Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue

460 U.S. 575
Supreme Court of the United States
March 29, 1983

MINNEAPOLIS STAR & TRIBUNE CO. v. MINNESOTA COMMISSIONER OF REVENUE. No. 81-1839. Argued January 12, 1983. Decided March 29, 1983. APPEAL FROM THE SUPREME COURT OF MINNESOTA. *Lawrence C. Brown* argued the cause for appellant. With him on the briefs were *John D. French, John P. Borger,* and *Norton L. Armour. Paul R. Kempainen,* Special Assistant Attorney General of Minnesota, argued the cause for appellee. With him on the brief was *Warren Spannaus,* Attorney General. [*] Briefs of amici curiae urging reversal were filed by Peter '. Schroth and Charles S. Sims for the American Civil Liberties Union et al.; and by Philip A. Lacovara. Terry Maguire, and Pamela J. Riley for Knight-Ridder Newspapers, Inc., et al. JUSTICE BLACKMUN joined the opinion of the Court except footnote 12, *which is not reproduced in this abridgement*. The opinion of JUSTICE WHITE, concurring in part and dissenting in part, is omitted.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.[8] Act of June 1, 1967, ch. 32, Art. XIII, § 2, 1967 Minn. Laws 2143, 2179, codified at Minn. Stat. § 297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. § 297A.25(1)('). As part of this general system of taxation and in support of the sales tax, see Minn. Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property." This use tax applies to any nonexempt tangible personal property unless the sales tax was paid on the sales price. Minn. Stat. § 297A.14 (1982). Like the classic use tax, this use tax protects the State's sales tax by eliminating the residents' incentive to travel to States with lower sales taxes to buy goods rather than buying them in Minnesota. §§ 297A.14, 297A.24.

The appellant, Minneapolis Star & Tribune Co., "Star Tribune," is the publisher of a morning newspaper and an evening newspaper (until 1982) in

[8] Currently, the tax applies to sales of items for more than 9¢. Minn. Stat. § 297A.03(2) (1982). When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, Art. XIII, § 3(2), 1967 Minn. Laws 2143, 2180.

Minneapolis. From 1967 until 1971, it enjoyed an exemption from the sales and use tax provided by Minnesota for periodic publications. 1967 Minn. Laws 2187, codified at Minn. Stat. § 297A.25(1)(i) (1982). In 1971, however, while leaving the exemption from the sales tax in place, the legislature amended the scheme to impose a "use tax" on the cost of paper and ink products consumed in the production of a publication. Act of Oct. 31, 1971, ch. 31, Art. I, § 5, 1971 Minn. Laws 2561, 2565, codified with modifications at Minn. Stat. §§ 297A.14, 297A.25(1)(i) (1982). Ink and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail. In 1974, the legislature again amended the statute, this time to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication an annual tax credit of $4,000. Act of May 24, 1973, ch. 650, Art. XIII, § 1, 1973 Minn. Laws 1606, 1637, codified at Minn. Stat. § 297A.14 (1982).˜ Publications remained exempt from the sales tax, § 2, 1973 Minn. Laws 1639.

After the enactment of the $100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the $893,355 collected, it paid $608,634, or roughly two-thirds of the total revenue raised by the tax. See 314 N. ‘. 2d 201, 203, and n. 4 (1981). In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper. *Id.,* at 204, and n. 5.

Star Tribune instituted this action to seek a refund of the use taxes it paid from January 1, 1974, to May 31, 1975. It challenged the imposition of the use tax on ink and paper used in publications as a violation of the guarantees of freedom of the press and equal protection in the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the tax against the federal constitutional challenge. 314 N.W. 2d 201 (1981). We noted probable jurisdiction, 457 U.S. 1130 (1982), and we now reverse.

II

Star Tribune argues that we must strike this tax on the authority of *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). Although there are similarities between the two cases, we agree with the State that *Grosjean* is not controlling.

In *Grosjean,* the State of Louisiana imposed a license tax of 2% of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the State, only 13 were subject to the tax. After noting that the tax was "single in kind" and that keying the tax to circulation curtailed the flow of information, *id.,* at 250-251, this Court held the tax invalid as an abridgment of the freedom of the press. Both the brief and the argument of the publishers in this Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. See Argument for Appellees, *id.,* at 238; Brief for Appellees, O. T. 1936, No. 303, pp. 8-9, 30. All but one of the large papers subject to the tax had "ganged up" on Senator Huey Long, and a circular distributed by Long and the Governor to each member of the state legislature described "lying newspapers" as conducting "a vicious

campaign" and the tax as "a tax on lying, 2c *[sic]* a lie." *Id.,* at 9. Although the Court's opinion did not describe this history, it stated "[the tax] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information," 297 U.S., at 250, an explanation that suggests that the motivation of the legislature may have been significant.

Our subsequent cases have not been consistent in their reading of *Grosjean* on this point. Compare *United States* v. *O'Brien,* 391 U.S. 367, 384-385 (1968) (stating that legislative purpose was irrelevant in *Grosjean*), with *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 9-10 (1978) (plurality opinion) (suggesting that purpose was relevant in *Grosjean*); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 383 (1973) (same). Commentators have generally viewed *Grosjean* as dependent on the improper censorial goals of the legislature. See T. Emerson, The System of Freedom of Expression 419 (1970); L. Tribe, American Constitutional Law 592, n. 8, 724, n. 10 (1978). We think that the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the State imposed the tax with an intent to penalize a selected group of newspapers. In the case currently before us, however, there is no legislative history.˜ and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to *Grosjean.* Instead, we must analyze the problem anew under the general principles of the First Amendment.

III

Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. See, *e. g., Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 139 (1969) (antitrust laws); *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 155-156 (1951) (same); *Breard* v. *Alexandria,* 341 U.S. 622 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 192-193 (1946) (Fair Labor Standards Act); *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178 (1946) (same); *Associated Press* v. *United States,* 326 U.S. 1, 6-7, 19-20 (1945) (antitrust laws); *Associated Press* v. *NLRB,* 301 U.S. 103, 132-133 (1937) (National Labor Relations Act); see also *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) (enforcement of subpoenas). Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision, quoted in n. 2, *supra,* is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

Minnesota's treatment of publications differs from that of other enterprises in at least two important respects:˜ it imposes a use tax that does not serve the function of protecting the sales tax, and it taxes an intermediate transaction rather than the ultimate retail sale. A use tax ordinarily serves to complement the sales tax by eliminating the incentive to make major purchases in States with lower

sales taxes; it requires the resident who shops out-of-state to pay a use tax equal to the sales tax savings. *E. g., National Geographic Society* v. *California Board of Equalization,* 430 U.S. 551, 555 (1977); P. Hartman, Federal Limitations on State and Local Taxation §§ 10:1, 10:5 (1981); Warren & Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way, 38 Colum. L. Rev. 49, 63 (1938). Minnesota designed its overall use tax scheme to serve this function. As the regulations state, "[t]he 'use tax' is a compensating or complementary tax." Minn. Code of Agency Rules, Tax S & U 300 (1979); see Minn. Stat. § 297A.24 (1982). Thus, in general, items exempt from the sales tax are not subject to the use tax, for, in the event of a sales tax exemption, there is no "complementary function" for a use tax to serve. See *DeLuxe Check Printers, Inc.* v. *Commissioner of Tax,* 295 Minn. 76, 203 N. '. 2d 341, 343 (1972). But the use tax on ink and paper serves no such complementary function; it applies to all uses, whether or not the taxpayer purchased the ink and paper instate, and it applies to items exempt from the sales tax.

Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper. "The statutory scheme is to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp.* v. *Commissioner of Revenue,* 288 N. '. 2d 234, 239 (Minn. 1979). Publishers, however, are taxed on their purchase of components, even though they will eventually sell their publications at retail.

By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. See, *e. g., United States* v. *Lee,* 455 U.S. 252 (1982). Any tax that the press must pay, of course, imposes some "burden." But, as we have observed, see *supra,* at 581, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all business˜, suggesting that a regulation that singled out the press might place a heavier burden of justification on the State, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment.˜ The role of the press in mobilizing sentiment in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected. Proponents of the Constitution, relying on the principle of enumerated powers, responded that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press. The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:

> "I confess I do not see in what cases the congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am

not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed . . . ." R. Lee, Observation Leading to a Fair Examination of the System of Government, Letter IV, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 466, 474 (1971).

See also A Review of the Constitution Proposed by the Late Convention by a Federal Republican, reprinted in 3 '. Storing, The Complete Anti-Federalist 65, 81-82 (1981); M. Smith, Address to the People of New York on the Necessity of Amendments to the Constitution, reprinted in 1 B. Schwartz, *supra,* at 566, 575-576; cf. The Federalist No. 84, p. 440, and n. 1 (A. Hamilton) (M. Beloff ed. 1948) (recognizing and attempting to refute the argument). The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights. See 1 B. Schwartz, *supra,* at 527.

The fears of the Antifederalists were well founded. A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. See *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. See generally Stewart, "Or of the Press," 26 HASTINGS L. J. 631, 634 (1975). "[A]n untrammeled press [is] a vital source of public information," *Grosjean,* 297 U.S., at 250, and an informed public is the essence of working democracy.

Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. See, *e. g., Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95-96 (1972); cf. *Brown* v. *Hartlage,* 456 U.S. 45 (1982) (First Amendment has its "fullest and most urgent" application in the case of regulation of the content of political speech). Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.~

IV

The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses

generally,˜ avoiding the censorial threat implicit in a tax that singles out the press.

Addressing the concern with differential treatment, Minnesota invites us to look beyond the form of the tax to its substance. The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press.˜ There are two fatal flaws in this reasoning. First, the State has offered no explanation of why it chose to use a substitute for the sales tax rather than the sales tax itself. The court below speculated that the State might have been concerned that collection of a tax on such small transactions would be impractical. 314 N.W. 2d, at 207. That suggestion is unpersuasive, for sales of other low-priced goods are not exempt˜. If the real goal of this tax is to duplicate the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax.

Further, even assuming that the legislature did have valid reasons for substituting another tax for the sales tax, we are not persuaded that this tax does serve as a substitute. The State asserts that this scheme actually *favors* the press over other businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price. We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).˜

A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.[12] The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.˜ Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers.˜

V

Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.˜ The State explains this exemption as part of a policy favoring an "equitable" tax system, although there are no comparable exemptions for small enterprises

outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an "equitable" tax system. The current system, it explains, promotes equity because it places the burden on large publications that impose more social costs than do smaller publications and that are more likely to be able to bear the burden of the tax. Even if we were willing to accept the premise that large businesses are more profitable and therefore better able to bear the burden of the tax, the State's commitment to this "equity" is questionable, for the concern has not led the State to grant benefits to small businesses in general.~ And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises.

VI

We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. See *NAACP* v. *Button,* 371 U.S., at 439; *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 461 (1958); *Lovell* v. *Griffin,* 303 U.S. 444, 451 (1938). We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment. *E. g., Schneider* v. *State,* 308 U.S. 147 (1939). A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment,~ and the judgment below is

Reversed.

JUSTICE REHNQUIST, dissenting.

Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment, has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.~

To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the

newspapers, and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

For the reasons set forth above, I would affirm the judgment of the Minnesota Supreme Court.

Brown v. Entertainment Merchants Association

559 U.S. ___
Supreme Court of the United States
June 27, 2011

EDMUND G. BROWN, J r ., GOVERNOR OF CALIFORNIA, et al. , PETITIONERS v. ENTERTAINMENT MERCHANTS ASSOCIATION et al. On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. SCALIA, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined. THOMAS, J., and BREYER, J., filed dissenting opinions.

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), 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. ____ (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 (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 (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 (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 (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. ___, ___ (2010) (slip op., at 5) (quoting *R. A. V.* v. *St. Paul* , 505 U.S. 377, 382–383 (1992)). These limited areas—such as obscenity, *Roth* v. *United States* , 354 U.S. 476, 483 (1957) , incitement, *Brandenburg* v. *Ohio* , 395 U.S. 444, 447–449 (1969) *(per curiam)* , and fighting words, *Chaplinsky* v. *New Hampshire* , 315 U.S. 568 , 572 (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.

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 "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 (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 ___ (slip op., at 7). 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 ___ (slip op., at 9). 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 ___ (slip op., at 7).

That holding controls this case.[9] 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. See also *Cohen* v. *California* , 403 U.S. 15, 20 (1971) ; *Roth* , *supra,* at 487, and n. 20.

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. The New York Court of Appeals upheld the provision as a law against obscenity. "[T]here can be no more precise test of written indecency or obscenity," it said, "than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. " *Id.* , at 514 (internal quotation marks omitted). That is of course the same expansive view of governmental power to abridge the freedom of speech based on interest-

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[9] Justice Alito distinguishes Stevens on several grounds that seem to us ill founded. He suggests, post, at 10 (opinion concurring in judgment), that Stevens did not apply strict scrutiny. If that is so (and we doubt it), it would make this an a fortiori case. He says, post, at 9, 10, that the California Act punishes the sale or rental rather than the "creation" or "possession" of violent depictions. That distinction appears nowhere in Stevens itself, and for good reason: It would make permissible the prohibition of printing or selling books—though not the writing of them. Whether government regulation applies to creating, distributing, or consuming speech makes no difference. And finally, Justice Alito points out, post, at 10, that Stevens "left open the possibility that a more narrowly drawn statute" would be constitutional. True, but entirely irrelevant. Stevens said, 559 U. S., at ___ (slip op., at 19), that the "crush-video" statute at issue there might pass muster if it were limited to videos of acts of animal cruelty that violated the law where the acts were performed. There is no contention that any of the virtual characters depicted in the imaginative videos at issue here are criminally liable.

balancing that we rejected in *Stevens* . 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, 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.

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 (1968) . That case approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child.[10] 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 (quoting *Mishkin* v. *New York* , 383 U.S. 502, 509 (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.

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 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, *Ginsberg* , *supra* , at 640–641; *Prince* v. *Massachusetts* , 321 U.S. 158, 165 (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.[11]

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[10] The statute in Ginsberg restricted the sale of certain depictions of "nudity, sexual conduct, sexual excitement, or sado-masochistic abuse," that were " '[h]armful to minors.' " A depiction was harmful to minors if it: "(i) predominantly appeals to the prurient, shameful or morbid interests of minors, and "(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and "(iii) is utterly without redeeming social importance for minors." 390 U. S., at 646 (Appendix A to opinion of the Court) (quoting N. Y. Penal Law §484–h(1)(f)).

[11] Justice Thomas ignores the holding of Erznoznik, and denies that persons under 18 have any constitutional right to speak or be spoken to without their parents' consent. He cites no case, state

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. 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.).[12]

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or federal, supporting this view, and to our knowledge there is none. Most of his dissent is devoted to the proposition that parents have traditionally had the power to control what their children hear and say. This is true enough. And it perhaps follows from this that the state has the power to enforce parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their children are forbidden to attend. But it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior consent. The latter would mean, for example, that it could be made criminal to admit persons under 18 to a political rally without their parents' prior written consent—even a political rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors. And what is good for First Amendment rights of speech must be good for First Amendment rights of religion as well: It could be made criminal to admit a person under 18 to church, or to give a person under 18 a religious tract, without his parents' prior consent. Our point is not, as Justice Thomas believes, post, at 16, n. 2, merely that such laws are "undesirable." They are obviously an infringement upon the religious freedom of young people and those who wish to proselytize young people. Such laws do not enforce parental authority over children's speech and religion; they impose governmental authority, subject only to a parental veto. In the absence of any precedent for state control, uninvited by the parents, over a child's speech and religion (Justice Thomas cites none), and in the absence of any justification for such control that would satisfy strict scrutiny, those laws must be unconstitutional. This argument is not, as Justice Thomas asserts, "circular," ibid. It is the absence of any historical warrant or compelling justification for such restrictions, not our ipse dixit, that renders them invalid.

[12] Justice Alito accuses us of pronouncing that playing violent video games "is not different in 'kind' " from reading violent literature. Post, at 2. Well of course it is different in kind, but not in a way that causes the provision and viewing of violent video games, unlike the provision and reading of books, not to be expressive activity and hence not to enjoy First Amendment protection. Reading

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, at 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 (1915) , but we eventually reversed course, *Joseph Burstyn, Inc.*, 343 U.S., at 502; see also *Erznoznik*, *supra,* at 212–214 (invalidating a drive-in movies restriction designed to protect children). Radio dramas were next, and then came comic books. Brief for Cato Institute, at 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.[13] 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

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Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not constitutional ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny—a question to which we devote our attention in Part III, infra. Even if we can see in them "nothing of any possible value to society . . . , they are as much entitled to the protection of free speech as the best of literature." Winters v. New York, 333 U. S. 507, 510 (1948)

[13] The crusade against comic books was led by a psychiatrist, Frederic Wertham, who told the Senate Judiciary Committee that "as long as the crime comic books industry exists in its present forms there are no secure homes." Juvenile Delinquency (Comic Books): Hearings before the Subcommittee to Investigate Juvenile Delinquency, 83d Cong., 2d Sess., 84 (1954). Wertham's objections extended even to Superman comics, which he described as "particularly injurious to the ethical development of children." Id., at 86. Wertham's crusade did convince the New York Legislature to pass a ban on the sale of certain comic books to minors, but it was vetoed by Governor Thomas Dewey on the ground that it was unconstitutional given our opinion in Winters, supra. See People v. Bookcase, Inc., 14 N. Y. 2d 409, 412–413, 201 N. E. 2d 14, 15–16 (1964).

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 re-search to identify, see *post* , at 14–15, nn. 13–18, video games in which "the violence is astounding," *post* , at 14. "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 14–15, 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. The State must specifically identify an "actual problem" in need of solving, *Playboy* , 529 U.S., at 822–823, and the curtailment of free speech must be actually necessary to the solution, see *R. A. V.* , *supra,* at 395. 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.

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 (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. California's burden is much higher, and because it bears the risk of uncertainty, see *Playboy* , *supra,* at 816–817, 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,[14] 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." *Video Software Dealers Assn.* 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.[15]

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. In his testimony in a similar lawsuit, Dr. Anderson admitted that the "effect sizes" of children's exposure to violent video games are "about the same" as that produced by their exposure to violence on television. App. 1263. And he admits that the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, *id.,* at 1304, or when they play video games like Sonic the Hedgehog that are rated "E" (appropriate for all ages), *id.,* at 1270, or even when they "vie[w] a picture of a gun," *id.,* at 1315–1316.[16]

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[14] See Video Software Dealers Assn. v. Schwarzenegger, 556 F. 3d 950, 963–964 (CA9 2009); Interactive Digital Software Assn. v. St. Louis County, 329 F. 3d 954 (CA8 2003); American Amusement Machine Assn. v. Kendrick, 244 F. 3d 572, 578–579 (CA7 2001); Entertainment Software Assn. v. Foti, 451 F. Supp. 2d 823, 832–833 (MD La. 2006); Entertainment Software Assn. v. Hatch, 443 F. Supp. 2d 1065, 1070 (Minn. 2006), aff 'd, 519 F. 3d 768 (CA8 2008); Entertainment Software Assn. v. Granholm, 426 F. Supp. 2d 646, 653 (ED Mich. 2006); Entertainment Software Assn. v. Blagojevich, 404 F. Supp. 2d 1051, 1063 (ND Ill. 2005), aff 'd, 469 F. 3d 641 (CA7 2006).

[15] One study, for example, found that children who had just finished playing violent video games were more likely to fill in the blank letter in "explo_e" with a "d" (so that it reads "explode") than with an "r" ("explore"). App. 496, 506 (internal quotation marks omitted). The prevention of this phenomenon, which might have been anticipated with common sense, is not a compelling state interest.

[16] Justice Alito is mistaken in thinking that we fail to take account of "new and rapidly evolving technology," post, at 1. The studies in question pertain to that new and rapidly evolving technology, and fail to show, with the degree of certitude that strict scrutiny requires, that this subject-matter restriction on speech is justified. Nor is Justice Alito correct in attributing to us the view that "violent video games really present no serious problem." Post, at 2. Perhaps they do present a problem, and perhaps none of us would allow our own children to play them. But there are all sorts of "problems"—some of them surely more serious than this one—that cannot be addressed by governmental restriction of free expression: for example, the problem of encouraging anti-Semitism (National Socialist Party of America v. Skokie, 432 U. S. 43 (1977) (per curiam)), the problem of spreading a political philosophy hostile to the Constitution (Noto v. United States, 367 U. S. 290 (1961)), or the problem of encouraging disrespect for the Nation's flag (Texas v. Johnson, 491 U. S. 397 (1989)). Justice Breyer would hold that California has satisfied strict scrutiny based upon his own research into the issue of the harmfulness of violent video games. See

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 (1994) ; *Florida Star* v. *B. J. F.* , 491 U.S. 524, 540 (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.

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. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). App. 86. The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-

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post, at 20–35 (Appendixes to dissenting opinion) (listing competing academic articles discussing the harmfulness vel non of violent video games). The vast preponderance of this research is outside the record—and in any event we do not see how it could lead to Justice Breyer's conclusion, since he admits he cannot say whether the studies on his side are right or wrong. Post, at 15. Similarly, Justice Alito says he is not "sure" whether there are any constitutionally dispositive differences between video games and other media. Post, at 2. If that is so, then strict scrutiny plainly has not been satisfied.

only games to minors; and to rent or sell "M" rated games to minors only with parental consent. *Id.,* at 47. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, "the video game industry outpaces the movie and music industries" in "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated products at retail." FTC, Report to Congress, Marketing Violent Entertainment to Children 30 (Dec. 2009), online at http:// www.ftc.gov / os/ 2009 / 12/ P994511violententertainment.pdf (as visited June 24, 2011, and available in Clerk of Court's case file) (FTC Report). 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.[17]

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 (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

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[17] Justice Breyer concludes that the remaining gap is compelling because, according to the FTC's report, some "20% of those under 17 are still able to buy M-rated games." Post, at 18 (citing FTC Report 28). But some gap in compliance is unavoidable. The sale of alcohol to minors, for example, has long been illegal, but a 2005 study suggests that about 18% of retailers still sell alcohol to those under the drinking age. Brief for State of Rhode Island et al. as Amici Curiae 18. Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.

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 (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.

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 10–13, 15–16. 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.^

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. ~

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.1 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. ___, ___ (2010) (slip op., at 25) (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 (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 (1942); see also United States v. Stevens, 559 U.S. ___, ___ (2010) (slip op., at 5–6). 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 (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. 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. ~

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). ~

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. ~

The California law at issue here prohibits 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 minorsfrom playing such games.~ 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.~

JUSTICE BREYER, dissenting.

Applying traditional First Amendment analysis, I would uphold the statute as constitutional on its face and would consequently reject the industries' facial challenge.~

Comparing the language of California's statute (set forth supra, at 1–2) 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 6 (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 (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 (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, 390 U.S.,

at 643, even though the New York law "dr[ew] no distinction between young children and adolescents who are nearing the age of majority," ante, at 8 (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 (1964) (concurring opinion). And Justice Douglas dissented from Miller's standard, which he thought was still too vague. 413 U.S., at 39–40. 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, supra, at 304 (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 14–15 (ALITO, J., concurring in judgment). 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. 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 7–8. 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.

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.^ 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.~ 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.~

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.