J. Reinier, From Virtue to Character: American Childhood, 1775-1850, p. 1 (1996) (hereinafter Reinier). Children came to be seen less as innately sinful and more as blank slates requiring careful and deliberate development. But the same overarching principles remained. Parents continued to have both the right and duty to ensure the proper development of their children. They exercised significant authority over their children, including control over the books that children read. And laws at the time continued to reflect strong support for parental authority and the sense that children were not fit to govern themselves.

1

The works of John Locke and Jean-Jacques Rousseau were a driving force behind the changed understanding of children and childhood. See *id.*, at 2-5; H. Brewer, By Birth or Consent 97 (2005) (hereinafter Brewer); K. Calvert, Children in the House 59-60 (1992) (hereinafter Calvert). Locke taught that children's minds were blank slates and that parents therefore had to be careful and deliberate about what their children were told and observed. Parents had only themselves to blame if, "by humouring and cockering" their children, they "poison'd the fountain" and later "taste[d] the bitter waters." Some Thoughts Concerning Education (1692), in 37 English Philosophers of the Seventeenth and Eighteenth Centuries 27-28 (C. Eliot ed. 1910). All vices, he explained, were sowed by parents and "those about children." *Id.,* at 29. Significantly, Locke did not suggest circumscribing parental authority but rather articulated a new basis for it. Rousseau disagreed with Locke in important respects, but his philosophy was similarly premised on parental control over a child's development. Although Rousseau advocated that children should be allowed to develop naturally, he instructed that the environment be directed by "a tutor who is given total control over the child and who removes him from society, from all competing sources of authority and influence." J. Fliegelman, Prodigals and Pilgrims 30 (1982) (hereinafter Fliegelman); see also Reinier 15.

These writings received considerable attention in America. Locke's An Essay Concerning Human Understanding and his Some Thoughts Concerning Education were significantly more popular than his Two Treatises of Government, according to a study of 92 colonial libraries between 1700 and 1776. Lundberg & May, The Enlightened Reader in America, 28 American Quarterly 262, 273 (1976) (hereinafter Lundberg). And Rousseau's Emile, a treatise on education, was more widely advertised and distributed than his political work, The Social Contract. Fliegelman 29; see also Lundberg 285. In general, the most popular books in the Colonies on the eve of the American Revolution were not political discourses but ones concerned with child rearing. See Mintz & Kellogg 45.

2

Locke's and Rousseau's writings fostered a new conception of childhood. Children were increasingly viewed as malleable creatures, and childhood came to be seen as an important period of growth, development, and preparation for adulthood. See *id.*, at 17, 21, 47; M. Grossberg, Governing the Hearth 8 (1985) (hereinafter Grossberg). Noah Webster, called the father of American education, wrote that "[t]he impressions received in early life usually form the characters of

individuals." On the Education of Youth in America (1790) (hereinafter Webster), in Essays on Education in the Early Republic 43 (F. Rudolph ed. 1965) (hereinafter Rudolph); cf. Slater, Noah Webster: Founding Father of American Scholarship and Education, in Noah Webster's First Edition of an American Dictionary of the English Language (1967). Elizabeth Smith, sister-in-law to John Adams, similarly wrote: "The Infant Mind, I beleive[,] is a blank, that eassily receives any impression." M. Norton, Liberty's Daughters 101 (1996) (hereinafter Norton) (internal quotation marks omitted; alteration in original); see also S. Doggett, A Discourse on Education (1796) (hereinafter Doggett), in Rudolph 151 ("[I]n early youth, . . . every power and capacity is pliable and susceptible of any direction or impression"); J. Abbott, The Mother at Home 2 (1834) (hereinafter Abbott) ("What impressions can be more strong, and more lasting, than those received upon the mind in the freshness and the susceptibility of youth").

Children lacked reason and decisionmaking ability. They "have not Judgment or Will of their own," John Adams noted. Letter to James Sullivan (May 26, 1776), in 4 Papers of John Adams 210 (R. Taylor ed. 1979); see also Vol. 1 1787: Drafting the Constitution, p. 229 (W. Benton ed. 1986) (quoting Gouverneur Morris in James Madison's notes from the Constitutional Convention explaining that children do not vote because they "want prudence" and "have no will of their own"). Children's "utter incapacity" rendered them "almost wholly at the mercy of their Parents or Instructors for a set of habits to regulate their whole conduct through life." J. Burgh, Thoughts on Education 7 (1749) (hereinafter Burgh) (emphasis deleted).

This conception of childhood led to great concern about influences on children. "Youth are ever learning to do what they see others around them doing, and these imitations grow into habits." Doggett, in Rudolph 151; see also B. Rush, A Plan for the Establishment of Public Schools (1786) (hereinafter Rush), in Rudolph 16 ("The vices of young people are generally learned from each other"); Webster, in Rudolph 58 ("[C]hildren, artless and unsuspecting, resign their hearts to any person whose manners are agreeable and whose conduct is respectable"). Books therefore advised parents "not to put children in the way of those whom you dare not trust." L. Child, The Mother's Book 149 (1831) (hereinafter Child); see also S. Coontz, The Social Origins of Private Life 149-150 (1988) (noting that it was "considered dangerous to leave children to the supervision of servants or apprentices").

As a result, it was widely accepted that children needed close monitoring and carefully planned development. See B. Wishy, The Child and the Republic 24-25, 32 (1968) (hereinafter Wishy); Grossberg 8. Managing the young mind was considered "infinitely important." Doggett, in Rudolph 151; see also A. MacLeod, A Moral Tale 72-73 (1975) (hereinafter MacLeod). In an essay on the education of youth in America, Noah Webster described the human mind as "a rich field, which, without constant care, will ever be covered with a luxuriant growth of weeds." Rudolph 54. He advocated sheltering children from "every low-bred, drunken, immoral character" and keeping their minds "untainted till their reasoning faculties have acquired strength and the good principles which may be planted in their minds have taken deep root." *Id.,* at 63; see also Rush, in *id.,* at 16 ("[T]he most useful citizens have been formed from those youth who have never known or felt their own wills till they were one and twenty years of age"); Burgh 7 ("[T]he souls of Youth are more immediately committed to the care of their Parents and Instructors than even those of a People are to their Pastor").

The Revolution only amplified these concerns. The Republic would require virtuous citizens, which necessitated proper training from childhood. See Mintz 54, 71; MacLeod 40; Saxton, French and American Childhoods, in Children and Youth in a New Nation 69 (J. Marten ed. 2009) (hereinafter Marten); see also W. Cardell, Story of Jack Halyard, pp. xv-xvi (30th ed. 1834) (hereinafter Cardell) ("[T]he glory and efficacy of our institutions will soon rest with those who are growing up to succede us"). Children were "the pivot of the moral world," and their proper development was "a subject of as high interest, as any to which the human mind ha[d] ever been called." *Id.,* at xvi.

3

Based on these views of childhood, the founding generation understood parents to have a right and duty to govern their children's growth. Parents were expected to direct the development and education of their children and ensure that bad habits did not take root. See Calvert 58-59; MacLeod 72; Mintz & Kellogg 23. They were responsible for instilling "moral prohibitions, behavioral standards, and a capacity for self-government that would prepare a child for the outside world." Mintz & Kellogg 58; see also Youth's Companion, Apr. 16, 1827, p. 1 (hereinafter Youth's Companion) ("Let [children's] minds be formed, their hearts prepared, and their characters moulded for the scenes and the duties of a brighter day"). In short, "[h]ome and family bore the major responsibility

for the moral training of children and thus, by implication, for the moral health of the nation." MacLeod 29; see also Introduction, in Marten 6; Reinier, p. xi; Smith, Autonomy and Affection: Parents and Children in Eighteenth-Century Chesapeake Families, in Growing up in America 54 (N. Hiner & J. Hawes eds. 1985).

This conception of parental rights and duties was exemplified by Thomas Jefferson's approach to raising children. He wrote letters to his daughters constantly and often gave specific instructions about what the children should do. See, *e.g.,* Letter to Martha Jefferson (Nov. 28, 1783), in S. Randolph, The Domestic Life of Thomas Jefferson 44 (1939) (dictating her daily schedule of music, dancing, drawing, and studying); Letter to Martha Jefferson (Dec. 22, 1783), in *id.,* at 45-46 ("I do not wish you to be gaily clothed at this time of life . . . . [A]bove all things and at all times let your clothes be neat, whole, and properly put on"). Jefferson expected his daughter, Martha, to write "by every post" and instructed her, "Inform me what books you read [and] what tunes you learn." Letter (Nov. 28, 1783), in *id.,* at 44. He took the same approach with his nephew, Peter Carr, after Carr's father died. See Letter (Aug. 19, 1785), in 8 The Papers of Thomas Jefferson 405-408 (J. Boyd ed. 1953) (detailing a course of reading and exercise, and asking for monthly progress reports describing "in what manner you employ every hour in the day"); see also 3 Dictionary of Virginia Biography 29 (2006).

Jefferson's rigorous management of his charges was not uncommon. "[M]uch evidence indicates that mothers and fathers both believed in giving their children a strict upbringing, enforcing obedience to their commands and stressing continued subjection to the parental will." Norton 96. Two parenting books published in the 1830's gave prototypical advice. In The Mother's Book, Lydia Child advised that "[t]he first and most important step in management is, that whatever a mother says, always *must* be done." Child 26. John Abbott, the author of The Mother at Home, likewise advised that "[o]bedience is absolutely essential to proper family government." Abbott 18. Echoing Locke, Abbott warned that parents who indulged a child's "foolish and un reasonable wishes" would doom that child to be indulgent in adulthood. *Id.,* at 16.

The concept of total parental control over children's lives extended into the schools. "The government both of families and schools should be absolute," declared Noah Webster. Rudolph 57-58. Dr. Benjamin Rush concurred: "In the education of youth, let the authority of our masters be as *absolute* as possible." *Id.,* at 16. Through the doctrine of *in loco parentis*, teachers assumed the " 'sacred dut[y] of parents . . . to train up and qualify their children' " and exercised the same authority " 'to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.' *Morse v. Frederick, 551 U.S. 393, 413-414, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007)* (Thomas, J., concurring) (quoting *State v. Pendergrass, 19 N. C. 365, 365-366 (1837))*; see also Wishy 73. Thus, the quality of teachers and schools had to "be watched with the most scrupulous attention." Webster, in Rudolph 64.

For their part, children were expected to be dutiful and obedient. . . .

An entire genre of books, "loosely termed 'advice to youth,' " taught similar lessons well into the 1800's. . . .

4

Society's concern with children's development extended to the books they read. . . .

Adults carefully controlled what they published for children. Stories written for children were dedicated to moral instruction and were relatively austere, lacking details that might titillate children's minds. . . . John Newbery, the publisher often credited with creating the genre of children's literature, removed traditional folk characters, like Tom Thumb, from their original stories and placed them in new morality tales in which good children were rewarded and disobedient children punished. Reinier 12.

Parents had total authority over what their children read. See A. MacLeod, American Childhood 177 (1994) ("Ideally, if not always actually, nineteenth-century parents regulated their children's lives fully, certainly including their reading"). Lydia Child put it bluntly in The Mother's Book: "Children . . . should not read anything without a mother's knowledge and sanction; this is particularly necessary between the ages of twelve and sixteen." Child 92; see also *id.,* at 143 ("[P]arents, or some guardian friends, should carefully examine every volume they put into the hands of young people"); E. Monaghan, Learning To Read and Write in Colonial America 337 (2005) (reviewing a 12-year-old girl's journal from the early 1770's and noting that the child's aunts monitored and guided her reading).

5

The law at the time reflected the founding generation's understanding of parent-child relations. According to Sir

William Blackstone, parents were responsible for maintaining, protecting, and educating their children, and therefore had "power" over their children. 1 Commentaries on the Laws of England 434, 440-441 (1765); cf. *Washington v. Glucksberg, 521 U.S. 702, 712, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (Blackstone's Commentaries was "a primary legal authority for 18th- and 19th-century American lawyers"). Chancellor James Kent agreed. 2 Commentaries on American Law *189-*207. The law entitled parents to "the custody of their [children]," "the value of th[e] [children's] labor and services," and the "right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." *Id.,* at *193, *203. Children, in turn, were charged with "obedience and assistance during their own minority, and gratitude and reverance during the rest of their lives." *Id.,* at *207.

Thus, in case after case, courts made clear that parents had a right to the child's labor and services until the child reached majority. In 1810, the Supreme Judicial Court of Massachusetts explained, "There is no question but that a father, who is entitled to the services of his minor son, and for whom he is obliged to provide, may, at the common law, assign those services to others, for a consideration to enure to himself." *Day v. Everett, 7 Mass. 145, 147*; see also *Benson v. Remington, 2 Mass. 113, 115 (1806)* (opinion of Parsons, C. J.) ("The law is very well settled, that parents are under obligations to support their children, and that they are entitled to their earnings"). Similarly, the Supreme Court of Judicature of New Hampshire noted that the right of parents to recover for the services of their child, while a minor, "cannot be contested." *Gale v. Parrot, 1 N. H. 28, 29 (1817)*. And parents could bring tort suits against those who knowingly enticed a minor away from them. See, *e.g., Kirkpatrick* v. *Lockhart*, 4 S.C. L. 276, 2 Brev. 276 (S. C. Constitutional Ct. 1809); *Jones v. Tevis, 14 Ky. 25, 4 Litt. 25 (Ky. App. 1823)*.

Relatedly, boys could not enlist in the military without parental consent. Many of those who did so during the Revolutionary War found, afterwards, that their fathers were entitled to their military wages. See Cox, Boy Soldiers of the American Revolution, in Marten 21-24. And after the war, minors who enlisted without parental consent in violation of federal law could find themselves returned home on writs of habeas corpus issued at their parents' request. See, *e.g., United States v. Anderson, 24 F. Cas. 813, F. Cas. No. 14449, 3 Tenn. 143 (No. 14,449) (CC Tenn. 1812)*; *Commonwealth v. Callan, 6 Binn. 255 (Pa. 1814) (per curiam)*.

Laws also set age limits restricting marriage without parental consent. For example, from 1730 until at least 1849, Pennsylvania law required parental consent for the marriage of anyone under the age of 21. . . .

Indeed, the law imposed age limits on all manner of activities that required judgment and reason. Children could not vote, could not serve on juries, and generally could not be witnesses in criminal cases unless they were older than 14. See Brewer 43, 145, 148, 159. Nor could they swear loyalty to a State. See, *e.g.,* 9 Pa. Stats. at Large 111 (1903 ed.). Early federal laws granting aliens the ability to become citizens provided that those under 21 were deemed citizens if their fathers chose to naturalize. See, *e.g.,* Act of Mar. 26, 1790, *1 Stat. 104*; Act of Jan. 29, 1795, ch. 20, *1 Stat. 415*.

C

The history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children. The Puritan tradition in New England laid the foundation of American parental authority and duty. . . . In the decades leading up to and following the Revolution, the conception of the child's mind evolved but the duty and authority of parents remained. Indeed, society paid closer attention to potential influences on children than before. . . . Teachers and schools came under scrutiny, and children's reading material was carefully supervised. Laws reflected these concerns and often supported parental authority with the coercive power of the state.

II

A

In light of this history, the Framers could not possibly have understood "the freedom of speech" to include an unqualified right to speak to minors. Specifically, I am sure that the founding generation would not have understood "the freedom of speech" to include a right to speak to children without going through their parents. As a consequence, I do not believe that laws limiting such speech--for example, by requiring parental consent to speak to a minor--"abridg[e] the freedom of speech" within the original meaning of the *First Amendment*.

We have recently noted that this Court does not have "freewheeling authority to declare new categories of speech outside the scope of the *First Amendment*." *Stevens, 559 U.S., at 472, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 446*. But we also recognized that there may be

"some categories of speech that have been historically unprotected [and] have not yet been specifically identified or discussed as such in our case law." *Ibid.* In my opinion, the historical evidence here plainly reveals one such category.

B

Admittedly, the original public understanding of a constitutional provision does not always comport with modern sensibilities. . . .

This, however, is not such a case. Although much has changed in this country since the Revolution, the notion that parents have authority over their children and that the law can support that authority persists today. For example, at least some States make it a crime to lure or entice a minor away from the minor's parent. See, *e.g.,* Cal. Penal Code Ann. § 272(b)(1) (West 2008); Fla. Stat. § 787.03 (2010). Every State in the Union still establishes a minimum age for marriage without parental or judicial consent. Cf. Roper v. Simmons, 543 U.S. 551, 558, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) . (Appendix D to opinion of the Court) Individuals less than 18 years old cannot enlist in the military without parental consent. 10 U.S.C. § 505(a). And minors remain subject to curfew laws across the country, see Brief for State of Louisiana et al. as *Amici Curiae* 16, and cannot unilaterally consent to most medical procedures, *id.,* at 15.

Moreover, there are many things minors today cannot do at all, whether they have parental consent or not. State laws set minimum ages for voting and jury duty. See Roper, supra, at 581-585, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (Appendixes B and C to opinion of the Court). In California (the State at issue here), minors cannot drive for hire or drive a school bus, Cal. Veh. Code Ann. §§ 12515, 12516 (West 2010), purchase tobacco, Cal. Penal Code Ann. § 308(b) (West 2008), play bingo for money, § 326.5(e), or execute a will, Cal. Prob. Code Ann. § 6220 (West 2009).

My understanding of "the freedom of speech" is also consistent with this Court's precedents. To be sure, the Court has held that children are entitled to the protection of the First Amendment, see, *e.g.,* Erznoznik v. Jacksonville, 422 U.S. 205, 212-213, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975), and the government may not unilaterally dictate what children can say or hear, see id., at 213-214, 95 S. Ct. 2268, 45 L. Ed. 2d 125; Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). But this Court has never held, until today, that "the freedom of speech" includes a right to speak to minors (or a right of minors to access speech) without going through the minors' parents. To the contrary, "[i]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." Erznoznik, supra, at 212, 95 S. Ct. 2268, 45 L. Ed. 2d 125; cf. post, at 841-842, 180 L. Ed. 2d, at 746 (Breyer, J., dissenting).

The Court's constitutional jurisprudence "historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." Parham v. J. R., 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979). Under that case law, "legislature[s] [can] properly conclude that parents and others, teachers for example, who have . . . primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Ginsberg v. New York, 390 U.S. 629, 639, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968); see also Bellotti II v. Baird, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (opinion of Powell, J.) ("[T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for concern, . . . sympathy, and . . . paternal attention" (internal quotation marks omitted)). This is because "the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter." Id., at 638, 99 S. Ct. 3035, 61 L. Ed. 2d 797; id., at 638-639, 99 S. Ct. 3035, 61 L. Ed. 2d 797 ("Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding").

III

The California law at issue here forbids the sale or rental of "violent video game[s]" to minors, defined as anyone "under 18 years of age." Cal. Civ. Code Ann. §§ 1746.1(a), 1746 (West 2009). A violation of the law is punishable by a civil fine of up to $1,000. § 1746.3. Critically, the law does not prohibit adults from buying or renting violent video games for a minor or prohibit minors from playing such games. Cf. ante, at 814, 180 L. Ed. 2d, at 729 (Alito, J., concurring in judgment); post, at 848, 180 L. Ed. 2d, at 750 (Breyer, J., dissenting). The law also does not restrict a "minor's parent, grandparent, aunt, uncle, or legal guardian" from selling or renting him a violent video game. § 1746.1(c). . . .

Under any of this Court's standards for a facial First Amendment challenge, this one must fail. The video

game associations cannot show "that no set of circumstances exists under which [the law] would be valid," "that the statute lacks any plainly legitimate sweep," or that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens, 559 U.S., at 472, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 446* (internal quotation marks omitted). Even assuming that video games are speech, in most applications the California law does not implicate the *First Amendment*. All that the law does is prohibit the direct sale or rental of a violent video game to a minor by someone other than the minor's parent, grandparent, aunt, uncle, or legal guardian. Where a minor has a parent or guardian, as is usually true, the law does not prevent that minor from obtaining a violent video game with his parent's or guardian's help. In the typical case, the only speech affected is speech that bypasses a minor's parent or guardian. Because such speech does not fall within "the freedom of speech" as originally understood, California's law does not ordinarily implicate the *First Amendment* and is not facially unconstitutional.

* * *

"The freedom of speech," as originally understood, does not include a right to speak to minors without going through the minors' parents or guardians. Therefore, I cannot agree that the statute at issue is facially unconstitutional under the *First Amendment*.

I respectfully dissent.

Justice **Breyer**, dissenting.

California imposes a civil fine of up to $1,000 upon any person who distributes a violent video game in California without labeling it "18," or who sells or rents a labeled violent video game to a person under the age of 18. Representatives of the video game and software industries, claiming that the statute violates the *First Amendment* on its face, seek an injunction against its enforcement. Applying traditional *First Amendment* analysis, I would uphold the statute as constitutional on its face and would consequently reject the industries' facial challenge.

I

A

California's statute defines a violent video game as: A game in which a player "kill[s], maim[s], dismember[s], or sexually assault[s] an image of a human being,"

and

> "[a] reasonable person, considering the game as a whole, would find [the game] appeals to a deviant or morbid interest of minors,"
> *and*
> "[the game] is patently offensive to prevailing standards in the community as to what is suitable for minors,"
> *and*
> "the game, as a whole, . . . lack[s] serious literary, artistic, political, or scientific value for minors." *Cal. Civ. Code Ann. § 1746(d)(1)* (West 2009).

The statute in effect forbids the sale of such a game to minors unless they are accompanied by a parent; it requires the makers of the game to affix a label identifying it as a game suitable only for those aged 18 and over; it exempts retailers from liability unless such a label is properly affixed to the game; and it imposes a civil fine of up to $1,000 upon a violator. See *§§ 1746.1-1746.3*.

B

A facial challenge to this statute based on the *First Amendment* can succeed only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 446 (2010)* (internal quotation marks omitted). Moreover, it is more difficult to mount a facial *First Amendment* attack on a statute that seeks to regulate activity that involves action as well as speech. See *Broadrick v. Oklahoma, 413 U.S. 601, 614-615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)*. Hence, I shall focus here upon an area within which I believe the State can legitimately apply its statute, namely, sales to minors under the age of 17 (the age cutoff used by the industry's own ratings system), of highly realistic violent video games, which a reasonable game maker would know meet the Act's criteria. That area lies at the heart of the statute. I shall assume that the number of instances in which the State will enforce the statute within that area is comparatively large, and that the number outside that area (for example, sales to 17-year-olds) is comparatively small. And the activity the statute regulates combines speech with action (a virtual form of target practice).

C

In determining whether the statute is unconstitutional, I would apply both this Court's "vagueness" precedents and a strict form of *First Amendment* scrutiny. In doing so, the special *First Amendment* category I find relevant

is not (as the Court claims) the category of "depictions of violence," *ante, at 795, 180 L. Ed. 2d, at 718*, but rather the category of "protection of children." This Court has held that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts, 321 U.S. 158, 170, 64 S. Ct. 438, 88 L. Ed. 645 (1944)*. And the " 'regulatio[n] of communication addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults.' *Ginsberg v. New York, 390 U.S. 629, 638, n. 6, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968)* (quoting Emerson, Toward a General Theory of the *First Amendment*, 72 Yale L. J. 877, 939 (1963)).

The majority's claim that the California statute, if upheld, would create a "new categor[y] of unprotected speech," *ante, at 791, 794, 180 L. Ed. 2d, at 715, 717*, is overstated. No one here argues that depictions of violence, even extreme violence, *automatically* fall outside the *First Amendment's* protective scope as, for example, do obscenity and depictions of child pornography. We properly speak of *categories* of expression that lack protection when, like "child pornography," the category is broad, when it applies automatically, and when the State can prohibit everyone, including adults, from obtaining access to the material within it. But where, as here, careful analysis must precede a narrower judicial conclusion (say, denying protection to a shout of "fire" falsely made in a crowded theater, or to an effort to teach a terrorist group how to peacefully petition the United Nations), we do not normally describe the result as creating a "new category of unprotected speech." See *Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470, 17 Ohio L. Rep. 26, 17 Ohio L. Rep. 149 (1919)*; *Holder v. Humanitarian Law Project, 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)*.

Thus, in *Stevens,* after rejecting the claim that *all* depictions of animal cruelty (a category) fall outside the *First Amendment's* protective scope, we went on to decide whether the particular statute at issue violates the *First Amendment* under traditional standards; and we held that, because the statute was overly broad, it was invalid. Similarly, here the issue is whether, applying traditional *First Amendment* standards, this statute does, or does not, pass muster.

II

In my view, California's statute provides "fair notice of what is prohibited," and consequently it is not impermissibly vague. *United States v. Williams, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)*. *Ginsberg* explains why that is so. The Court there considered a New York law that forbade the sale to minors of a

> "picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity . . . ,"

that

> "predominately appeals to the prurient, shameful or morbid interest of minors,"

and

> "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,"

and

> "is utterly without redeeming social importance for minors." *390 U.S., at 646-647, 88 S. Ct. 1274, 20 L. Ed. 2d 195*.

This Court upheld the New York statute in *Ginsberg* (which is sometimes unfortunately confused with a very different, earlier case, *Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966)*). The five-Justice majority, in an opinion written by Justice Brennan, wrote that the statute was sufficiently clear. *390 U.S., at 643-645, 88 S. Ct. 1274, 20 L. Ed. 2d 195*. No Member of the Court voiced any vagueness objection. See *id., at 648-650, 88 S. Ct. 1274, 20 L. Ed. 2d 195* (Stewart, J., concurring in result); *id., at 650-671, 88 S. Ct. 1274, 20 L. Ed. 2d 195* (Douglas, J., joined by Black, J., dissenting); *id., at 671-675, 88 S. Ct. 1274, 20 L. Ed. 2d 195* (Fortas, J., dissenting).

Comparing the language of California's statute (set forth *supra, at 840, 180 L. Ed. 2d, at 745*) with the language of New York's statute (set forth immediately above), it is difficult to find any vagueness-related difference. Why are the words "kill," "maim," and "dismember" any more difficult to understand than the word "nudity?" Justice Alito objects that these words do "not perform the narrowing function" that this Court has required in adult obscenity cases, where statutes can only cover " 'hard core' " depictions. *Ante, at 810, 180 L. Ed. 2d, at 727* (opinion concurring in judgment). But the relevant comparison is not to adult obscenity cases but to *Ginsberg*, which dealt with "nudity," a category no more "narrow" than killing and maiming. And in any event, *narrowness* and *vagueness* do not necessarily have

anything to do with one another. All that is required for vagueness purposes is that the terms "kill," "maim," and "dismember" give fair notice as to what they cover, which they do.

The remainder of California's definition copies, almost word for word, the language this Court used in *Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)*, in permitting a *total ban* on material that satisfied its definition (one enforced with *criminal* penalties). The California law's reliance on "community standards" adheres to *Miller*, and in *Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 57-58, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989)*, this Court specifically upheld the use of *Miller*'s language against charges of vagueness. California only departed from the *Miller* formulation in two significant respects: It substituted the word "deviant" for the words "prurient" and "shameful," and it three times added the words "for minors." The word "deviant" differs from "prurient" and "shameful," but it would seem no less suited to defining and narrowing the reach of the statute. And the addition of "for minors" to a version of the *Miller* standard was approved in *Ginsberg, supra, at 643, 88 S. Ct. 1274, 20 L. Ed. 2d 195*, even though the New York law "dr[ew] no distinction between young children and adolescents who are nearing the age of majority," *ante, at 812, 180 L. Ed. 2d, at 728* (opinion of Alito, J.).

Both the *Miller* standard and the law upheld in *Ginsberg* lack perfect clarity. But that fact reflects the difficulty of the Court's long search for words capable of protecting expression without depriving the State of a legitimate constitutional power to regulate. As is well known, at one point Justice Stewart thought he could do no better in defining obscenity than, "I know it when I see it." *Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964)* (concurring opinion). And Justice Douglas dissented from *Miller*'s standard, which he thought was still too vague. *413 U.S., at 39-40, 93 S. Ct. 2607, 37 L. Ed. 2d 419*. Ultimately, however, this Court accepted the "community standards" tests used in *Miller* and *Ginsberg*. They reflect the fact that sometimes, even when a precise standard proves elusive, it is easy enough to identify instances that fall within a legitimate regulation. And they seek to draw a line, which, while favoring free expression, will nonetheless permit a legislature to find the words necessary to accomplish a legitimate constitutional objective. Cf. *Williams, 553 U.S.,, at 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650* (the Constitution does not always require " 'perfect clarity and precise guidance,' " even when " 'expressive activity' " is involved).

What, then, is the difference between *Ginsberg* and *Miller* on the one hand and the California law on the other? It will often be easy to pick out cases at which California's statute directly aims, involving, say, a character who shoots out a police officer's knee, douses him with gasoline, lights him on fire, urinates on his burning body, and finally kills him with a gunshot to the head. (Footage of one such game sequence has been submitted in the record.) See also *ante, at 818-819, 180 L. Ed. 2d, at 732* (opinion of Alito, J.). As in *Miller* and *Ginsberg*, the California law clearly *protects* even the most violent games that possess serious literary, artistic, political, or scientific value. *§ 1746(d)(1)(A)(iii)*. And it is easier here than in *Miller* or *Ginsberg* to separate the sheep from the goats at the statute's border. That is because here the industry itself has promulgated standards and created a review process, in which adults who "typically have experience with children" assess what games are inappropriate for minors. See Entertainment Software Rating Board, Rating Process, online at http://www.esrb.org/ratings/_ process.jsp (all Internet materials as visited June 24, 2011, and available in Clerk of Court's case file).

There is, of course, one obvious difference: The *Ginsberg* statute concerned depictions of "nudity," while California's statute concerns extremely violent video games. But for purposes of vagueness, why should that matter? Justice Alito argues that the *Miller* standard sufficed because there are "certain generally accepted norms concerning expression related to sex," whereas there are no similarly "accepted standards regarding the suitability of violent entertainment." *Ante, at 811-812, 180 L. Ed. 2d, at 728*. But there is no evidence that is so. The Court relied on "community standards" in *Miller* precisely because of the difficulty of articulating "accepted norms" about depictions of sex. I can find no difference--historical or otherwise--that is *relevant* to the vagueness question. Indeed, the majority's examples of literary descriptions of violence, on which Justice Alito relies, do not show anything relevant at all.

After all, one can find in literature as many (if not more) descriptions of physical love as descriptions of violence. Indeed, sex "has been a theme in art and literature throughout the ages." *Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)*. For every Homer, there is a Titian. For every Dante, there is an Ovid. And for all the teenagers who have read the original versions of Grimm's Fairy Tales, I suspect there are those who know the story of Lady Godiva.

Thus, I can find no meaningful vagueness-related differences between California's law and the New York law upheld in *Ginsberg*. And if there remain any vagueness problems, the state courts can cure them through interpretation. See *Erznoznik v. Jacksonville, 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)* ("[s]tate statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts"). Cf. *Ginsberg, 390 U.S., at 644, 88 S. Ct. 1274, 20 L. Ed. 2d 195* (relying on the fact that New York Court of Appeals would read a knowledge requirement into the statute); *Berry v. Santa Barbara, 40 Cal. App. 4th 1075, 1088-1089, 47 Cal.Rptr.2d 661, 669 (1995)* (reading a knowledge requirement into a statute). Consequently, for purposes of this facial challenge, I would not find the statute unconstitutionally vague.

III

Video games combine physical action with expression. Were physical activity to predominate in a game, government could appropriately intervene, say, by requiring parents to accompany children when playing a game involving actual target practice, or restricting the sale of toys presenting physical dangers to children. See generally Consumer Product Safety Improvement Act of 2008, *122 Stat. 3016* ("Title I--Children's Product Safety"). But because video games also embody important expressive and artistic elements, I agree with the Court that the *First Amendment* significantly limits the State's power to regulate. And I would determine whether the State has exceeded those limits by applying a strict standard of review.

Like the majority, I believe that the California law must be "narrowly tailored" to further a "compelling interest," without there being a "less restrictive" alternative that would be "at least as effective." *Reno v. American Civil Liberties Union, 521 U.S. 844, 874, 875, 879, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)*. I would not apply this strict standard "mechanically." *United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 841, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)* (Breyer, J., joined by Rehnquist, C. J., and O'Connor and Scalia, JJ., dissenting). Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying "compelling interests," the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, "the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide." *Ibid.* See also *Burson v. Freeman, 504 U.S. 191, 210, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992)* (plurality opinion) (applying strict scrutiny and finding relevant the lack of a "significant impingement" on speech).

First Amendment standards applied in this way are difficult but not impossible to satisfy. Applying "strict scrutiny" the Court has upheld restrictions on speech that, for example, ban the teaching of peaceful dispute resolution to a group on the State Department's list of terrorist organizations, *Holder, 561 U.S., at 27-39, 130 S. Ct. 2705, 177 L. Ed. 2d 355*; but cf. *id., at 41, 130 S. Ct. 2705, 177 L. Ed. 2d 355* Breyer, J., dissenting), and limit speech near polling places, *Burson, supra, at 210-211, 112 S. Ct. 1846, 119 L. Ed. 2d 5* (plurality opinion). And applying less clearly defined but still rigorous standards, the Court has allowed States to require disclosure of petition signers, *Doe v. Reed, 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010)*, and to impose campaign contribution limits that were " 'closely drawn' to match a 'sufficiently important interest,' *Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 387-388, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)*.

Moreover, although the Court did not specify the "level of scrutiny" it applied in *Ginsberg*, we have subsequently described that case as finding a "compelling interest" in protecting children from harm sufficient to justify limitations on speech. See *Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989)*. Since the Court in *Ginsberg* specified that the statute's prohibition applied to material that was *not* obscene, *390 U.S., at 634, 88 S. Ct. 1274, 20 L. Ed. 2d 195*, I cannot dismiss *Ginsberg* on the ground that it concerned obscenity. But cf. *ante, at 793-794, 180 L. Ed. 2d, at 716* (majority opinion). Nor need I depend upon the fact that the Court in *Ginsberg* insisted only that the legislature have a "rational" basis for finding the depictions there at issue harmful to children. *390 U.S., at 639, 88 S. Ct. 1274, 20 L. Ed. 2d 195*. For in this case, California has substantiated its claim of harm with considerably stronger evidence.

A

California's law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. *§ 1746.1(c)*. All it prevents is a child or adolescent from buying, without a parent's assistance, a

gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17. See Brief for Respondents 8.

Nor is the statute, if upheld, likely to create a precedent that would adversely affect other media, say, films, or videos, or books. A typical video game involves a significant amount of physical activity. See *ante, at 817-818, 180 L. Ed. 2d, at 731-732* (Alito, J., concurring in judgment) (citing examples of the increasing interactivity of video game controllers). And pushing buttons that achieve an interactive, virtual form of target practice (using images of human beings as targets), while containing an expressive component, is not just like watching a typical movie. See *infra, at 853, 180 L. Ed. 2d, at 752*.

B

The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the "basic" parental claim "to authority in their own household to direct the rearing of their children," which makes it proper to enact "laws designed to aid discharge of [parental] responsibility," and (2) the State's "independent interest in the well-being of its youth." *Ginsberg, 390 U.S., at 639-640, 88 S. Ct. 1274, 20 L. Ed. 2d 195*. Cf. *id., at 639, n. 7, 88 S. Ct. 1274, 20 L. Ed. 2d 195* ("'[O]ne can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit' " (quoting Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391, 413, n. 68 (1963))). And where these interests work in tandem, it is not fatally "underinclusive" for a State to advance its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish.

Both interests are present here. As to the need to help parents guide their children, the Court noted in 1968 that " 'parental control or guidance cannot always be provided.' *390 U.S., at 640, 88 S. Ct. 1274, 20 L. Ed. 2d 195*. Today, 5.3 million grade-school-age children of working parents are routinely home alone. . . .Thus, it has, if anything, become more important to supplement parents' authority to guide their children's development.

As to the State's independent interest, we have pointed out that juveniles are more likely to show a " 'lack of maturity' " and are "more vulnerable or susceptible to negative influences and outside pressures," and that their "character . . . is not as well formed as that of an adult." *Roper v. Simmons, 543 U.S. 551, 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*. And we have therefore recognized "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications, supra, at 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93*.

At the same time, there is considerable evidence that California's statute significantly furthers this compelling interest. That is, in part, because video games are excellent teaching tools. Learning a practical task often means developing habits, becoming accustomed to performing the task, and receiving positive reinforcement when performing that task well. Video games can help develop habits, accustom the player to performance of the task, and reward the player for performing that task well. Why else would the Armed Forces incorporate video games into its training? . . .

When the military uses video games to help soldiers train for missions, it is using this medium for a beneficial purpose. But California argues that when the teaching features of video games are put to less desirable ends, harm can ensue. In particular, extremely violent games can harm children by rewarding them for being violently aggressive in play, and thereby often teaching them to be violently aggressive in life. And video games can cause more harm in this respect than can typically passive media, such as books or films or television programs.

There are many scientific studies that support California's views. Social scientists, for example, have found *causal* evidence that playing these games results in harm. Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period. . . .

Experimental studies in laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent games. . . .

Surveys of eighth and ninth grade students have found a correlation between playing violent video games and aggression. . . .

Cutting-edge neuroscience has shown . . .

And "meta-analyses," *i.e.*, studies of all the studies, have concluded that exposure to violent video games "was

positively associated with aggressive behavior, aggressive cognition, and aggressive affect," and that "playing violent video games is a *causal* risk factor for long-term harmful outcomes." . . .

Some of these studies take care to explain in a common-sense way why video games are potentially more harmful than, say, films or books or television. In essence, they say that the closer a child's behavior comes, not to watching, but to *acting* out horrific violence, the greater the potential psychological harm. . . .

Experts debate the conclusions of all these studies. Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions. (I list both sets of research in the appendixes.) I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.

Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature's conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in *First Amendment* cases. . . .

C

I can find no "less restrictive" alternative to California's law that would be "at least as effective." . . .

IV

The upshot is that California's statute, as applied to its heartland of applications (*i.e.,* buyers under 17; extremely violent, realistic video games), imposes a restriction on speech that is modest at most. That restriction is justified by a compelling interest (supplementing parents' efforts to prevent their children from purchasing potentially harmful violent, interactive material). And there is no equally effective, less restrictive alternative. California's statute is consequently constitutional on its face--though litigants remain free to challenge the statute as applied in particular instances, including any effort by the State to apply it to minors aged 17.

I add that the majority's different conclusion creates a serious anomaly in *First Amendment* law. *Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of *First Amendment* would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman--bound, gagged, tortured, and killed--is also topless?

This anomaly is not compelled by the *First Amendment*. It disappears once one recognizes that extreme violence, where interactive, and *without literary, artistic, or similar justification*, can prove at least as, if not more, harmful to children as photographs of nudity. And the record here is more than adequate to support such a view. That is why I believe that *Ginsberg* controls the outcome here *a fortiori.* And it is why I believe California's law is constitutional on its face.

This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children--by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the *First Amendment* does not disable government from helping parents make such a choice here--a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children.

For these reasons, I respectfully dissent.

APPENDIXES

With the assistance of the Supreme Court Library, I have compiled these two appendixes listing peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games. The library conducted a search for relevant articles on the following databases: PsycINFO, PubMed, Academic Search Premier, ArticleFirst (OCLC), and Dialog (files 1,

7, 34, 98, 121, 142, 144, 149). The following search terms were used: “(video* or computer or arcade or online) and (game*) and (attack* or fight* or aggress* or violen* or hostil* or ang* or arous* or prosocial or help* or desens* or empathy).” After eliminating irrelevant matches based on title or abstract, I categorized these articles as either supporting the hypothesis that violent video games are harmful (listed in Appendix A), or not supporting/rejecting the hypothesis that violent video games are harmful (listed in Appendix B).

Many, but not all, of these articles were available to the California Legislature or the parties in briefing this case. I list them because they suggest that there is substantial (though controverted) evidence supporting the expert associations of public health professionals that have concluded that violent video games can *cause* children psychological harm. See *supra, at 853-855, 180 L. Ed. 2d, at 753-754*. And consequently, these studies help to substantiate the validity of the original judgment of the California Legislature, as well as that judgment's continuing validity.