First Amendment Rights
Professor Leora Harpaz
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Chapter I: Introduction and Advocacy of Lawlessness

Introduction

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The general reference to freedom of speech in the First Amendment is used to resolve myriad disputes over expression. To resolve those disputes, the U.S. Supreme Court has developed a complex set of doctrines. This course will explore the various ways in which First Amendment free speech disputes are resolved.

No matter what the specific elements of a constitutional dispute over freedom of speech, ultimately the question presented in every First Amendment case is about a conflict in values. On the side is the individual's interest in expression which is judged by the benefit of the speech to the community and to the individual speaker. On the other side is the government's interest in suppressing speech, an interest in protecting the public, whether from violence, from offense, or some other negative consequence of the speech.

This analysis in which competing values are weighed has both a philosophical aspect and a doctrinal aspect. On the philosophical side, the First Amendment reflects a belief system which places certain values at the forefront of American society. Those values underlie the First Amendment and help the Supreme Court to resolve particular First Amendment free speech disputes.

First, and most important, the Free Speech Clause serves important values in a democratic society. One of its central goals is to develop an educated citizenry. An educated citizenry means citizens who are informed about issues and candidates so they can perform their civic duty and participate in elections as well as forming views on issues that the country or their state or community face and work to influence the political process in addressing those issues.

Freedom of expression is also seen as promoting a search for truth and enlightenment that helps to achieve a good society, the best society we are capable of being. This search for truth is promoted by the Free Speech Clause because the First Amendment allows there to be a marketplace of ideas in which all ideas are welcome, and can compete with each other in the marketplace so that, hopefully, society can eventually choose the best ideas. As John Stuart Mill wrote in *On Liberty* (1859):

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of

> the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

While this optimistic view of the impact of public debate may seem unrealistic at this polarized time, it is nevertheless the assumption that underlies the protection of freedom of expression.

These two First Amendment values, the two major values discussed in the Supreme Court's cases, are both instrumental values. The First Amendment isn't an end in itself, but a means to an end. However, the First Amendment also serves the intrinsic value of helping each individual to achieve self-fulfillment and self-realization by allowing them to freely express their personality through speech. Self-fulfillment also can have an instrumental benefit as well because the hope is that by allowing this kind of individual freedom, creative minds will flourish, new ways of thinking will be encouraged, and all of society will benefit.

The Free Speech Clause also protects a variety of other values. It performs a checking value so that citizens can check governmental excess. If the government is doing something people believe is wrong, the First Amendment allows people to publicize that fact and start a movement to force the government to alter its behavior. It also has a safety valve function. The theory is that people will be less inclined to resort to violence to achieve their ends if they are free to express their ideas. It is also seen as a method of social control. It helps to strike a balance between the status quo and change because society discusses and debates new ideas before it implements them.

Last, but certainly not least, freedom of expression is seen as promoting tolerance as a basic democratic value. Free speech requires that we permit the expression of views with which we violently disagree. As a result, in theory, it makes us more tolerant. While in some periods of American history, the present being one of them, tolerance may seem like it is in short supply, it is nevertheless one of the objectives of the Free Speech Clause. As Justice Oliver Wendell Holmes, Jr. famously said in his dissent in *United States v. Schwimmer*, 279 U.S. 644 (1929), "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other," he wrote, "it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."

Beyond the philosophical underpinnings of the First Amendment, there is the doctrinal aspect. To resolve speech disputes, the Supreme Court has developed a complex set of doctrines to answer the question of whether a particular form of government regulation of speech is or is not constitutionally permissible. The first is the consideration of the content of the speech at issue since not all speech is created equal in First Amendment analysis. Some content categories are fully protected, some receive less protection, and others receive no protection at all and are described as unprotected categories.

Second, First Amendment doctrine considers the type of regulatory technique used by the government to limit speech with some techniques viewed as more harmful to speech interests than other techniques. For example, prohibiting prior restraints on publication so the speech doesn't reach an audience rather than subsequent punishment of speech is understood as one

of the central reasons for including protection for speech in the Bill of Rights. In addition, regulations that single out speech because of its content or viewpoint are rarely constitutional. By contrast, courts are more willing to permit government regulations that focus on non-speech aspects of expression as well as regulations that limit speech by channeling it by time, place, or manner, but do not suppress it completely.

The location of the speech also can play a role in the analysis. If the speech takes place on government property, the nature of that property matters. Some government property is property to which the public has a guaranteed right of access such as city sidewalks or public parks. Other property, such as a military base, is property the government is allowed seal off from use by the public for purposes of expression. Still other property owned by the government can be voluntarily opened up for purposes of some types of expression, creating a limited form of speech rights.

Other factors that can play a role in the analysis used by the courts are the identity of the speaker or the medium used to communicate the message. Some speakers have more free speech rights than others. Public school students while in school have only limited free speech rights as do government employees. Speech in a newspaper or on the internet is more protected than speech broadcast on radio or television.

When it comes to the type of speech at issue, which is the first unit of material and by far the longest unit, we have to answer questions including: what qualifies as speech under the First Amendment; if not all speech is protected by the first amendment, how is unprotected speech identified; if speech is protected, is all speech equally protected or does some speech get more protection than other speech based on its content; and, if speech is not absolutely protected, what government interests are sufficient to justify suppression of speech.

As you will see in the earliest Supreme Court First Amendment opinions, they involve challenges to federal law and not state law. The explanation for this limitation is that the text of the First Amendment refers to the fact that "Congress shall make no law." Originally the provisions in the Bill of Rights were viewed only as limits on the federal government and not the states. It was only after the adoption of the Fourteenth Amendment and the development of the incorporation doctrine that the First Amendment became applicable to the states through incorporation into the Fourteenth Amendment Due Process Clause. Freedom of speech was first assumed to be applicable to the states in *Gitlow v. New York* in 1925.

A. The Espionage Act and the Clear and Present Danger Test

The earliest free speech cases decided by the U.S. Supreme Court were challenges to convictions under the Espionage Act passed by Congress two months after United States entry into World War I. Convictions for violations of the Espionage Act as originally enacted in 2017 as well as 2018 amendments to the Espionage Act reached the Supreme Court after the war ended in a series of four cases decided in 2019. The first three decisions, *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States*, were by a unanimous Court, but the fourth case, *Abrams v. United States*, contained a famous dissent by Oliver Wendell Holmes, Jr. who wrote the majority opinion for the Court in the first three cases.

1. SCHENCK v. UNITED STATES
249 U.S. 47 (1919)

JUSTICE HOLMES delivered the opinion of the Court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917 a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20 the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c.; and there was a resolve that Comrade Schenck be allowed $ 125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office there for distribution. Other copies were proved to have been sent through the mails to drafted men. No reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of

the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, winding up "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the documents would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in § 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. Affirmed.

2. FROHWERK v. UNITED STATES
249 U.S. 204 (1919)

JUSTICE HOLMES delivered the opinion of the Court.

This an indictment in thirteen counts. The first alleges a conspiracy between the plaintiff in error and one Carl Gleeser, they then being engaged in the preparation and publication of a newspaper, the Missouri Staats Zeitung, to violate the Espionage Act of June 15, 1917. It alleges as overt acts the preparation and circulation of twelve articles in the said newspaper at different dates from July 6, 1917, to December 7 of the same year. The other counts allege attempts to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, by the same publications, each count being confined to the publication of a single date. Motion to dismiss and a demurrer on constitutional and other grounds, especially that of the First Amendment as to free speech, were overruled. There was a trial and Frohwerk

was found guilty. He was sentenced to a fine and to ten years imprisonment on each count, the imprisonment on the later counts to run concurrently with that on the first.

We think it necessary to add to what has been said in *Schenck v. United States* only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

We have decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion. So far as the language of the articles goes there is not much to choose between expressions to be found in them and those before us in *Schenck v. United States*. The first begins by declaring it a monumental and inexcusable mistake to send our soldiers to France, says that it comes no doubt from the great trusts, and later that it appears to be outright murder without serving anything practical; speaks of the unconquerable spirit and undiminished strength of the German nation, and characterizes its own discourse as words of warning to the American people. Next, on August 10, after deploring "the draft riots in Oklahoma and elsewhere" in language that might be taken to convey an innuendo of a different sort, it is said that the previous talk about legal remedies is all very well for those who are past the draft age and have no boys to be drafted, and the paper goes on to give a picture, made as moving as the writer was able to make it, of the sufferings of a drafted man, of his then recognizing that this country is not in danger and that he is being sent to a foreign land to fight in a cause that neither he nor any one else knows anything of, and reaching the conviction that this is but a war to protect some rich men's money. Who then, it is asked, will pronounce a verdict of guilty upon him if he stops reasoning and follows the first impulse of nature: self-preservation; and further, whether, while technically he is wrong in his resistance, he is not more sinned against than sinning; and yet again whether the guilt of those who voted the unnatural sacrifice is not greater than the wrong of those who now seek to escape by ill-advised resistance. There is much more to the general effect that we are in the wrong and are giving false and hypocritical reasons for our course, but the foregoing is enough to indicate the kind of matter with which we have to deal.

It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the Country is at war. It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed. But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out. Judgment affirmed.

3. DEBS v. UNITED STATES
249 U.S. 211 (1919)

JUSTICE HOLMES delivered the opinion of the Court.

This is an indictment under the Espionage Act of June 15, 1917, as amended by the Act of May 16, 1918. The [indictment] alleges that on or about June 16, 1918, at Canton, Ohio, the defendant caused and incited and attempted to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and with intent so to do delivered, to an assembly of people, a public speech, set forth. The fourth count alleges that he obstructed and attempted to obstruct the recruiting and enlistment service of the United States and to that end and with that intent delivered the same speech, again set forth. There was a demurrer to the indictment on the ground that the statute is unconstitutional as interfering with free speech, contrary to the First Amendment. The defendant was found guilty and was sentenced to ten years' imprisonment on each of the two counts, the punishment to run concurrently on both.

The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part of the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech. The speaker began by saying that he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class -- these being Wagenknecht, Baker and Ruthenberg, who had been convicted of aiding and abetting another in failing to register for the draft. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States.

After considerable discourse that it is unnecessary to follow, he took up the case of Kate Richards O'Hare, convicted of obstructing the enlistment service, praised her for her loyalty to socialism and otherwise, and said that she was convicted on false testimony. The defendant spoke of other cases, and then, after dealing with Russia, said that the master class has always declared the war and the subject class has always fought the battles -- that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and have never yet had a voice in declaring peace. "You have your lives to lose; you certainly ought to have the right to declare war if you consider a war necessary." The defendant next mentioned Rose Pastor Stokes, convicted of attempting to cause insubordination and refusal of duty in the military forces of the United States and obstructing the recruiting service. He said that she went out to render her service to the cause in this day of crises, and they sent her to the penitentiary for ten years; that she had said no more than the speaker had said that afternoon; that if she was guilty so

was he, and that he would not be cowardly enough to plead his innocence.

There followed personal experiences and illustrations of the growth of socialism, a glorification of minorities, and a prophecy of the success of the international socialist crusade, with the interjection that "you need to know that you are fit for something better than slavery and cannon fodder." The rest of the discourse had only the indirect though not necessarily ineffective bearing on the offences alleged that is to be found in the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens, attribution to plutocrats of the high price of coal, &c., with the implication running through it all that the working men are not concerned in the war, and a final exhortation "Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves." The defendant addressed the jury himself, and while contending that his speech did not warrant the charges said "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone." The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. It that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

The chief defense w[as] based upon the First Amendment, disposed of in *Schenck v. United States*. There was introduced also an "Anti-war Proclamation and Program" adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance. This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it "was instigated by the predatory capitalists in the United States." It alleged that the war of the United States against Germany could not "be justified even on the plea that it is a war in defense of American rights or American 'honor.'" It said "We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage." Its first recommendation was, "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power." Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind. Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained. Therefore it is less important to consider whether that upon the third count, for causing and attempting to cause insubordination, &c., in the military and naval forces, is equally impregnable. The jury were instructed that for the purposes of the statute the persons designated by the Act of May 18,

1917, registered and enrolled under it, and thus subject to be called into the active service, were a part of the military forces of the United States. The Government presents a strong argument from the history of the statutes that the instruction was correct. We see no sufficient reason for differing from the conclusion. Judgment affirmed.

4. ABRAMS v. UNITED STATES
250 U.S. 616 (1919)

JUSTICE CLARKE delivered the opinion of the Court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions so the Espionage Act of Congress. Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: In the first count, "disloyal, scurrilous and abusive language about the form of Government of the United States;" in the second count, language "intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;" and in the third count, language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired "when the United States was at war with the Imperial German Government, . . . unlawfully and wilfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the City of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf and of these, three frankly avowed that they were "rebels," "revolutionists," "anarchists," that they did not believe in government in any form, and they declared that they had no interest whatever in the government of the United States. The fourth defendant testified that he was a "socialist" and believed in "a proper kind of government, not capitalistic," but in his classification the Government of the United States was "capitalistic."

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that five thousand of them had been printed and distributed about the 22d day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams, under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed

and installed it in a basement room where the work was done at night. The circulars were distributed some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded "not guilty," and the case of the Government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled "Revolutionists Unite for Action," written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group, and for which Abrams assumed responsibility. Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established.

On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment. This contention is sufficiently discussed and is definitely negatived in *Schenck v. United States*.

The first of the two articles attached to the indictment is conspicuously headed, "The Hypocrisy of the United States and her Allies." After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our Government in general. Growing more inflammatory as it proceeds, the circular culminates in:

> "The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! "Yes! friends, there is only one enemy of the workers of the world and that is CAPITALISM." This is clearly an appeal to the "workers" of this country to arise and put down by force the Government of the United States which they characterize as their "hypocritical," "cowardly" and "capitalistic" enemy. It concludes: "Awake! Awake, you Workers of the World! "REVOLUTIONISTS."

The second of the articles was printed in the Yiddish language and in the translation is headed, "Workers -- Wake up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!", it continues: "Workers, Russian emigrants, you who had the least belief in the honesty of our Government" "must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war." The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war. It goes on: "With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom."

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily

involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they, hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians.

This is not an attempt to bring about a change of administration by candid discussion, for the manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them.

While the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our Government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe. The defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus it is clear that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment.

JUSTICE HOLMES dissenting.

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I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs* were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private

rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendants' words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government -- not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that in connection with the other elaborate provisions of the act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own

conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

JUSTICE BRANDEIS concurs with the foregoing opinion.

NOTE: *Masses Publishing Co. v. Patten* below is an influential opinion by Judge Learned Hand while he was a district court judge. It adopts a different approach to the First Amendment limits on the Espionage Act than the Supreme Court adopted in *Schenck* and the subsequent cases. While the opinion was reversed by the Second Circuit Court of Appeals and the Supreme Court did not initially adopt Judge Hand's analysis, in the year's ahead his reasoning in *Masses* had an influence on the Supreme Court's approach to the free speech issues raised by advocacy of lawlessness.

5. MASSES PUBLISHING CO. v. PATTEN
244 F. 535 (S.D.N.Y. 1917)

Learned Hand, District Judge.

The plaintiff applies for a preliminary injunction against the postmaster of New York to forbid his refusal to accept its magazine in the mails under the following circumstances: The plaintiff is a publishing company in the city of New York engaged in the production of a monthly revolutionary journal called "The Masses," containing both text and cartoons, each issue of which is ready for the mails during the first ten days of the preceding month. In July, 1917, the postmaster of New York, acting upon the direction of the Postmaster General, advised the plaintiff that the August number to which he had had access would be denied the mails under the Espionage Act of June 15, 1917. Though professing willingness to excerpt from the

number any particular matter which was objectionable in the opinion of the Postmaster General, the plaintiff was unable to learn any specification of objection, and thereupon filed this bill, and now applies for a preliminary injunction upon a statement of the facts.

Upon return of the rule to show cause the defendant, while objecting generally that the whole purport of the [issue] was in violation of the law, since it tended to produce a violation of the law, to encourage the enemies of the United States, and to hamper the government in the conduct of the war, specified four cartoons and four pieces of text as especially falling within the act.

In this case there is no dispute of fact which the plaintiff can successfully challenge except the meaning of the words and pictures in the magazine. As to these the query must be: What is the extreme latitude of the interpretation which must be placed upon them, and whether that extremity certainly falls outside any of the provisions of the act of June 15, 1917. Unless this be true, the decision of the postmaster must stand. It will be necessary, first, to interpret the law, and, next, the words and pictures.

It must be remembered at the outset that no question arises touching the war powers of Congress. Here is presented solely the question of how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered, but necessary to the existence of the state as such. If Congress has omitted repressive measures necessary to the safety of the nation and success of its great enterprise, the responsibility rests upon Congress and with it the power to remedy that omission.

Coming to the act itself, I turn directly to section 3 of title 1, which the plaintiff is said to violate. That section contains three provisions. The first is, in substance, that no one shall make any false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies. The defendant says that the cartoons and text of the magazine, constituting, as they certainly do, a virulent attack upon the war and those laws which have been enacted to assist its prosecution, may interfere with the success of the military forces of the United States. That such utterances may have the effect so ascribed to them is unhappily true; publications of this kind enervate public feeling at home which is their chief purpose, and encourage the success of the enemies of the United States abroad, to which they are generally indifferent. Dissension within a country is a high source of comfort and assistance to its enemies.

All this, however, is beside the question whether such an attack is a willfully false statement. That phrase properly includes only a statement of fact which the utterer knows to be false, and it cannot be maintained that any of these statements are of fact, or that the plaintiff believes them to be false. They are all within the range of opinion and of criticism; they are all certainly believed to be true by the utterer. As such they fall within the scope of that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority. The argument may be trivial in substance, and violent and perverse in manner, but so long as it is confined to abuse of existing policies or laws, it is impossible to class it as a false statement of facts of the kind here in question. To

modify this provision, so clearly intended to prevent the spreading of false rumors which may embarrass the military, into the prohibition of any kind of propaganda, honest or vicious, is to disregard the meaning of the language, established by legal construction and common use, and to raise it into a means of suppressing intemperate and inflammatory public discussion, which was surely not its purpose.

The next phrase relied upon is that which forbids any one from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The defendant's position is that to arouse discontent and disaffection among the people with the prosecution of the war and with the draft tends to promote a mutinous and insubordinate temper among the troops. This, too, is true; men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by a tyrannous disregard for the will of those who must suffer and die, will be more prone to insubordination than those who have faith in the cause and acquiesce in the means. Yet to interpret the word 'cause' so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument. It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper. Assuming that the power to repress such opinion may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the clearest expression of such a power justifies the conclusion that it was intended.

The defendant's position, therefore, in so far as it involves the suppression of the free utterance of abuse and criticism of the existing law, or of the policies of the war, is not, in my judgment, supported by the language of the statute. Yet there has always been a recognized limit to such expressions, incident indeed to the existence of any compulsive power of the state itself. One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. The defendant asserts not only that the magazine indirectly through its propaganda leads to a disintegration of loyalty and a disobedience of law, but that in addition it counsels and advises resistance to existing law, especially to the draft. The consideration of this aspect of the case more properly arises under the third phrase of section 3, which forbids any willful obstruction of the recruiting or enlistment service of the United States, but, as the defendant urges that the magazine falls within each phrase, it is as well to take it up now. To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it. Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement

to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.

It seems to me, however, quite plain that none of the language and none of the cartoons in this paper can be thought directly to counsel or advise insubordination or mutiny, without a violation of their meaning quite beyond any tolerable understanding. I come, therefore, to the third phrase of the section, which forbids any one from willfully obstructing the recruiting or enlistment service of the United States. Here again, however, since the question is of the expression of opinion, I construe the sentence, so far as it restrains public utterance, as I have construed the other two, and as therefore limited to the direct advocacy of resistance to the recruiting and enlistment service. If so, the inquiry is narrowed to the question whether any of the challenged matter may be said to advocate resistance to the draft, taking the meaning of the words with the utmost latitude which they can bear. As to the cartoons it seems to me quite clear that they do not fall within such a test. Certainly the nearest is that entitled "Conscription," and the most that can be said of that is that it may breed such animosity to the draft as will promote resistance and strengthen the determination of those disposed to be recalcitrant.[1] There is no intimation that, however hateful the draft may be, one is in duty bound to resist it, certainly none that such resistance is to one's interest. I cannot, therefore, even with the limitations which surround the power of the court, assent to the assertion that any of the cartoons violate the act.

The text offers more embarrassment. The poem to Emma Goldman and Alexander Berkman, at most, goes no further than to say that they are martyrs in the cause of love among nations.[2]

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[1] Professor's Note: In an appendix to the opinion, the Conscription cartoon is described in the following way: "The cartoon shows a cannon to the mouth of which is bound the naked figure of a youth, to the wheel that of a woman, marked 'Democracy,' and upon the carriage that of a man, marked 'Labor.' On the ground kneels a draped woman marked 'Motherhood' in a posture of desperation, while her infant lies on the ground. The import of this cartoon is obviously that conscription is the destruction of youth, democracy, and labor, and the desolation of the family. No one can dispute that it was intended to rouse detestation for the draft law."

[2] Professor's Note: The poem is called "A Tribute" and it is reprinted below:
Emma Goldman and Alexander Berkman
Are in prison,
Although the night is tremblingly beautiful
And the sound of water climbs down the rocks

Such a sentiment holds them up to admiration, and hence their conduct to possible emulation. The paragraph in which the editor offers to receive funds for their appeal also expresses admiration for them, but goes no further. The paragraphs upon conscientious objectors are of the same kind. They go no further than to express high admiration for those who have held and are holding out for their convictions even to the extent of resisting the law. It is plain enough that the paper has the fullest sympathy for these people, that it admires their courage, and that it presumptively approves their conduct. Moreover, these passages occur in a magazine which attacks with the utmost violence the draft and the war. That such comments have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain. Literally at least they do not, and while, as I have said, the words are to be taken, not literally, but according to their full import, the literal meaning is the starting point for interpretation. One may admire and approve the course of a hero without feeling any duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passages can be said to fall within the law. The question before me is: Could any reasonable man say, not that the indirect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft? I cannot think that upon such language any verdict would stand.

B. Criminal Anarchy and Criminal Syndicalism

After World War I and the Russian Revolution, the United States entered a period referred to as the "Red Scare." During the 1920s and 1930s, the federal government's reaction to radical political activity promoting Socialism and Communism was to deport large numbers of aliens. At the state level, two-thirds of the states passed criminal anarchy and criminal syndicalism laws. Criminal anarchy is the advocacy of the overthrow of the government by force or violence and criminal syndicalism is the advocacy of force or violence to change the system of industrial ownership or the political system. In 1925, in *Gitlow v. New York*, the Supreme Court upheld a conviction under New York's criminal anarchy statute and also indicated that the First Amendment protections for speech and press are presumably applicable to the states as well as the federal government.

And the breath of the night air moves through multitudes and multitudes of leaves
That love to waste themselves for the sake of the summer.
Emma Goldman and Alexander Berkman
Are in prison tonight,
But they have made themselves elemental forces, Like the water that climbs down the rocks;
Like the wind in the leaves;
Like the gentle night that holds us; They are working on our destinies;
They are forging the love of the nations; Tonight they lie in prison.

1. GITLOW v. NEW YORK
268 U.S. 652 (1925)

JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. The case is here on writ of error to the Supreme Court.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

> § 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.
>
> § 161. Advocacy of criminal anarchy. Any person who:
> 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . ,
> Is guilty of a felony and punishable by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue

which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation." There was no evidence of any effect resulting from the publication and circulation of the Manifesto. No witnesses were offered in behalf of the defendant.

Extracts from the Manifesto are set forth in the margin. Coupled with a review of the rise of Socialism, it condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism", based on "the class struggle" and mobilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action", for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat", the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg were cited as instances of a development already verging on revolutionary action and suggestive of proletarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government"; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

At the outset of the trial the defendant's counsel objected to the introduction of any evidence under the indictment on the grounds that "the statute is in contravention of" the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of evidence, to dismiss the indictment and direct an acquittal. These motions were also denied.

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere

statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising and advocacy of employing such unlawful acts for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

The precise question presented, and the only question which we can consider under this writ of error is whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that: "A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. . . ."

The Manifesto, plainly, is neither the statement of abstract doctrine nor mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society -- the struggle for these -- is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. Reasonably limited, this freedom is an inestimable privilege in a free

government; without such limitation, it might become the scourge of the republic. That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance -- not too trivial to be beneath the notice of the law -- which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute....And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is affirmed.

JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope given to the word 'liberty.' If I am right, then I think that the criterion sanctioned by the full Court in *Schenck v. United States* applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." In my opinion this criterion was departed from in *Abrams v. United States*, but the convictions that I expressed in that case are too deep for me to believe that it settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

Note: Two years after *Gitlow*, a unanimous Court in *Whitney v. California* upheld a conviction under California's criminal syndicalism statute. The behavior at issue was an effort to create the Communist Labor Party of America and the reasoning, like *Gitlow*, only required that the law not be arbitrary or unreasonable. *Whitney*, however, is best known for a concurring opinion by Justice Brandeis joined by Justice Holmes that is one of the most important explanations in a Supreme Court opinion of the value of free speech in the American system of government:

2. WHITNEY v. CALIFORNIA
274 U.S. 357 (1927)

JUSTICE BRANDEIS, concurring, joined by JUSTICE HOLMES.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail

over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; 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.

Fear of serious injury cannot alone justify suppressions of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.

Moreover, even imminent danger cannot justify resort to prohibition of these functions

essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.

C. Return to Clear and Present Danger

In *Gitlow* and *Whitney*, in upholding convictions under state criminal anarchy and criminal syndicalism statutes, the Court only required that the law not be arbitrary or unreasonable. That approach grew out of favor and the Court returned to using the clear and present danger test in a series of cases involving the Smith Act, a federal law enacted in 1940 that outlawed the knowing advocacy "of overthrowing or destroying any government in the United States by force or violence." The Smith Act was used extensively to prosecute leaders of the American Communist Party at the height of the Cold War between the United States and the Soviet Union. The case that marked the return to the clear and present danger test was *Dennis v. United States*. In *Denni*s, the Court adopted an interpretation of the clear and present danger test which required that "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Seeing the Communist Party (in the words of Justice Jackson's concurrence) as "a permanently organized, well-financed, semi-secret organization," the Court decided the danger was real and the threat imminent. Justices Black and Douglas dissented. Justice Douglas saw no evidence in the record to conclude the Party was a genuine threat, noting that they received less than 1% of the vote in recent elections.

DENNIS v. UNITED STATES
341 U.S. 494 (1951)

CHIEF JUSTICE VINSON announced the judgment of the Court and an opinion in which JUSTICES REED, BURTON, and MINTON join.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act. The indictment charged the petitioners with wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the Act.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. The Court of Appeals held that the record supports the following broad conclusions: that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties,

tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.

The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such power, but whether the means which it has employed conflict with the First and Fifth Amendments.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

But the statute in this case has resulted in convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech.

The basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

No important case involving free speech was decided by this Court prior to *Schenck v. United States*. That case involved a conviction under the Criminal Espionage Act. The question the Court faced was whether the evidence was sufficient to sustain the conviction. Writing for a

unanimous Court, Justice Holmes stated that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In *Gitlow v. New York*, the majority refused to apply the "clear and present danger" test to the specific utterance. Its reasoning was as follows: The "clear and present danger" test was applied to the utterance itself in *Schenck* because the question was merely one of sufficiency of evidence under an admittedly constitutional statute. *Gitlow*, however, presented a different question. There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was "reasonable." Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable. The only question remaining in the case became whether there was evidence to support the conviction, a question which gave the majority no difficulty. Justices Holmes and Brandeis refused to accept this approach, but insisted that wherever speech was the evidence of the violation, it was necessary to show that the speech created the "clear and present danger" of the substantive evil which the legislature had the right to prevent. Justices Holmes and Brandeis, then, made no distinction between a federal statute which made certain acts unlawful, the evidence to support the conviction being speech, and a statute which made speech itself the crime. Although no case subsequent to *Gitlow* has expressly overruled the majority opinion, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers of power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners

intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are affirmed.

D. Brandenburg v. Ohio: A New Approach to Advocacy of Lawlessness

After reviewing convictions under the Smith Act in a series of cases beginning with *Dennis*, the Supreme Court next addressed the issue of advocacy of illegal conduct in 1969 in a very different factual context. At issue was a conviction under Ohio's Criminal Syndicalism statute of a leader of a Ku Klux Klan group. In reversing the conviction and striking down the statute as a violation of the First Amendment, a unanimous Court abandoned the clear and present danger test and adopted a more speech protective approach.

1. BRANDENBURG v. OHIO
395 U.S. 444 (1969)

Members of the Court: CHIEF JUSTICE WARREN, and ASSOCIATE JUSTICES BLACK, DOUGLAS, HARLAN, BRENNAN, STEWART, WHITE, and MARSHALL.

PER CURIAM

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. § 2923.13. He was fined $ 1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> This is an organizers' meeting. We have had quite a few members here today which are -- we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida,

the other group to march into Mississippi. Thank you.

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494, 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. "The mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, cannot be supported, and that decision is therefore overruled.

JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, does not indicate

any agreement on the Court's part with the "clear and present danger" doctrine.

JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a caveat. . . .

The Court quite properly overrules *Whitney v. California,* which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow v. New York*:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

We have never been faithful to the philosophy of that dissent.

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test. When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. The threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous.

One's beliefs have long been thought to be sanctuaries which government could not invade. I think that all matters of belief are beyond the reach of subpoenas. The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.

2. HESS v. INDIANA
414 U.S. 105 (1973)

PER CURIAM (JUSTICES DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL voted to overturn Hess' conviction).

Gregory Hess appeals from his conviction in the Indiana courts for violating the State's disorderly conduct statute. Appellant contends that his conviction should be reversed because

the statute forbids activity that is protected under the First and Fourteenth Amendments and because the statute, as applied here, abridged his constitutionally protected freedom of speech. These contentions were rejected in the City Court, where Hess was convicted, and in the Superior Court, which reviewed his conviction. The Supreme Court of Indiana affirmed his conviction.

The events leading to Hess' conviction began with an antiwar demonstration on the campus of Indiana University. In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered. Hess was standing off the street as the sheriff passed him. The sheriff heard Hess utter the word "fuck" in what he later described as a loud voice and immediately arrested him on the disorderly conduct charge. It was later stipulated that what appellant had said was "We'll take the fucking street later," or "We'll take the fucking street again." Two witnesses who were in the immediate vicinity testified, apparently without contradiction, that they heard Hess' words and witnessed his arrest. They indicated that Hess did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area.

Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that "the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'" The words here did not fall within any of these "limited classes." In the first place, the Indiana court abjured any suggestion that Hess' words could be punished as obscene. By the same token, any suggestion that Hess' speech amounted to "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), could not withstand scrutiny. Even if under other circumstances this language could be regarded as a personal insult, the evidence is undisputed that Hess' statement was not directed to any person or group in particular. The sheriff stated that he did not interpret the expression as being directed personally at him, and the evidence is clear that appellant had his back to the sheriff at the time. Thus, under our decisions, the State could not punish this speech as "fighting words."

The Indiana Supreme Court placed primary reliance on the trial court's finding that Hess' statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech. Under our decisions, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Since the uncontroverted evidence showed that Hess' statement was not directed to

any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.'" Accordingly, the judgment of the Supreme Court of Indiana is reversed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

The Court's per curiam opinion rendered today aptly demonstrates the difficulties inherent in substituting a different complex of factual inferences for the inferences reached by the courts below. Since it is not clear to me that the Court has a sufficient basis for its action, I dissent.

The only "established" facts which emerge are that "Hess was standing off the street on the eastern curb of Indiana Avenue" and that he said, in the words of the trial court, "We'll take the fucking street later (or again)." The two female witnesses testified, as the majority correctly observes, that they were not offended by Hess' statement, that it was said no louder than statements by other demonstrators, "that Hess did not appear to be exhorting the crowd to go back into the street," that he was facing the crowd, and "that his statement did not appear to be addressed to any particular person or group."

The majority makes much of this "uncontroverted evidence," but I am unable to find anywhere in the opinion an explanation of why it must be believed. Surely the sentence "We'll take the fucking street later (or again)" is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd.

The majority also places great emphasis on appellant's use of the word "later," even suggesting that the statement "could be taken as counsel for present moderation." Whatever other theoretical interpretations may be placed upon the remark, there are surely possible constructions which would encompass more or less immediate and continuing action against the police. They should not be rejected because of an unexplained preference for other acceptable alternatives.

The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below. Since this is not the traditional function of any appellate court, and is surely not a wise or proper use of the authority of this Court, I dissent.

Chapter II: Unprotected Categories of Speech

Introduction

Beginning in 1942 in *Chaplinsky v. New Hampshire*, the Supreme Court has identified a number of categories of speech that receive no First Amendment protection. If speech falls within an unprotected category, the government is free to regulate it without needing to abide by First Amendment limitations. That original list of unprotected categories identified in *Chaplinsky* has not remained static. Some original categories have been given First Amendment protection and removed from the list, while other categories have been added to the list. In addition to changes in the list of unprotected categories, more recently the Court has altered the rationale for identifying a category of speech as unprotected. Despite these changes, the Court has not reconsidered the existence of unprotected categories of speech.

When the Supreme Court identifies an unprotected category such as the category of "fighting words" at issue in *Chaplinsky*, it also narrowly defines that category to avoid including speech that deserves protection. Therefore, if the government argues the speech for which a defendant is being punished is unprotected expression, the defendant will attempt to argue that the speech does not satisfy one or more of the elements needed to classify the speech as falling within an unprotected category.

A. Fighting Words

1. CHAPLINSKY v. NEW HAMPSHIRE
315 U.S. 568 (1942)

JUSTICE Murphy delivered the opinion for the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name.

The complaint charged that appellant in a certain public place in said city of Rochester did unlawfully repeat the words, addressed to the complainant, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists," the same being offensive, derisive and annoying words and names.

Appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled, and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

Over appellant's objection, the trial court excluded, as immaterial, testimony relating to appellant's treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below, which held that provocation would [not] constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." Freedom of worship is similarly sheltered.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. 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. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are 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.

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. The state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." It was further said:

> The word "offensive" is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which, by general consent, are "fighting words". . . . [S]uch words, as ordinary men know, are likely to cause a fight. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker -- including "classical fighting words," [and] words in current use less "classical" but equally likely to cause violence.

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense or mitigation are questions for the state court. Our function is a determination that the challenged statute, on its face and as applied, do not contravene the Fourteenth Amendment. Affirmed.

2. GOODING v. WILSON
405 U.S. 518 (1972)

JUSTICE BRENNAN delivered the opinion of the Court joined by DOUGLAS, STEWART, WHITE, and MARSHALL, JJ.

Appellee was convicted in Superior Court, Fulton County, Georgia, on two counts of using opprobrious words and abusive language in violation of Georgia Code Ann. § 26-6303, which provides: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." Appellee appealed the conviction to the Supreme Court of Georgia on the ground, among others, that the statute violated the First and Fourteenth Amendments because vague and overbroad. The Georgia Supreme Court rejected that contention and sustained the conviction. Appellee then sought federal habeas corpus relief in

the District Court for the Northern District of Georgia.[1] The District Court held that § 26-6303, on its face, was unconstitutionally vague and broad and set aside appellee's conviction. The Court of Appeals for the Fifth Circuit affirmed. We noted probable jurisdiction of the State's appeal. We affirm.

Section 26-6303 punishes only spoken words. It can therefore withstand appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. Only the Georgia courts can supply the requisite construction. It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

> Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its

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[1] The facts giving rise to the prosecutions are stated in the opinion of the Supreme Court of Georgia as follows:

> The defendant was one of a group of persons who, on August 18, 1966, picketed the building in which the 12th Corps Headquarters of the United States Army was located, carrying signs opposing the war in Viet Nam. When the inductees arrived at the building, these persons began to block the door so that the inductees could not enter. They were requested by police officers to move from the door, but refused to do so. The officers attempted to remove them from the door, and a scuffle ensued. There was ample evidence to show that the defendant committed assault and battery on the two police officers named in the indictment. There was also sufficient evidence of the use of the opprobrious and abusive words charged, and the jury was authorized to find from the circumstances shown by the evidence that the words were spoken without sufficient provocation, and tended to cause a breach of the peace.
>
> Count 3 of the indictment alleged that the accused did without provocation use to and of M. G. Redding and in his presence, the following abusive language and opprobrious words, tending to cause a breach of the peace: "White son of a bitch, I'll kill you." "You son of a bitch, I'll choke you to death." Count 4 alleged that the defendant did without provocation use to and of T. L. Raborn and in his presence, the following abusive language and opprobrious words, tending to cause a breach of the peace: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."

> vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights.

Coates v. City of Cincinnati, 402 U.S. 611, at 619-20 (1971) (opinion of WHITE, J.).

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Even as to such a class, however, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Appellant does not challenge these principles but contends that the Georgia statute is narrowly drawn to apply only to a constitutionally unprotected class of words - "fighting" words - "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." In *Chaplinsky*, we sustained a conviction under Chapter 378, § 2, of the Public Laws of New Hampshire, which provided: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ." Chaplinsky was convicted for addressing to another on a public sidewalk the words, "You are a God damned racketeer," and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Chaplinsky challenged the constitutionality of the statute as inhibiting freedom of expression because it was vague and indefinite. The Supreme Court of New Hampshire, however, "long before the words for which Chaplinsky was convicted," sharply limited the statutory language "offensive, derisive or annoying word" to "fighting" words:

> [N]o words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed . . . .
>
> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . .
>
> The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee . . . .

In view of that authoritative construction, this Court held: "We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free

expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish "fighting" words under carefully drawn statutes not also susceptible of application to protected expression. We reaffirm that proposition today.

Appellant argues that the Georgia appellate courts have by construction limited the proscription of § 26-6303 to "fighting" words, as the New Hampshire Supreme Court limited the New Hampshire statute. We have, however, made our own examination of the Georgia cases. That examination brings us to the conclusion, in agreement with the courts below, that the Georgia appellate decisions have not construed § 26-6303 to be limited in application, as in *Chaplinsky*, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."

The dictionary definitions of "opprobrious" and "abusive" give them greater reach than "fighting" words. Webster's Third New International Dictionary (1961) defined "opprobrious" as "conveying or intended to convey disgrace," and "abusive" as including "harsh insulting language." Georgia appellate decisions have construed § 26-6303 to apply to utterances that, although within these definitions, are not "fighting" words as *Chaplinsky* defines them. In *Lyons v. State*, a conviction under the statute was sustained for awakening 10 women scout leaders on a camp-out by shouting, "Boys, this is where we are going to spend the night." "Get the G__ d___ bed rolls out . . . let's see how close we can come to the G__ d___ tents." These were not words "which by their very utterance . . . tend to incite an immediate breach of the peace."

Georgia appellate decisions construing the reach of "tending to cause a breach of the peace" underscore that § 26-6303 is not limited to words that "naturally tend to provoke violent resentment." Indeed, the Georgia Court of Appeals in *Elmore v. State* construed "tending to cause a breach of the peace" as mere

> words of description, indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, can not actually then and there resent the same by a breach of the peace . . . .
>
> . . . Suppose that one, at a safe distance and out of hearing of any other than the person to whom he spoke, addressed such language to one locked in a prison cell or on the opposite bank of an impassable torrent, and hence without power to respond immediately to such verbal insults by physical retaliation, could it be reasonably contended that, because no breach of the peace could then follow, the statute would not be violated? . . .
>
> . . . [T]hough, on account of circumstances or obligations imposed by office, one may not be able at the time to assault and beat another on account of such language, it might still tend to cause a breach of the peace at some future time, when the person to whom it was addressed might be no longer hampered by physical inability, present

conditions, or official position.

Accordingly, we agree with the District Court that § 26-6303, as construed, does not define the standard of responsibility with requisite narrow specificity. We agree "[t]he fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application." Unlike the construction of the New Hampshire statute by the New Hampshire Supreme Court, the Georgia appellate courts have not construed § 26-6303 "so as to avoid all constitutional difficulties."

CHIEF JUSTICE BURGER, dissenting.

I fully join in MR. JUSTICE BLACKMUN'S dissent against the bizarre result reached by the Court. The statute at bar does not prohibit language "tending to cause a breach of the peace." Nor does it prohibit the use of "opprobrious words or abusive language" without more. Rather, it prohibits use "to or of another, and in his presence [of] opprobrious words or abusive language, tending to cause a breach of the peace." If words are to bear their common meaning, and are to be considered in context, rather than dissected with surgical precision using a semantic scalpel, this statute has little potential for application outside the realm of "fighting words" that this Court held beyond the protection of the First Amendment in *Chaplinsky*. Indeed, the language used by the *Chaplinsky* Court to describe words properly subject to regulation bears a striking resemblance to that of the Georgia statute, which was enacted many, many years before *Chaplinsky* was decided. The statute, as its language so clearly indicates, is aimed at preventing precisely that type of personal, face-to-face, abusive and insulting language likely to provoke a violent retaliation - self-help, as we euphemistically call it - that the *Chaplinsky* case recognized could be validly prohibited. The facts of the case now before the Court demonstrate that the Georgia statute is serving that valid and entirely proper purpose. There is no persuasive reason to wipe the statute from the books, unless we want to encourage victims of such verbal assaults to seek their own private redress.

JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

It seems strange, indeed, that in this day a man may say to a police officer, who is attempting to restore access to a public building, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death," and say to an accompanying officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," and yet constitutionally cannot be prosecuted and convicted under a state statute that makes it a misdemeanor to "use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . ." This, however, is precisely what the Court pronounces as the law today.

The Supreme Court of Georgia, when the conviction was appealed, unanimously held the other way. Surely any adult who can read should reasonably expect no other conclusion. The words of Georgia Code 26-6303 are clear. They are also concise. They are not, in my view, overbroad or incapable of being understood.

The Court reaches its result by saying that the Georgia statute has been interpreted by the State's courts so as to be applicable in practice to otherwise constitutionally protected speech. It follows, says the Court, that the statute is overbroad and therefore is facially unconstitutional and to be struck down in its entirety. Thus Georgia apparently is to be left with no valid statute on its books to meet Wilson's bullying tactic. This result, achieved by what is indeed a very strict construction, will be totally incomprehensible to the State of Georgia, to its courts, and to its citizens.

I wonder, now that § 26-6303 is voided, just what Georgia can do if it seeks to proscribe what the Court says it still may constitutionally proscribe. The natural thing would be to enact a new statute reading just as § 26-6303 reads. But it, too, presumably would be overbroad unless the legislature would add words to the effect that it means only what this Court says it may mean and no more. See Criminal Code of Georgia § 26-2610 (1969).

For me, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), was good law when it was decided and deserves to remain as good law now. A unanimous Court, including among its members Chief Justice Stone and Justices Black, Reed, DOUGLAS, and Murphy, obviously thought it was good law. But I feel that by decisions such as this one, the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*. As the appellee states in a footnote to his brief, "Although there is no doubt that the state can punish 'fighting words' this appears to be about all that is left of the decision in *Chaplinsky*." The Court has painted itself into a corner from which it, and the States, can extricate themselves only with difficulty.

POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

B. True Threats

1. WATTS v. UNITED STATES
394 U.S. 705 (1969)

PER CURIAM. [For CHIEF JUSTICE WARREN and JUSTICES BLACK, DOUGLAS, BRENNAN and MARSHALL.]

After a jury trial, petitioner was convicted of violating a 1917 statute which prohibits any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . ." The incident which led to petitioner's arrest occurred on August 27, 1966, during a public rally on the Washington Monument grounds. The crowd broke up into small discussion groups and petitioner joined a gathering to discuss police brutality. Most of those in the group were quite young, either in their teens or early twenties. Petitioner, who was 18 years old, entered into the discussion after one member of the group suggested that the young people present should get more education before expressing their views. According to an investigator for the Army Counter Intelligence Corps who was present, petitioner responded: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my

physical this Monday. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." "They are not going to make me kill my black brothers." On the basis of this statement, the jury found that petitioner had committed a felony by knowingly and willfully threatening the President. The Court of Appeals affirmed. We reverse.

At the close of the Government's case, petitioner's counsel moved for a judgment of acquittal. He contended that there was "absolutely no evidence on the basis of which the jury would be entitled to find that [petitioner] made a threat against the life of the President." He stressed the fact that petitioner's statement was made during a political debate, that it was expressly made conditional upon an event—induction into the Armed Forces—which petitioner vowed would never occur, and that both petitioner and the crowd laughed after the statement was made. He concluded, "Now actually what happened here was a very crude offensive method of stating a political opposition to the President. He was saying, I don't want to shoot black people because I don't consider them my enemy, and if they put a rifle in my hand it is the people that put the rifle in my hand, as symbolized by the President, who are my real enemy." We hold that the trial judge erred in denying this motion.

Certainly the statute under which petitioner was convicted is constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence. Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

The statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "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." *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964). The language of the political arena is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

The petition for a writ of certiorari are granted and the judgment of the Court of Appeals is reversed. The case is remanded with instructions that it be returned to the District Court for entry of a judgment of acquittal.

JUSTICE DOUGLAS, concurring.

While our Alien and Sedition Laws were in force, John Adams, President of the United States, en route from Philadelphia, Pennsylvania, to Quincy, Massachusetts, stopped in Newark, New Jersey, where he was greeted by a crowd and by a committee that saluted him by firing a cannon. A bystander said, "There goes the President and they are firing at his ass." Luther

Baldwin was indicted for replying that he did not care "if they fired through his ass." He was convicted in the federal court for speaking "sedicious words tending to defame the President and Government of the United States" and fined, assessed court costs and expenses, and committed to jail until the fine and fees were paid. The Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever.

Yet the present statute has hardly fared better. Convictions under 18 U. S. C. § 871 have been sustained for displaying posters urging passersby to "hang [President] Roosevelt"; for declaring that "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself"; for declaring that "Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell, and if I had the power I would put him there." Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution.

JUSTICE FORTAS, with whom JUSTICE HARLAN joins, dissenting.

The Court holds, without hearing, that this statute is constitutional and that it is here wrongly applied. Neither of these rulings should be made without hearing, even if we assume that they are correct. Perhaps this is a trivial case because of its peculiar facts and because the petitioner was merely given a suspended sentence. That does not justify the Court's action. It should induce us to deny certiorari, not to adjudicate the difficult questions that it presents.

2. VIRGINIA v. BLACK
538 U.S. 343 (2003)

JUSTICE O'CONNOR delivered the opinion of the Court in Parts I, II, and III joined by REHNQUIST, STEVENS, SCALIA, and BREYER JJ. and a concurring opinion in Parts IV and V joined by REHNQUIST, STEVENS, and BREYER, JJ.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

I
Respondent Barry Black [was] convicted of violating Virginia's cross-burning statute, §18.2—423. That statute provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a

person or group of persons.

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see wha[t] [was] going on" from the lawn of her in-laws' house.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." The speakers "talked real bad about the blacks and the Mexicans." One speaker told the assembled gathering that "he would love to take a .30/.30 and just random[ly] shoot the blacks." The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to … the black people." Sechrist testified that this language made her "very …scared."

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden … went up in a flame." As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel "awful" and "terrible."

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." Black responded, "I guess I am because I'm the head of the rally." The sheriff then told Black, "[T]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this."

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of §18.2—423. At his trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." When Black objected to this last instruction on First Amendment grounds, the prosecutor responded that the instruction was "taken straight out of the [Virginia] Model Instructions." The jury found Black guilty, and fined him $2,500.

II

Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan. The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far

different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process. Soon the Klan imposed "a veritable reign of terror" throughout the South. The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure." In response, Congress passed what is now known as the Ku Klux Klan Act. President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon's book into the movie The Birth of a Nation in 1915, the association between cross burning and the Klan became indelible. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. . . . The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things."

After a cross burning in Suffolk, Virginia during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization." These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. Typically, a cross burning would start with a prayer by the "Klavern" minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang The Old Rugged Cross. Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

III

The protections afforded by the First Amendment are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. The First Amendment permits "restrictions upon the content of speech in a few limited areas, which 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.'"

Thus, for example, we have held that fighting words–"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"–are generally proscribable under the First Amendment. See *Chaplinsky v. New Hampshire*. Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio* (1969). And the First Amendment also permits a State to ban a "true threat."

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so.

Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a

signal of impending violence. Thus, a State may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is proscribable under the First Amendment.

IV

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "'would create an unacceptable risk of the suppression of ideas.'" The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute–and potentially convict–somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "[b]urning a cross at a political rally would almost certainly be protected expression." Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission.

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my

power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand.

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, concurring in the judgment.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression. I disagree that any exception should save Virginia's law from unconstitutionality.

THOMAS, J., dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred and the profane. I believe that cross burning is the paradigmatic example of the latter.

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban … cross burning carried out with intent to intimidate," I believe that the majority errs in imputing an expressive component to the activity in question. In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

"In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.'"

> Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States.....
>
> In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims a well-grounded fear of physical violence....

It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests. Because I would uphold the validity of this statute, I respectfully dissent.

C. How to Identify Unprotected Categories

1. UNITED STATES v. STEVENS

559 U.S. 460 (2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court joined by STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ.

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.

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.

"[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." 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."

"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." These "historic and traditional categories long familiar to the bar," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, 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 (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." 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.'"

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," 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,'" 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."

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.

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.'" *Chaplinsky*. The Government derives its proposed test from these descriptions in our precedents.

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. We [have] grounded [our] analysis in a previously recognized, long-established category of unprotected speech.

Our decisions 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.

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.

Note: The Court in *Stevens* goes on to invalidate the federal statute using the overbreadth doctrine, one analytic technique that applies to a protected category of speech. The remaining part of the opinion will be included in a later chapter dealing with overbreadth. However, in the opinions below, *Brown v. Entertainment Merchants Assoc.* and *United States v. Alvarez*, the edited versions of the opinions include both the discussion of whether the speech is or is not protected as well as the analysis of the constitutionality of the statutes once the Court determines that the speech is protected. In those parts of the opinions, the Court applies the strict scrutiny test that applies to content-based regulations to strike down the statutes.

2. BROWN v. ENTERTAINMENT MERCHANTS ASSOCIATION
564 U.S. 786 (2011)

JUSTICE SCALIA delivered the opinion of the Court joined by KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ.

California Assembly Bill 1179 (2005) 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." Violation of the Act is punishable by a civil fine of up to $1,000.

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. The Court of Appeals affirmed, and we granted certiorari.

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." 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." 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.

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." There are of course exceptions. These limited areas—such as obscenity, incitement, and fighting words—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

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. We held that statute to be an impermissible restriction on speech. There was no American tradition of forbidding the depiction of animal cruelty—though States have long had laws against committing it. That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation. That does not suffice. The obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct."

The California Act 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." No doubt a State possesses legitimate power to protect children from harm, 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."

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 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." Cinderella's evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

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. ("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. And Golding's Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered by other children while marooned on an island.

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. 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."

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. The State must specifically identify an "actual problem" in need of solving and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible."

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, 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 California's burden is much higher, and because it bears the risk of uncertainty, 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. 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. 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. And he admits that the same effects have been found when children watch cartoons starring Bugs Bunny or the Road

Runner, or when they play video games like Sonic the Hedgehog that are rated "E" (appropriate for all ages), or even when they "vie[w] a picture of a gun."

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. 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 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.

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 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. 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.

3. UNITED STATES v. ALVAREZ
567 U.S. 709 (2012)

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join.

Lying was his habit. Xavier Alvarez lied when he said that he played hockey for the Detroit

Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005.

In 2007, respondent attended his first meeting as a board member of the Three Valley Water District Board. He introduced himself as follows: "I'm a retired marine of 25 years. I retired in 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." None of this was true. For all the record shows, respondent's statements were but a pathetic attempt to gain respect. The statements do not seem to have been made to secure employment or financial benefits or privileges reserved for those who earned the Medal.

Respondent's claim to hold the Congressional Medal of Honor was false. On this premise, respondent violated §704(b); and, because the lie concerned the Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are as follows:

> (b) False Claims About Receipt of Military Decorations or Medals.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.
>
> (c) Enhanced Penalty for Offenses Involving Congressional Medal of Honor.—
>
> (1) In General.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal. It argues that false statements "have no First Amendment value in themselves," and thus "are protected only to the extent needed to avoid chilling fully protected speech." Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot save the statute.

"[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." As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid."

In light of the substantial threats to free expression posed by content-based restrictions, this Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits." Instead, content-based restrictions on speech have been permitted only when confined to the few "historic and traditional categories [of expression] long familiar to the bar." Among these

categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain. These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.

The Government disagrees with this proposition. It cites language from some of this Court's precedents to support its contention that false statements have no value and hence no First Amendment protection. These isolated statements in some earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

The Government gives three examples of regulations on false speech that courts generally have found permissible: first, the criminal prohibition of a false statement made to a Government official; second, laws punishing perjury; and third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government. These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.

The federal statute prohibiting false statements to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context. The same point can be made about perjury statutes. It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony "is at war with justice" because it can cause a court to render a "judgment not resting on truth." Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system. Testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others. Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself. Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech.

As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true

speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected.

Although the First Amendment stands against any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified . . . in our case law." Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.

The probable, and adverse, effect of the Act on freedom of expression illustrates the reasons for the Law's distrust of content-based speech prohibitions. The Act by its terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. Still, the sweeping reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, Nineteen Eighty-Four (1949). Were this law to be sustained, there could be an endless list of subjects the government could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, it is well established that the Government may restrict speech without affronting the First Amendment. But the Stolen Valor Act is not so limited. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has applied the "most exacting scrutiny." Although the objectives the Government seeks to further by the statute are not without significance, the Court must find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals "serve the important public function

of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and also "'foste[r] morale, mission accomplishment and esprit de corps' among service members." These interests are related to the integrity of the military honors system in general, and the Congressional Medal of Honor in particular. The Medal, which is the highest military award for valor against an enemy force, has been given just 3,476 times. The Government's interest in protecting the integrity of the Medal of Honor is beyond question.

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. Although appearing to concede that "an isolated misrepresentation by itself would not tarnish the meaning of military honors," the Government asserts it is "common sense that false representations have the tendency to dilute the value and meaning of military awards." It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal.

Yet these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. The Government points to no evidence that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. As one of the amici notes "there is nothing that charlatans can do to stain [the Medal winners'] honor." This general proposition is sound, even if true holders of the Medal might experience anger and frustration.

The lack of a causal link between the Government's interest and the Act is not the only way in which the Act is not necessary to achieve the Government's interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him "Alvarez was perceived as a phony." Once the lie was made public, he was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation. There is good reason to believe that a similar fate would befall other false claimants. Indeed, the outrage and contempt expressed for respondent's lies can serve to reinforce the public's respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right.

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. See *Whitney v. California* (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to

avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States* (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

The American people do not need a government prosecution to express their high regard for military heroes. Only a weak society needs government intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this. The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government "concluded that such a database would be impracticable and insufficiently comprehensive." Without more explanation, it is difficult to assess the Government's claim, especially when at least one database of Congressional Medal of Honor winners already exists.

One of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech. The Stolen Valor Act infringes upon speech protected by the First Amendment.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, concurring in the judgment.

I agree with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. But I do not rest my conclusion upon a strict categorical analysis. Rather, I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways. . . .

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal

recipients and their families. By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.

Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value. Consistent with this recognition, many kinds of false factual statements have long been proscribed without "'rais[ing] any Constitutional problem.'" Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.

We have also described as falling outside the First Amendment's protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment's adoption. The right to freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement, even though that tort did not enter our law until the late 19th century. And the Court concluded that the free speech right allows recovery for the even more modern tort of false-light invasion of privacy.

In line with these holdings, it has long been assumed that the First Amendment is not offended by criminal statutes with no close common-law analog. The most well known of these is probably 18 U. S. C. §1001, which makes it a crime to "knowingly and willfully" make any "materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Still other statutes make it a crime to falsely represent that one is speaking on behalf of, or with the approval of, the Federal Government. There are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern.

These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own right. Respondent and others who join him in attacking the Stolen Valor Act take a different view. Respondent's brief features a veritable paean to lying. According to respondent, his lie about the Medal of Honor was nothing out of the ordinary for 21st-century Americans. "Everyone lies," he says. "We lie all the time." "[H]uman beings are constantly forced to choose the persona we present to the world, and our choices nearly always involve intentional omissions and misrepresentations, if not outright deception." An academic amicus tells us that the First Amendment protects the right to construct "self-aggrandizing fabrications such as having been awarded a military decoration."

This radical interpretation of the First Amendment is not supported by any precedent of this Court. The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment's scope. I now turn to that question.

While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to "exten[d] a measure of strategic protection" to these statements in order to ensure

sufficient "'breathing space'" for protected speech. Thus, to prevent the chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity. This same requirement applies when public officials and figures seek to recover for intentional infliction of emotional distress. These requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech.

These examples by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection. There are broad areas in which any attempt to penalize false speech would present a grave danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.

Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged. Today's accepted wisdom sometimes turns out to be mistaken. And in these contexts, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times Co. v. Sullivan*, 376 U. S. 254, 279, n. 19 (1964) (quoting J. Mill, On Liberty 15 (R. McCallum ed. 1947)).

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, the potential for abuse of power in these areas is simply too great.

In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk that valuable speech will be suppressed. The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect. The Stolen Valor Act is a narrow law enacted to address an important problem, and it presents no threat to freedom of expression.

Chapter III: Profanity and Libel

In *Chaplinsky v. New Hampshire*, profanity and libel were included in the list of unprotected categories which included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." In *Cohen v. California*, 403 U.S. 15 (1971), profanity gained First Amendment protection, at least when used to communicate a political message. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), generally recognized to be one of the most important free speech cases decided by the Supreme Court, libel in some circumstances received free speech protection. Prior to the *New York Times* case, states were free to design their own libel laws without any free speech limitations. Over time, the Court applied the First Amendment to other tort actions where liability also had free speech consequences.

A. Profanity

COHEN v. CALIFORNIA
403 U.S. 15 (1971)

JUSTICE HARLAN delivered the opinion of the Court joined by DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ."[1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

> On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a

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[1] The statute provides in full:

"Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court."

> jacket bearing the words `Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.
>
> The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket." We now reverse.

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does not present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places.

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety

and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this

sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," and why "so long as the means are peaceful, the communication need not meet standards of acceptability."

Against this perception of the constitutional policies involved, we discern more particularized considerations that call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Finally, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

JUSTICE BLACKMUN, with whom CHIEF JUSTICE BURGER and JUSTICE BLACK join, and JUSTICE WHITE joins in part, dissenting.

Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench.

B. Libel

NEW YORK TIMES CO. v. SULLIVAN
376 U.S. 254 (1964)

JUSTICE BRENNAN delivered the opinion for a unanimous 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.

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. 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 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. . . .

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery.

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.

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. 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. 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.

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. 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. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." 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."

Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive." 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." 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 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, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded.

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. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence

to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect." We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing 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 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.

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. 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. 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 matter 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.

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." 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.

JUSTICE BLACK, with whom 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." 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.

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. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public

officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $ 5,600,000, and five such suits against the Columbia Broadcasting System seeking $ 1,700,000. 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. Stopgap measures like those the Court adopts are in my judgment not enough.

JUSTICE GOLDBERG, with whom JUSTICE DOUGLAS joins, concurring.

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." 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.

C. Post-Sullivan Libel Cases

New York Times v. Sullivan left many issues unresolved. It didn’t decide if First Amendment limits applied to criminal libel actions as well as civil actions, it didn’t define the category of public officials subject to the *New York Times* rule, and it didn’t discuss whether the rule applied to anyone beyond public officials, to name three important unresolved issues. These issues were the subject of future Supreme Court cases. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court extended the protections of the *New York Times* decision to criminal libel prosecutions. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court addressed the issue of who qualified as a public official:

> Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear that the “public official” designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

In 1967, in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the Court extended the New York Times rule to also apply to public figures, defined as persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." However, in *Gertz v. Robert Welch, Inc.*, the Court adopted a lesser First Amendment standard to apply to libel actions brought by private persons involved in issues of public concern.

1. GERTZ v. ROBERT WELCH, INC.
418 U.S. 323 (1974)

JUSTICE POWELL delivered the opinion of the Court joined by STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen.

I
In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of Officer Nuccio. In March 1969 respondent published the resulting article under the title "FRAME-UP: Richard Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the

1968 Democratic Convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harrasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen.

Following the jury verdict [in favor of Gertz] and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict.

Petitioner appealed to contest the applicability of the *New York Times* standard to this case. The Court of Appeals for the Seventh Circuit agreed with the District Court that respondent could assert the constitutional privilege. After reviewing the record, the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. For the reasons stated below, we reverse.

II

Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This extension was announced in *Curtis Publishing Co. v. Butts* and its companion, *Associated Press v. Walker*, 388 U.S. 130, 162 (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game between their respective schools. Walker involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni

association and Walker had resigned from the Army, neither could be classified as a "public official." Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."

III

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty."

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy."

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law

rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media

are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Such a case is not now before us, and we intimate no view as to its proper resolution.

IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of

liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

V

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited

range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand.

CHIEF JUSTICE BURGER, dissenting.

The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition -- the right to counsel -- would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" or as an "ambulance chaser." I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict and the entry of an appropriate judgment on that verdict.

JUSTICE DOUGLAS, dissenting.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

JUSTICE BRENNAN, dissenting.

Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the disputed article with knowledge of its falsity or with reckless

disregard of the truth, I would affirm the judgment of the Court of Appeals.

JUSTICE WHITE, dissenting.

For some 200 years -- from the very founding of the Nation -- the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because the view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment, the Court has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. The decision is an ill-considered exercise of the power entrusted to this Court, particularly when the Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court decides.

Note: After *Gertz*, the Supreme Court addressed one further circumstance in which a libel action can be brought, a situation where, unlike in *Gertz*, the subject of the libel is not a matter of public concern. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985), the plurality opinion provided this description of the facts:

> Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities.

In its decision, after balancing the competing interests, including the lesser First Amendment interest in private concern speech, the Court concluded that a libel action where the content of the libel is not a matter of public concern is not governed by *Gertz*. Instead, states are free to apply state libel law without any First Amendment limitations so that presumed and punitive damages can be awarded without satisfying the actual malice standard.

Having reached the conclusion that *Gertz* did not apply to private concern speech, the Court then considered "whether petitioner's credit report involved a matter of public concern":

> We have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. . . .Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U. S., at 270.

The Court addressed one other important issue in *Dun & Bradstreet*. A majority, consisting of Justices Brennan, Marshall, Blackman, and Stevens, the four Justices who dissented from the conclusion that *Gertz* did not apply, together with Justice White, rejected the argument that Gertz only applied "to cases in which the defendant is a 'media' entity." Instead the majority concluded that First Amendment protection did not depend on the identity of the speaker:

> Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

D. Other Torts

1. HUSTLER MAGAZINE v. FALWELL
485 U.S. 46 (1988)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after

actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody -- not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "The freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole." We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. As Justice Holmes wrote, "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market."

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Justice Frankfurter put it succinctly when he said that "one of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks."

Of course, this does not mean that any speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan*, we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false

or with reckless disregard of whether it was false or not." False statements of fact are particularly valueless; they interfere with the truthseeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate" and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.'" This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability.

Here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. In respondent's view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." The appeal of the political cartoon or caricature is often based on exploration of unfortunate physical traits or politically embarrassing events -- an exploration often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words: "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters."

Despite their sometimes caustic nature, from the early cartoon portraying George Washington

as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," and we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here.

2. SNYDER v. PHELPS
562 U.S. 443 (2011)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

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
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.

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 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. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. 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.

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.

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church in the United States District Court. 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.

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 elements of those torts. 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. 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. The District Court remitted the punitive damages award to $2.1 million, but left the jury verdict otherwise intact. In the Court of Appeals, Westboro's primary argument was that the First Amendment fully protected Westboro's speech. The Court of Appeals agreed. 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. The Free Speech Clause of the First Amendment 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 (1988).[1]

Whether the First Amendment prohibits holding Westboro liable for its speech turns largely on whether that speech is of public or private concern. "[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, 758-59 (1985). 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 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."

"'[N]ot all speech is of equal First Amendment importance,'" and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. 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.

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," 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."

Our opinion in *Dun & Bradstreet* provides an example of speech of only private concern. In that case we held that information about a particular individual's credit report "concerns no public issue." The content of the report "was speech solely in the individual interest of the

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[1] The dissent attempts to draw parallels between this case and hypothetical cases involving defamation or fighting words. 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.'"

speaker and its specific business audience." That was confirmed by the fact that the report was sent to only five subscribers to the reporting service, who were bound not to disseminate it.

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.'" As in other First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" 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." 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." 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 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 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," and the funeral setting does not alter that conclusion.

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." 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.

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views 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." "[W]e have repeatedly referred to public streets as the archetype of a traditional public forum."

That said, "[e]ven protected speech is not equally permissible in all places and at all times." Maryland now has a law imposing restrictions on funeral picketing, as do 43 other States and the Federal Government. 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.[2]

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 simply because society finds the idea itself offensive or disagreeable." 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."

The jury was instructed 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." 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. 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." What Westboro said, in the 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.

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

III

The jury also found Westboro liable for the state law torts of intrusion upon seclusion and civil conspiracy. Snyder argues that 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. 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."

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. 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 interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here.

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."

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 compliance with the guidance of local officials. The speech was planned to coincide with Matthew Snyder's funeral, but did not 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.

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. Albert Snyder is not a public figure. He is simply a parent whose son 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 deprived him of that elementary right. They launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.

Respondents 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.

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 jurisdictions permit recovery in tort for the intentional infliction of emotional distress (or IIED).

This is a narrow tort with requirements that "are difficult to satisfy." Although the elements of the tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here. Instead, they maintained that the First Amendment gave them a license to engage in such conduct. They are wrong. 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 (1942). When grave injury is intentionally inflicted by means of an attack like the one here, the First Amendment should not interfere with recovery.

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. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain.

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.

Exploitation of a funeral for the purpose of attracting public attention "intrud[es] upon their grief," and may permanently stain their memories of the 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.

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 dissent.

Chapter IV: Obscenity and Child Pornography

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), obscenity was listed as an unprotected category. While it has remained unprotected, the early Supreme Court obscenity cases were focused on how to define the category. In *Roth v. United States*, the Court began the process of defining obscenity, but in subsequent cases a majority of the Court could not agree on a definition. However, in 1973 in *Miller v. California*, the Court crafted a definition that remains the current method of defining obscenity.

A. Obscenity

1. ROTH v. UNITED STATES
354 U.S. 476 (1957)

Brennan, J., delivered the opinion of the Court, in which Frankfurter, Burton, Clark and Whittaker, JJ., joined. Warren, C.J., filed a an opinion concurring in the judgment. Harlan, J., filed a dissenting opinion. Douglas, J., filed a dissenting opinion, in which Black, J., joined.

JUSTICE BRENNAN delivered the opinion of the Court.

The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth*, the primary constitutional question is whether the federal obscenity statute violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." In *Alberts*, the primary constitutional question is whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.

The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-57 (1942): "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. These

include the lewd and obscene. It has been well observed that such utterances are 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." We hold that obscenity is not within the area of constitutionally protected speech or press.

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.,* in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*, [1868] L. R. 3 Q. B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity. . . .

We hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give adequate notice of what is prohibited.

2. MILLER v. CALIFORNIA
413 U.S. 15 (1973)

CHIEF JUSTICE BURGER delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem."

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2 (a), a misdemeanor, by knowingly distributing obscene matter, and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed."

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

Since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In *Roth v. United States*, 354 U.S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

> All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-57: "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. These include the lewd and obscene. It has been well observed that such utterances are 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." We hold that obscenity is not within the area of constitutionally protected speech or press.

Nine years later, in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition: "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "utterly without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.*, that the material was "utterly without redeeming social value" -- a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the "utterly without redeeming social value" test had any meaning at all.

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test. But now the *Memoirs* test has been abandoned as unworkable by its author, and no Member of the Court today supports the *Memoirs* formulation.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. "The First and Fourteenth Amendments have never been treated as absolutes." We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic,

political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*; that concept has never commanded the adherence of more than three Justices at one time. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may attempt to provide positive guidance to federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us

to adopt a convenient "institutional" rationale -- an absolutist, "anything goes" view of the First Amendment -- because it will lighten our burdens. "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day.

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs*. This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency," it was to apply "contemporary community standards of the State of California."

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards or to the instructions of the trial judge on "statewide" standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether

certain materials are obscene as a matter of fact.

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin v. New York*, 383 U.S. 502 (1966), primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person–or indeed a totally insensitive one. We hold that the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate. Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

Today we leave open the way for California to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

The Court has worked hard to define obscenity and concededly has failed. My Brother STEWART in *Jacobellis* commented that the difficulty of the Court in giving content to obscenity was that it was "faced with the task of trying to define what may be indefinable."

Today we would add a new three-pronged test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Those are the standards we ourselves have written into the Constitution. Yet how under these vague tests can we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since "obscenity" is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from "the press" which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated "obscene" publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done

by constitutional amendment after full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime -- whether the old standards or the new ones are used -- the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication.

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

JUSTICE BRENNAN, with whom JUSTICES STEWART and MARSHALL join, dissenting.

In my dissent in *Paris Adult Theatre I v. Slaton*, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Paris Adult Theatre I*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face. "The transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" I would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion.

3. PARIS ADULT THEATER I v. SLATON
413 U.S. 49 (1973)

On the same day as the Court decided *Miller*, it also decided *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973). In that case, the Court made clear that expert testimony is not required to show that material is obscene if the material itself is introduced into evidence. It also held that the state can prohibit displays of obscenity even if the audience is limited to consenting adults. The Court stated, “We categorically disapprove the theory . . . that obscene, pornographic

films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." Instead, the Court identified a number of state interests, beyond protecting juveniles and unconsenting adults, for regulating obscenity including "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."

Justice Brennan dissented in *Paris Adult Theater*. In his opinion, he announced that he had changed his view of obscenity in the 16 years since the Court decided *Roth v. United States*:

> No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 16 years ago in *Roth v. United States*, 354 U. S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

The "significant departure" Justice Brennan referred to was, in essence, to remove obscenity from the list of unprotected categories, while allowing regulation of obscenity as protected speech in situations where the government could show both a compelling interest, such as protecting juveniles and unconsenting adults, and the use of constitutional means:

> After 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," *Jacobellis v. Ohio*, 378 U.S. 187, 197 (1964) (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.
>
> While I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented

materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

Note: Only a year after it decided *Miller* and *Paris Adult Theater*, the issue of obscenity was back before the Court in *Jenkins v. Georgia*. In its decision, the Supreme Court overturned a conviction for showing the film "Carnal Knowledge" in a movie theater in Georgia. The film starred Jack Nicholson, Art Garfunkel, Ann-Margret, Candice Bergen, and Rita Moreno and was written by Jules Feiffer and directed by Mike Nichols. It was nominated for two Academy Awards and Ann-Margret won a Golden Globe for Best Supporting Actress. Despite the film's pedigree and the fact that it did not "depict sexual conduct in a patently offensive way," the jury convicted the defendant of distributing obscene material. In its decision overturning the conviction, the Court clarified the choices available to the states in applying the community standards aspect of *Miller* and made clear that there was a role for appellate courts in reviewing obscenity convictions even if the trial judge instructed the jury to apply the correct legal standard.

4. JENKINS v. GEORGIA
418 U.S. 153 (1974)

Rehnquist, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, and Powell, JJ., joined. Douglas, J., filed a statement concurring in the result. Brennan, J., filed an opinion concurring in the result, in which Stewart and Marshall, JJ., joined.

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant was convicted in Georgia of the crime of distributing obscene material. His conviction, in March 1972, was for showing the film "Carnal Knowledge" in a movie theater in Albany, Georgia. The jury that found appellant guilty was instructed on obscenity pursuant to the Georgia statute, which defines obscene material in language similar to that of the definition of obscenity set forth in this Court's plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966): "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

We conclude here that the film "Carnal Knowledge" is not obscene under the constitutional standards announced in *Miller v. California*, 413 U.S. 15 (1973), and that the First and Fourteenth Amendments therefore require that the judgment of the Supreme Court of Georgia affirming appellant's conviction be reversed.

Appellant was the manager of the theater in which "Carnal Knowledge" was being shown.

While he was exhibiting the film on January 13, 1972, local law enforcement officers seized it pursuant to a search warrant. Appellant was later charged by accusation with the offense of distributing obscene material. After his trial in the Superior Court of Dougherty County, the jury, having seen the film and heard testimony, returned a general verdict of guilty on March 23, 1972. Appellant was fined $ 750 and sentenced to 12 months' probation. He appealed to the Supreme Court of Georgia which affirmed the judgment of conviction on July 2, 1973. That court stated that the definition of obscenity contained in the Georgia statute was "considerably more restrictive" than the new test set forth in the recent case of *Miller v. California*, and that the First Amendment does not protect the commercial exhibition of "hard core" pornography. Appellant then appealed to this Court and we noted probable jurisdiction.

We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

We now turn to the question of whether appellant's exhibition of the film was protected by the First and Fourteenth Amendments. There is little to be found in the record about the film "Carnal Knowledge" other than the film itself. However, appellant has supplied a variety of information and critical commentary, the authenticity of which appellee does not dispute. The film appeared on many "Ten Best" lists for 1971, the year in which it was released. Many but not all of the reviews were favorable. We believe that the following passage from a review which appeared in the Saturday Review is a reasonably accurate description of the film:

> [It is basically a story] of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy. As the "safer" one of the two, he is selected by Susan for marriage. The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with something of a past. "Why don't we shack up?" she suggests. They do and a horrendous relationship ensues. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and

Garfunkel tries once more. And later, even more foolishly, again.

Appellee contends essentially that under *Miller* the obscenity of the film "Carnal Knowledge" was a question for the jury, and that the jury having resolved the question against appellant, and there being some evidence to support its findings, the judgment of conviction should be affirmed. We turn to the language of *Miller* to evaluate appellee's contention.

Miller states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient' it would be unrealistic to require that the answer be based on some abstract formulation . . . . To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility." We held in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), decided on the same day, that expert testimony as to obscenity is not necessary when the films at issue are themselves placed in evidence.

But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," but we made it plain that under that holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct."

We also took pains in *Miller* to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced," that is, the requirement of patent offensiveness. These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.

Our own viewing of the film satisfies us that "Carnal Knowledge" could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the "patently offensive" element of those standards, nor is

there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.

Appellant's showing of the film "Carnal Knowledge" is simply not the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which we said was punishable in *Miller*. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia.

B. Child Pornography

Nine years after *Miller*, in *New York v. Ferber*, 458 U.S. 747 (1982), the Court identified a new category of sexually explicit speech, child pornography, but the definition of that category differs from the definition of obscenity adopted in *Miller* as does the justification for classifying the category as unprotected. In recent years, federal and state prosecutions have focused on child pornography rather than obscenity.

1. NEW YORK v. FERBER
458 U.S. 747 (1982)

JUSTICE WHITE delivered the opinion of the Court joined by BURGER, C.J. and POWELL, REHNQUIST, and O'CONNOR, JJ.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I
In recent years, the exploitative use of children in the production of pornography has become a serious national problem. The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene. New York is one of the 20. In 1977, the New York Legislature enacted Article 263 of its Penal Law. N. Y. Penal Law, Art. 263 (McKinney 1980). Section 263.05 criminalizes as a class C felony the use of a child in a sexual performance:

> A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

A "[sexual] performance" is defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." § 263.00(1). "Sexual conduct" is in turn defined in § 263.00(3): "'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."

A performance is defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." § 263.00(4).

At issue in this case is § 263.15, defining a class D felony:

> A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

To "promote" is also defined:

> Promote means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

This case arose when Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. Ferber was indicted on two counts of violating § 263.10 and two counts of violating § 263.15, the two New York laws controlling dissemination of child pornography. After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under § 263.15, which did not require proof that the films were obscene. Ferber's convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court.

The New York Court of Appeals reversed, holding that § 263.15 violated the First Amendment. We granted the State's petition for certiorari, presenting the single question:

"To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?"

II

The Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in § 263.10, which follows the guidelines enunciated in *Miller v. California*, 413 U.S. 15 (1973), constitutes the appropriate line dividing protected from unprotected

expression by which to measure a regulation directed at child pornography.

The Court of Appeals' assumption was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children. We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.

The *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the "sensibilities of unwilling recipients" from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

First. It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York*, 390 U.S. 629 (1968), we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, 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. Indeed, there 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. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting

products requires a visible apparatus of distribution. 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. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions.

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value." We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.

Third. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not, protected by the First Amendment often depends on the

content of the speech." When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.

We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection.

O'CONNOR, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined. BLACKMUN, J., concurred in the result. STEVENS, J., filed an opinion concurring in the judgment. These opinions are omitted.

2. ASHCROFT v. FREE SPEECH COALITION
535 U.S. 234 (2002)

JUSTICE KENNEDY delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined.

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251 et seq., abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber*, which distinguished child pornography from other sexually explicit

speech because of the State's interest in protecting the children exploited by the production process. As a general rule, pornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*. *Ferber* recognized that "[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. Like the law in *Ferber*, the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.

I

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors. The CPPA retains that prohibition and adds three other prohibited categories of speech, of which the first, § 2256(8)(B), and the third, § 2256(8)(D), are at issue in this case. Section 2256(8)(B) prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition on any "visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated sexual intercourse."

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." Under these rationales, harm flows from the content of the images, not from the means of their production.

In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it.

Respondents do challenge § 2256(8)(D). Like the text of the "appears to be" provision, the sweep of this provision is quite broad. Section 2256(8)(D) defines child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." One Committee Report identified the provision as directed at sexually explicit images pandered as child pornography. The statute is not so limited in its reach, however, as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court for the Northern District of California. The Coalition, a California trade association for the adult-entertainment industry, alleged that its members did not use minors in their sexually explicit works, but they believed some of these materials might fall within the CPPAs expanded definition of child pornography. The other respondents are Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images. Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment.

II

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.

Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech.

As a general principle, the First Amendment bars the government from dictating what we see

or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA.

As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. The CPPA extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea–that of teenagers engaging in sexual activity–that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes, teenage sexual activity and the sexual abuse of children, have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. Shakespeare may not have written sexually explicit scenes for the Elizabethean audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, Traffic, which was nominated for Best Picture. The film portrays a teenager, identified as a 16 year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, American Beauty won the Academy Award for Best Picture. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound,

and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation."

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "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." Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

The Government says these indirect harms are sufficient because child pornography rarely can be valuable speech. This argument, however, suffers from two flaws. First, *Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The

second flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value, but relied on virtual images–the very images prohibited by the CPPA–as an alternative and permissible means of expression: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized."

III

The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*. The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U. S. 105, 108 (1973) (*per curiam*). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*).There is here no attempt, incitement, solicitation, or conspiracy. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. Here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted."

In sum, § 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is unconstitutional.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins in part, dissenting.

Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so. Serious First Amendment concerns would arise were the Government ever to prosecute someone for simple distribution or possession of a film with literary or artistic value, such as Traffic or American Beauty. I write separately, however, because the Child Pornography Prevention Act of 1996 need not be construed to reach such materials.

We normally do not strike down a statute on First Amendment grounds "when a limiting

instruction has been or could be placed on the challenged statute." This case should be treated no differently.

Other than computer generated images that are virtually indistinguishable from real children engaged in sexually explicitly conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPAs definition of "sexually explicit conduct" is quite explicit in this regard. It makes clear that the statute only reaches "visual depictions" of: "[A]ctual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person."

The Court suggest[s] that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to "simulated" intercourse. Read as a whole, however, I think the definition reaches only the sort of "hard core of child pornography" that we found without protection in *Ferber*. So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depictions, and thus fall outside the purview of the statute.

This narrow reading of "sexually explicit conduct" not only accords with the text of the CPPA and the intentions of Congress; it is exactly how the phrase was understood prior to the broadening gloss the Court gives it today. Indeed, had "sexually explicit conduct" been thought to reach the sort of material the Court says it does, then films such as Traffic and American Beauty would not have been made the way they were. Traffic won its Academy Award in 2001. American Beauty won its Academy Award in 2000. But the CPPA has been on the books, and has been enforced, since 1996. The chill felt by the Court has apparently never been felt by those who actually make movies.

In sum, while potentially impermissible applications of the CPPA may exist, I doubt that they would be "substantial in relation to the statute's plainly legitimate sweep." The aim of ensuring the enforceability of our Nation's child pornography laws is a compelling one. The CPPA is targeted to this aim by extending the definition of child pornography to reach computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.

Chapter V: Commercial Speech

In the same year that the Supreme Court decided *Chaplinsky v. New Hampshire*, it also decided *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which it ruled that commercial advertising was not entitled to First Amendment protection. In a number of cases, the Court limited that holding, but it wasn't until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the Court finally abandoned that view. While that case recognized there was some measure of protection for commercial speech, the Court did not specify all of the elements of that protection or identify a standard to apply to challenges to the regulation of commercial speech. Those developments only occurred in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980).

1. VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC.

425 U.S. 748 (1976)

MR. JUSTICE BLACKMUN delivered the opinion of the Court, in which BURGER, C.J. and BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ, joined.

The plaintiff-appellees in this case attack, as violative of the First and Fourteenth Amendments that portion of § 54-524.35 of Code Ann. which provides that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he "(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for any drugs which may be dispensed only by prescription."

Inasmuch as only a licensed pharmacist may dispense prescription drugs in Virginia, advertising or other affirmative dissemination of prescription drug price information is effectively forbidden in the State. Some pharmacies refuse even to quote prescription drug prices over the telephone. The Board's position, however, is that this would not constitute an unprofessional publication. It is clear, nonetheless, that all advertising of such prices, in the normal sense, is forbidden.

The present, and second, attack on the statute is one made not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim that they would greatly benefit if the prohibition were lifted and advertising freely allowed. The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations. Their claim is that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond "the cost of 40 Achromycin tablets ranges from $2.59 to $6.00, a difference of 140%," and that in the Newport News-Hampton area the cost

of tetracycline ranges from $1.20 to $9.00, a difference of 650%.

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech "'necessarily protects the right to receive.'" And in *Procunier v. Martinez*, 416 U.S. 396 (1974), where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine v. Chrestensen*, 316 U.S. 52 (1942), the Court upheld a New York statute that prohibited the distribution of any "handbill, circular. . . or other advertising matter whatsoever in or upon any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed "no such restraint on government as respects purely commercial advertising." Further support for a "commercial speech" exception to the First Amendment may perhaps be found in *Breard v. Alexandria*, 341 U.S. 622 (1951), where the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. Since the decision in *Breard*, however, the Court has never denied protection on the ground that the speech in issue was "commercial speech."

Last Term, in *Bigelow v. Virginia*, 421 U.S. 809 (1975), the notion of unprotected "commercial speech" all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen*'s continued validity was questioned, and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." We concluded that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," and we observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."

Some fragment of hope for the continuing validity of a "commercial speech" exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. We noted that in announcing the availability of legal abortions in New York, the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" Indeed, we observed: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money.

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection.

Our question is whether speech which does "no more than propose a commercial transaction" is so removed from any "exposition of ideas" and from "'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" that it lacks all protection. Our answer is that it is not.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Indisputably, the State has a strong interest in maintaining that professionalism.

Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. Such services are time consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business. It is also claimed that prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will inflate the cost of drugs. It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention - and certainly the practice of monitoring - impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.

The strength of these proffered justifications is greatly undermined by the fact that high

professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject. And this case concerns the retail sale by the pharmacist more than it does his professional standards. Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his license. At the same time, we cannot discount the Board's justifications entirely.

The challenge now made, however, is based on the First Amendment. It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way.

What is at issue is whether a State may completely suppress the dissemination of concededly

truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.

MR. JUSTICE REHNQUIST, dissenting.

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise. In coming to this conclusion, the Court has overruled a legislative determination that such advertising should not be allowed and has done so on behalf of a consumer group which is not directly disadvantaged by the statute in question. This effort to reach a result which the Court obviously considers desirable is a troublesome one, for two reasons. It extends standing to raise First Amendment claims beyond the previous decisions of this Court. It also extends the protection of that Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.

2. CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION
447 U.S. 557 (1980)

JUSTICE POWELL delivered the opinion of the Court joined by BURGER, C.J. and STEWART, WHITE, and MARSHALL, JJ.

The case presents the question whether a regulation of the Public Service Commission of the state of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I
In December 1973, the Commission, appeals here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter."

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses "into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commissioner's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing powerplants. And since oil dealers are not under the Commissioner's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption.

The Commission's order explicitly permitted "informational" advertising designed to encourage "shifts of consumption" from peak demand times to periods of low electricity demand. Information advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria."

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost, the Commission feared that additional power would be priced below the actual cost of generation. The additional electricity would be subsidized by all consumers through generally higher rates. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments. The Commission's order was upheld by the trial court and at the intermediate appellate level. The New York Court of Appeals affirmed. It found little value to advertising in "the noncompetitive market in which electric corporations operate." Since consumers "have no choice regarding the source of their electric power," the court denied that "promotional advertising of electricity might contribute to society's interest in `informed and reliable' economic decisionmaking." The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We now reverse.

II

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. *Virginia Pharmacy Board v. Virginia*

Citizens Consumer Council, 425 U. S. 748, 762 (1976). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In *Virginia Pharmacy Board*, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted that "[t]he advertising ban does not directly affect professional standards one way or the other."

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising. The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

The reasoning falls short of establishing that apellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago. Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses— even regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly services at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising. Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission

argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness. The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major

improvement in electric heating, and the use of electric heat as a "backup" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the Court that the Public Service Commission's ban on promotional advertising of electricity by public utilities is inconsistent with the First and Fourteenth Amendments. I concur only in the Court's judgment, however, because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech. I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's

four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

I agree with the Court that, in today's world, energy conservation is a goal of paramount national and local importance. I disagree with the Court, however, when it says that suppression of speech may be a permissible means to achieve that goal. The Court recognizes that we have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised. Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated.

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. As the Court recognizes, the State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them.

If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. Our cases indicate that this guarantee applies even to commercial speech. We have not suggested that the "commonsense differences" between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech. The differences articulated by the Court justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion. No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

Because "commercial speech" is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. The issue in this case is whether New York's prohibition on the promotion of the use of electricity through advertising is a ban on nothing but commercial speech.

In my judgment one of the two definitions the Court uses in addressing that issue is too broad and the other may be somewhat too narrow. The Court first describes commercial speech as

"expression related solely to the economic interests of the speaker and its audience." Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is unquestionably too broad.

The Court's second definition refers to "'speech proposing a commercial transaction.'" A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept. Presumably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, I am persuaded that it should not include the entire range of communication that is embraced within the term "promotional advertising."

This case involves a governmental regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions. It prohibits all advocacy of the immediate or future use of electricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders. The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.

The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not justify the suppression of speech.

In sum, I concur in the result because I do not consider this to be a "commercial speech" case. Accordingly, I see no need to decide whether the Court's four-part analysis, adequately protects commercial speech—as properly defined— in the face of a blanket ban of the sort involved in this case.

MR. JUSTICE REHNQUIST, dissenting.

The Court's analysis in my view is wrong in several respects. Initially, I disagree with the

Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a "no more extensive than necessary" analysis that will unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

In concluding that appellant's promotional advertising constitutes protected speech, the Court reasons that speech by electric utilities is valuable to consumers who must decide whether to use the monopoly service or turn to an alternative energy source, and if they decide to use the service how much of it to purchase. The Court in so doing "assume[s] that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." The Court's analysis ignores the fact that the monopoly here is entirely state-created and subject to an extensive state regulatory scheme from which it derives benefits as well as burdens.

While this Court has stated that the "capacity [of speech] for informing the public does not depend upon the identity of its source," the source of the speech nevertheless may be relevant in determining whether a given message is protected under the First Amendment. When the source of the speech is a state-created monopoly such as this, traditional First Amendment concerns, if they come into play at all, certainly do not justify the board interventionist role adopted by the Court today.

The extensive regulations governing decisionmaking by public utilities suggest that for purposes of First Amendment analysis, a utility is far closer to a state-controlled enterprise than is an ordinary corporation. Accordingly, I think a State has broad discretion in determining the statements that a utility may make in that such statements emanate from the entity created by the State to provide important and unique public services. And a state regulatory body charged with the oversight of these types of services may reasonably decide to impose on the utility a special duty to conform its conduct to the agency's conception of the public interest. Thus I think it is constitutionally permissible for it to decide that promotional advertising is inconsistent with the public interest in energy conservation. I also think New York's ban on such advertising falls within the scope of permissible state regulation of an economic activity by an entity that could not exist in corporate form, say nothing of enjoy monopoly status, were it not for the laws of New York.

This Court has previously recognized that although commercial speech may be entitled to First Amendment protection, that protection is not as extensive as that accorded to the advocacy of ideas. "We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to

government regulation, and other varieties of speech.

The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner v. New York*, 198 U. S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies. I had thought by now it had become well established that a State has broad discretion in imposing economic regulations.

The Court today holds not only that commercial speech is entitled to First Amendment protection, but also that when it is protected a State may not regulate it unless its reason for doing so amounts to a "substantial" governmental interest, its regulation "directly advances" that interest, and its manner of regulation is "not more extensive than necessary" to serve the interest. The test adopted by the Court thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has, by labeling economic regulation of business conduct as a restraint on "free speech," gone far to resurrect the discredited doctrine of cases such as *Lochner*. New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

An ostensible justification for striking down New York's ban on promotional advertising is that this Court has previously "rejected the `highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .'" Whatever the merits of this view, I think the Court has carried its logic too far here.

The view apparently derives from the Court's frequent reference to the "marketplace of ideas," which was deemed analogous to the commercial market in which a laissez-faire policy would lead to optimum economic decisionmaking under the guidance of the "invisible hand." See, *e.g.,* Adam Smith, Wealth of Nations (1776). This notion was expressed by Mr. Justice Holmes in his dissenting opinion in *Abrams v. United States*, 250 U. S. 616, 630 (1919), wherein he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market. Indeed, many types of speech have been held to fall outside the scope of the First Amendment, thereby subject to governmental regulation, despite this Court's references to a marketplace of ideas. See, *e.g.*, *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942) (fighting words); *Roth v. United States*, 354 U. S. 476 (1957) (obscenity). And as this Court stated in *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 344, n. 9 (1974): "Of course, an opportunity for rebuttal seldom

suffices to undo [the] harm of a defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie." The Court similarly has recognized that false and misleading commercial speech is not entitled to any First Amendment protection.

The above examples illustrate that in a number of instances government may constitutionally decide that societal interests justify the imposition of restrictions on the free flow of information. When the question is whether a given commercial message is protected, I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted state restriction on such speech when the restriction is designed to promote a concededly substantial state interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by utilities. Nor do I think there is any basis for concluding that individual citizens of the State will recognize the need for and act to promote energy conservation to the extent the government deems appropriate, if only the channels of communication are left open. Thus, even if I were to agree that commercial speech is entitled to some First Amendment protection, I would hold here that the State's decision to ban promotional advertising, in light of the substantial state interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its citizens.

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U. S. 748 (1976). The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Pharmacy Board*. For in the world of political advocacy and its marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "caveat emptor." But since "fraudulent speech" in this area is to be remediable under *Virginia Pharmacy Board*, the remedy of one defrauded is a lawsuit or an agency proceeding based on common-law notions of fraud that are separated by a world of difference from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Pharmacy Board*, and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will

undoubtedly have to relearn many years hence.

Note: Part four of the four-part *Central Hudson* test requires that the regulation of commercial speech be "no more extensive than necessary to further the State's interest." In a subsequent case, *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989), the Court made clear that the "no more extensive than necessary" element of the test did not require the government to use the "least restrictive alternative."

3. CITY OF CINCINNATI v. DISCOVERY NETWORK, INC.
507 U.S. 410 (1993)

JUSTICE STEVENS delivered the opinion of the Court joined by BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ.

Motivated by its interest in the safety and attractive appearance of its streets and sidewalks, the city of Cincinnati has refused to allow respondents to distribute their commercial publications through freestanding newsracks located on public property. The question presented is whether this refusal is consistent with the First Amendment. In agreement with the District Court and the Court of Appeals, we hold that it is not.

I
Respondent Discovery Network, Inc., is engaged in the business of providing adult educational, recreational, and social programs to individuals in the Cincinnati area. It advertises those programs in a free magazine that it publishes nine times a year. Although these magazines consist primarily of promotional material pertaining to Discovery's courses, they also include some information about current events of general interest. Approximately one-third of these magazines are distributed through the 38 newsracks that the city authorized Discovery to place on public property in 1989.

Respondent Harmon Publishing Company, Inc., publishes and distributes a free magazine that advertises real estate for sale at various locations throughout the United States. The magazine contains listings and photographs of available residential properties in the greater Cincinnati area, and also includes some information about interest rates, market trends, and other real estate matters. In 1989, Harmon received the city's permission to install 24 newsracks at approved locations. About 15% of its distribution in the Cincinnati area is through those devices.

In March 1990, the city's Director of Public Works notified each of the respondents that its permit to use dispensing devices on public property was revoked, and ordered the newsracks removed within 30 days. Each notice explained that respondent's publication was a "commercial handbill" within the meaning of the Municipal Code and therefore § 714-23 of the code prohibited its distribution on public property. Respondents then commenced this litigation in the United States District Court for the Southern District of Ohio.

II
There is no claim in this case that there is anything unlawful or misleading about the contents

of respondents' publications. Moreover, respondents do not challenge their characterization as "commercial speech." Nor do respondents question the substantiality of the city's interest in safety and esthetics. It was, therefore, proper for the District Court and the Court of Appeals to judge the validity of the city's prohibition under the standards we set forth in *Central Hudson*. It was the city's burden to establish a "reasonable fit" between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests.

There is ample support in the record for the conclusion that the city did not "establish the reasonable fit we require." The ordinance on which it relied was an outdated prohibition against the distribution of any commercial handbills on public property. It was enacted long before any concern about newsracks developed. Its apparent purpose was to prevent the kind of visual blight caused by littering, rather than any harm associated with permanent, freestanding dispensing devices. The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition. The benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place was considered "minute" by the District Court and "paltry" by the Court of Appeals. We share their evaluation of the "fit" between the city's goal and its method of achieving it.

In seeking reversal, the city argues that it is wrong to focus attention on the relatively small number of newsracks affected by its prohibition, because the city's central concern is with the overall number of newsracks on its sidewalks, rather than with the unattractive appearance of a handful of dispensing devices. It contends, first, that a categorical prohibition on the use of newsracks to disseminate commercial messages burdens no more speech than is necessary to further its interest in limiting the number of newsracks; and, second, that the prohibition is a valid "time, place, and manner" regulation because it is content neutral and leaves open ample alternative channels of communication. We consider these arguments in turn.

III

The city argues that there is a close fit between its ban on newsracks dispensing "commercial handbills" and its interests in safety and esthetics because every decrease in the number of such dispensing devices necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape. In the city's view, the prohibition is thus entirely related to its legitimate interests in safety and esthetics.

We accept the validity of the city's proposition, but consider it an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, and have only a minimal impact on the overall number of newsracks on the city's sidewalks. The major premise supporting the city's argument is the proposition that commercial speech has only a low value. Based on that premise, the city contends that the fact that assertedly more valuable publications are allowed to use newsracks does not undermine its judgment that its esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public.

We cannot agree. In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech. This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category. For respondents' publications share important characteristics with the publications that the city classifies as "newspapers." Particularly, they are "commercial handbills" within the meaning of § 714-1-C of the city's code because they contain advertising, a feature that apparently also places ordinary newspapers within the same category. Presumably, respondents' publications do not qualify as newspapers because an examination of their content discloses a higher ratio of advertising to other text, such as news and feature stories, than is found in the exempted publications. Indeed, Cincinnati's City Manager has determined that publications that qualify as newspapers and therefore can be distributed by newsrack are those that are published daily and/or weekly and "primarily present coverage of, and commentary on, current events."

We have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech -- "that is, expression related solely to the economic interests of the speaker and its audience." In *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989), we described the category more narrowly, by characterizing the proposal of a commercial transaction as "the test for identifying commercial speech." Under the *Fox* test it is clear that much of the material in ordinary newspapers is commercial speech and, conversely, that the editorial content in respondents' promotional publications is not what we have described as "core" commercial speech. There is no doubt a "commonsense" basis for distinguishing between the two, but under both the city's code and our cases the difference is a matter of degree.

Nevertheless, for the purpose of deciding this case, we assume that all of the speech barred from Cincinnati's sidewalks is what we have labeled "core" commercial speech and that no such speech is found in publications that are allowed to use newsracks. We nonetheless agree with the Court of Appeals that Cincinnati's actions in this case run afoul of the First Amendment. Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests.

The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing "newspapers" or "commercial handbills," is equally unattractive. While there was some testimony in the District Court that commercial publications are distinct from noncommercial publications in their capacity to proliferate, the evidence of such was exceedingly weak. As we have explained, the city's primary concern, as argued to us, is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault. In fact, the newspapers are arguably the greater culprit because of their

superior number.

Cincinnati has not asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech. Here, the city contends that safety concerns and visual blight may be addressed by a prohibition that distinguishes between commercial and noncommercial publications that are equally responsible for those problems.

In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing. Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the "fit" between its goals and its chosen means that is required.

Cincinnati has enacted a sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech. As did the District Court and the Court of Appeals, we conclude that Cincinnati has failed to justify that policy. The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests that Cincinnati has asserted are unrelated to any distinction between "commercial handbills" and "newspapers." Cincinnati's categorical ban on the distribution, via newsrack, of "commercial handbills" cannot be squared with the dictates of the First Amendment.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE THOMAS join, dissenting.

Concerned about the safety and esthetics of its streets and sidewalks, the city of Cincinnati decided to do something about the proliferation of newsracks on its street corners. Pursuant to an existing ordinance prohibiting the distribution of "commercial handbills" on public property, the city ordered respondents Discovery Network, Inc., and Harmon Publishing Company, Inc., to remove their newsracks from its sidewalks within 30 days. Respondents publish and distribute free of charge magazines that consist principally of commercial speech. Together their publications account for 62 of the 1,500-2,000 newsracks that clutter Cincinnati's street corners. Because the city chose to address its newsrack problem by banning only those newsracks that disseminate commercial handbills, rather than regulating all newsracks (including those that disseminate traditional newspapers) alike, the Court holds that its actions violate the First Amendment to the Constitution. I believe this result is inconsistent with prior precedent.

I agree with the Court that the city's prohibition against respondents' newsracks is properly

analyzed under *Central Hudson*, but differ as to the result this analysis should produce. This case turns on the application of the last part of the *Central Hudson* analysis. Although the Court does not say so, there can be no question that Cincinnati's prohibition against respondents' newsracks "directly advances" its safety and esthetic interests because, if enforced, the city's policy will decrease the number of newsracks on its street corners. This leaves the question whether the city's prohibition is "more extensive than necessary" to serve its interests or whether there is a "reasonable fit" between the city's desired ends and the means it has chosen to accomplish those ends. Because the city's "commercial handbill" ordinance was not enacted specifically to address the problems caused by newsracks, and, if enforced, the city's prohibition against respondents' newsracks would result in the removal of only 62 newsracks from its street corners, the Court finds "ample support in the record for the conclusion that the city did not establish [a] reasonable fit." I disagree.

The relevant inquiry is not the degree to which the locality's interests are furthered in a particular case, but rather the relation that the challenged regulation of commercial speech bears to the "overall problem" the locality is seeking to alleviate. Properly viewed, the city's prohibition against respondents' newsracks is directly related to its efforts to alleviate the problems caused by newsracks, since every newsrack that is removed from the city's sidewalks marginally enhances the safety of its streets and esthetics of its cityscape. This conclusion is not altered by the fact that the city has chosen to address its problem by banning only those newsracks that disseminate commercial speech, rather than regulating all newsracks alike. Our commercial speech cases establish that localities may stop short of fully accomplishing their objectives without running afoul of the First Amendment.

If (as I am certain) Cincinnati may regulate newsracks that disseminate commercial speech based on the interests it has asserted, I am at a loss as to why its scheme is unconstitutional because it does not also regulate newsracks that disseminate noncommercial speech. One would have thought that the city, perhaps even following the teachings of our commercial speech jurisprudence, could have decided to place the burden of its regulatory scheme on less protected speech (i.e., commercial handbills) without running afoul of the First Amendment. Today's decision, though, places the city in the position of having to decide between restricting more speech -- fully protected speech -- and allowing the proliferation of newsracks on its street corners to continue unabated. It scarcely seems logical that the First Amendment compels such a result.

4. LORILLARD TOBACCO CO. v. REILLY
533 U.S. 525 (2001)

JUSTICE O'CONNOR delivered the opinion of the Court.

In January 1999, the Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. Petitioners, a group of cigarette, smokeless tobacco, and cigar manufacturers and retailers, filed suit in Federal District Court claiming that the regulations violate federal law and the United States Constitution. The first question presented for our review is whether certain

cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA). The second question presented is whether certain regulations governing the advertising and sale of tobacco products violate the First Amendment.

I

In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief. At the press conference covering Massachusetts' decision to sign the agreement, then-Attorney General Scott Harshbarger announced that as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices for tobacco products. He explained that the regulations were necessary in order to "close holes" in the settlement agreement and "to stop Big Tobacco from recruiting new customers among the children of Massachusetts."

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade, Mass. Gen. Laws, ch. 93A, §2 (1997), the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the cigarette and smokeless tobacco regulations is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age …. [and] in order to prevent access to such products by underage consumers." The regulations place a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.

Before the effective date of the regulations, February 1, 2000, members of the tobacco industry sued the Attorney General. Four cigarette manufacturers, a maker of smokeless tobacco products, and several cigar manufacturers and retailers claimed that many of the regulations violate the Commerce Clause, the Supremacy Clause, the First and Fourteenth Amendments.

II

Before reaching the First Amendment issues, we must decide to what extent federal law pre-empts the Attorney General's regulations. We hold that the Attorney General's outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA.

III

By its terms, the FCLAA's pre-emption provision only applies to cigarettes. Accordingly, we must evaluate the smokeless tobacco and cigar petitioners' First Amendment challenges to the State's outdoor and point-of-sale advertising regulations. The cigarette petitioners did not raise a pre-emption challenge to the sales practices regulations. Thus, we must analyze the cigarette as well as the smokeless tobacco and cigar petitioners' claim that certain sales practices regulations for tobacco products violate the First Amendment.

A

For over 25 years, the Court has recognized that commercial speech does not fall outside the

purview of the First Amendment. Instead, the Court has afforded commercial speech a measure of First Amendment protection "'commensurate'" with its position in relation to other constitutionally guaranteed expression. In recognition of the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," we developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions. The analysis contains four elements: "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. But here we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

Only the last two steps of *Central Hudson's* four-part analysis are at issue here. The Attorney General has assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection. With respect to the second step, none of the petitioners contests the importance of the State's interest in preventing the use of tobacco products by minors.

The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that "the speech restriction directly and materially advanc[e] the asserted governmental interest. 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"

We do not, however, require that "empirical data come … accompanied by a surfeit of background information… [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'"

The last step of the *Central Hudson* analysis "complements" the third step, "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." We have made it clear that "the least restrictive means" is not the standard; instead, the case law requires a reasonable "'fit between the legislature's ends and the means chosen to accomplish those ends, … a means narrowly tailored to achieve the desired objective.'" Focusing on the third and fourth steps of the *Central Hudson* analysis, we first address the outdoor advertising and point-of-sale advertising regulations for smokeless tobacco and cigars. We then address the sales practices regulations for all tobacco products.

B

The outdoor advertising regulations prohibit smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground. The smokeless tobacco and cigar petitioners contend that the Attorney General's regulations do not satisfy *Central Hudson*'s third step. Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture."

Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis. The final step of the *Central Hudson* analysis, the "critical inquiry in this case," requires a reasonable fit between the means and ends of the regulatory scheme. The Attorney General's regulations do not meet this standard. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed" by the regulations.

The outdoor advertising regulations prohibit any smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds. In the District Court, petitioners maintained that this prohibition would prevent advertising in 87% to 91% of Boston, Worchester, and Springfield, Massachusetts. The 87% to 91% figure appears to include not only the effect of the regulations, but also the limitations imposed by other generally applicable zoning restrictions. The Attorney General disputed petitioners' figures but "concede[d] that the reach of the regulations is substantial." Thus, the Court of Appeals concluded that the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts.

The substantial geographical reach of the Attorney General's outdoor advertising regulations is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if that advertising is visible from outside the store. The regulations restrict advertisements of any size and the term advertisement also includes oral statements.

In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved.

First, the Attorney General did not seem to consider the impact of the 1,000-foot restriction on commercial speech in major metropolitan areas. The effect of the Attorney General's speech regulations will vary based on whether a locale is rural, suburban, or urban. The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.

In addition, the range of communications restricted seems unduly broad. For instance, it is not clear from the regulatory scheme why a ban on oral communications is necessary to further the State's interest. Apparently that restriction means that a retailer is unable to answer inquiries about its tobacco products if that communication occurs outdoors. Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs. To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others. As crafted, the regulations make no distinction among practices on this basis.

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.

In some instances, Massachusetts' outdoor advertising regulations would impose particularly onerous burdens on speech. For example, we disagree with the Court of Appeals' conclusion that because cigar manufacturers and retailers conduct a limited amount of advertising in comparison to other tobacco products, "the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small." If some retailers have relatively small advertising budgets, and use few avenues of communication, then the Attorney General's outdoor advertising regulations potentially place a greater, not lesser, burden on those retailers' speech. Furthermore, to the extent that cigar products and cigar advertising differ from that of other tobacco products, that difference should inform the inquiry into what speech restrictions are necessary.

In addition, a retailer in Massachusetts may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like convenience stores, which have unique security concerns that counsel in favor of full visibility of the store from the outside. It is these sorts of considerations that the Attorney General failed to incorporate into the regulatory scheme.

We conclude that the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use. A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. After reviewing the outdoor advertising regulations, we find the calculation in this case insufficient.

C

Massachusetts has also restricted indoor, point-of-sale advertising for smokeless tobacco and cigars. Advertising cannot be "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground. We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis. A regulation cannot be sustained if it '"provides only ineffective or remote support for the government's purpose,'" or if there is "little chance" that the restriction will advance the State's goal. As outlined above, the State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5-foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. We conclude that the restriction on the height of indoor advertising is invalid under Central Hudson's third and fourth prongs.

D

The Attorney General also promulgated a number of regulations that restrict sales practices by cigarette, smokeless tobacco, and cigar manufacturers and retailers. Among other restrictions, the regulations bar the use of self-service displays and require that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons.

Assuming that petitioners have a cognizable speech interest in a particular means of displaying their products, *cf. Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410 (1993), these regulations withstand First Amendment scrutiny. Massachusetts' sales practices provisions regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas. *United States v. O'Brien*, 391 U.S. 367, 382 (1968). We conclude that the State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest.

Unattended displays of tobacco products present an opportunity for access without the proper age verification required by law. Thus, the State prohibits self-service and other displays that would allow an individual to obtain tobacco products without direct contact with a salesperson. It is clear that the regulations leave open ample channels of communication. The regulations do not significantly impede adult access to tobacco products. Moreover, retailers have other means of exercising any cognizable speech interest in the presentation of their products. We presume that vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel. As for cigars, there is no indication in the regulations that a customer is unable to examine a cigar prior to purchase, so long as that examination takes place through a salesperson.

We conclude that the sales practices regulations withstand First Amendment scrutiny. The

means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.

IV

We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States.

The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information. To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means.

5. Compelled Disclosures in Commercial Advertising

In the previous cases, the government was prohibiting the inclusion of certain information in commercial speech, a traditional form of censorship. However, the commercial speech cases also deal with compelled disclosure where an advertiser is required to include certain information in its advertisements such as possible side effects in drug advertisements. This issue first arose in a series of cases where the Supreme Court dealt with restrictions on attorney advertising. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court struck down several provisions of Ohio's attorney disciplinary rules as applied to an attorney who placed an advertisement providing information about litigation concerning the harmful effects of a particular form of contraceptive:

> In the spring of 1982, appellant placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device. The advertisement featured a line drawing of the Dalkon Shield accompanied by the question, "DID YOU USE THIS IUD?" The advertisement then related the following information:
>
> "The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

> The ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for "free information." *Id.* at 630-31.

The Court overturned the discipline of Mr. Zauderer for violating Ohio's rule against including illustrations in attorney advertising as well as its "rules against self-recommendation and accepting employment resulting from unsolicited legal advice." However, the Court upheld a requirement that advertisements that include information about contingent fees must include "the information that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful."

In that part of its opinion, the Court rejected the use of the *Central Hudson* test when the regulation only required the advertiser to "include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." In reviewing a disclosure regulation of that type, the Court only required that the disclosure requirements are reasonably related to the State's interest in preventing deception of consumers":

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."
>
> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.
>
> The State's application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard. Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs" — terms that, in ordinary usage, might

> well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

In 2010 in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the Court applied the *Zauderer* standard to another disclosure requirement also involving attorneys. The case arose under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It classified "professionals who provide bankruptcy assistance to consumer debtors" as "debt relief agencies." The Court first determined that attorneys who provided "qualifying services" were debt relief agencies. It then upheld the Act's disclosure requirements "designed to improve bankruptcy law and practice" as applied to such attorneys:

> The BAPCPA subjects debt relief agencies to a number of restrictions and requirements, as set forth in §§526, 527, and 528. As relevant here, §528 requires qualifying professionals to include certain disclosures in their advertisements. Subsection (a) provides that debt relief agencies must "clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public . . . that the services or benefits are with respect to bankruptcy relief under this title." §528(a)(3). It also requires them to include the following, "or a substantially similar statement": "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." §528(a)(4). Subsection (b) requires essentially the same disclosures in advertisements "indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt." §528(b)(2). Debt relief agencies advertising such services must disclose "that the assistance may involve bankruptcy relief," §528(b)(2)(A), and must identify themselves as "debt relief agenc[ies]" as required by §528(a)(4), see §528(b)(2)(B).
>
> We next consider the standard of scrutiny applicable to §528's disclosure requirements. The Government maintains that §528 is directed at misleading commercial speech. For that reason, and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech, the Government contends that the less exacting scrutiny described in *Zauderer* governs our review. We agree.
>
> *Zauderer* addressed the validity of a rule of professional conduct that required attorneys who advertised contingency-fee services to disclose in their advertisements that a losing client might still be responsible for certain litigation fees and costs. Noting that First Amendment protection for commercial speech is justified in large part by the information's value to consumers, the Court concluded that an attorney's constitutionally protected interest in not providing the required factual information is

> "minimal." Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."
>
> The challenged provisions of §528 share the essential features of the rule at issue in *Zauderer*. As in that case, §528's required disclosures are intended to combat the problem of inherently misleading commercial advertisements--specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs. Additionally, the disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information.
>
> Milavetz makes much of the fact that the Government in these consolidated cases has adduced no evidence that its advertisements are misleading. *Zauderer* forecloses that argument: "When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" Evidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost is adequate to establish that the likelihood of deception in this case "is hardly a speculative one."
>
> Because §528's requirements that Milavetz identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services are "reasonably related to the [Government's] interest in preventing deception of consumers," *Zauderer*, 471 U.S. at 651, we uphold those provisions as applied to Milavetz.

In *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), a 5-4 decision with a majority opinion by Justice Thomas, the Court struck down disclosure requirements in the form of posted notices that California required of two types of pro-life clinics providing pregnancy-related services. In its analysis of the notice that applied to licensed clinics, the Court found *Zauderer* inapplicable:

> The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available." The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an "uncontroversial" topic. Accordingly, *Zauderer* has no application here.

The Court found it unnecessary to decide which test applied to the unlicensed clinic notice since Justice Thomas concluded that it even failed the *Zauderer* test.

Chapter VI: Symbolic Speech

In previous chapters, the focus has been on various categories of traditional speech involving words in a written or spoken form. However, the First Amendment also protects ideas that are expressed by symbols or expressive conduct. This First Amendment protection is not unlimited and the Supreme Court has addressed the scope of what is referred to as either symbolic speech or expressive conduct in numbers of decisions.

A. The O'Brien Standard for Expressive Conduct

UNITED STATES v. O'BRIEN
391 U.S. 367 (1968)

CHIEF JUSTICE WARREN delivered the opinion of the Court joined by BLACK, HARLAN, BRENNAN, STEWART, WHITE, and FORTAS, JJ.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate in violation of Title 50, App., United States Code, Section 462 (b)." Section 462 (b) is part of the Universal Military Training and Service Act of 1948. Section 462 (b)(3), one of six numbered subdivisions of § 462 (b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person, "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate . . . ."

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose. The District Court

rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the Amendment was a reasonable exercise of the power of Congress to raise armies. On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech. The Government petitioned for certiorari. We granted the Government's petition.

I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board. He is assigned a Selective Service number, and within five days he is issued a registration certificate (SSS Form No. 2). Subsequently, and based on a questionnaire completed by the registrant, he is assigned a classification denoting his eligibility for induction, and "as soon as practicable" thereafter he is issued a Notice of Classification.

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.

The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times.

By the 1965 Amendment, Congress added to § 12 (b)(3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private

destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. The power of Congress to classify and conscript manpower for military service is "beyond question." Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the

continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California*, 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct.

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

III.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument.

There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. After his brief statement, and without any additional substantive comments, the bill, passed the Senate. In the House debate only two Congressmen addressed themselves to the Amendment -- Congressmen Rivers and Bray. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional-"purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. While both reports make clear a concern with the "defiant" destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

IV.
Since the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court.

B. The United States Flag

The Supreme Court recognized that flags can be used to communicate political ideas as early as 1931 in *Stromberg v. California*, 283 U. S. 359 (1931). *Stromberg* involved a conviction for violating a state law that made it a crime to "display[] a red flag . . . as a sign, symbol or emblem of opposition to organized government . . . ." The Defendant, Yetta Stromberg, was 19 years old and a member of the Young Communist League. She was a teacher at the Pioneer Summer Camp which was affiliated with a number of organizations with ties to the Communist Party. One of her responsibilities at the camp was supervising a daily raising of a red flag, the flag of Soviet Russia and the Communist Party in the United States, and reciting a pledge of allegiance to "the workers' red flag, and the cause for which it stands, one aim throughout our lives, freedom for the working class." The Supreme Court overturned her conviction. More recent cases have involved the use of the U.S. flag as a form of expression. In one of those cases, *Spence v. Washington*, the Court identified a standard to determine if the use of a symbol would be considered speech under the First Amendment.

1. SPENCE v. WASHINGTON
418 U.S. 405 (1974)

PER CURIAM. [For JUSTICES DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL.]

Appellant displayed a United States flag, which he owned, out of the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of

removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's conviction. It rejected appellant's contentions that the statute under which he was charged, on its face and as applied, contravened the First Amendment. We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

I

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag was upside down, and attached to the front and back was a peace symbol (*i.e.*, a circle enclosing a trident) made of removable black tape. The window was above the ground floor. The flag measured approximately three by five feet and was plainly visible to passersby. The peace symbol occupied roughly half of the surface of the flag.

Three Seattle police officers observed the flag and entered the apartment house. They were met at the main door by appellant, who said: "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." Appellant permitted the officers to enter his apartment, where they seized the flag and arrested him.

Appellant was not charged under Washington's flag-desecration statute. Rather, the State relied on the so-called "improper use" statute, Wash. Rev. Code § 9.86.020. This statute provides, in pertinent part:

> No person shall, in any manner, for exhibition or display:
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

The State based its case on the flag itself and the testimony of the three arresting officers. Appellant took the stand in his own defense. He testified that he put a peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest. He said that his purpose was to associate the American flag with peace instead of war and violence: "I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace." Appellant further testified that he chose to fashion the peace symbol from tape so that it could be removed without damaging the flag. The State made no effort to controvert any of appellant's testimony.

The trial court instructed the jury in essence that the mere act of displaying the flag with the peace symbol attached, if proved beyond a reasonable doubt, was sufficient to convict. The jury returned a verdict of guilty.

II

A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any government. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints[1] on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than three police officers observed the flag.

Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication. Although the stipulated facts fail to show that any member of the general public viewed the flag, the State's concession is inevitable on this record. The undisputed facts are that appellant "wanted people to know that I thought America stood for peace." To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*, 391 U. S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." But the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

The Court for decades has recognized the communicative connotations of the use of flags. *E.g., Stromberg v. California*, 283 U. S. 359 (1931). In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . . ," and "a short cut from mind to mind." *Board of Education v. Barnette*, 319 U. S. 624, 632 (1943). On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed

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[1] Professor's Note: Analysis of time, place, and manner restrictions on speech will be addressed in a later chapter.

expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

We are confronted then with a case of prosecution for the expression of an idea through activity. Moreover, the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression. Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

We are met with something of an enigma in the manner in which the case was presented to us. The Washington Supreme Court rejected any reliance on a breach-of-the-peace rationale. It based its result primarily on the ground that "the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation." Yet counsel for the State declined to support the highest state court's principal rationale in argument before us. He pursued instead the breach-of-the-peace theory discarded by the state court.

We think it appropriate to review briefly the range of various state interests that might be thought to support the challenged conviction. The first interest at issue is prevention of breach of the peace. In our view, the Washington Supreme Court correctly rejected this notion. It is totally without support in the record. We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display. See *Cohen v. California*, 403 U. S. 15 (1971). Nor may appellant be punished for failing to show proper respect for our national emblem.

We are brought, then, to the state court's thesis that Washington has an interest in preserving the national flag as an unalloyed symbol of our country. The court did not define this interest; it simply asserted it. MR. JUSTICE REHNQUIST's dissenting opinion today adopts essentially the same approach. Presumably, this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular product or viewpoint might be taken erroneously as evidence of governmental endorsement. Alternatively, it might be argued that the interest asserted by the state court is based on the uniquely universal character of the national flag as a symbol. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message. "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will

lose its capability of mirroring the sentiments of all who view it.

But we need not decide in this case whether the interest advanced by the court below is valid. We assume, arguendo, that it is. The statute is nonetheless unconstitutional as applied to appellant's activity. There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully protesting the fact that it did not. Appellant was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

Although I agree with the Court that appellant's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is unsound.

"[T]he right of free speech is not absolute at all times and under all circumstances." This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.

Since a State concededly may impose some limitations on speech directly, it would seem to follow a fortiori that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

Yet the Court today holds that the State of Washington cannot limit use of the American flag, at least insofar as its statute prevents appellant from using a privately owned flag to convey his personal message. Expressing its willingness to assume, arguendo, that Washington has a valid interest in preserving the integrity of the flag, the Court nevertheless finds that interest to

be insufficient in this case. To achieve this result the Court first devalues the State's interest under these circumstances, noting that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts . . . ." The Court takes pains to point out that appellant did not "permanently disfigure the flag or destroy it," and emphasizes that the flag was displayed "in a way closely analogous to the manner in which flags have always been used to convey ideas." The Court then restates the notion that such state interests are secondary to messages which are "direct, likely to be understood, and within the contours of the First Amendment." In my view the first premise demonstrates a total misunderstanding of the State's interest in the integrity of the American flag, and the second premise places the Court in the position either of ultimately favoring appellant's message because of its subject matter, a position about which almost all members of the majority have only recently expressed doubt, or, alternatively, of making the flag available for a limitless succession of political and commercial messages. I shall treat these issues in reverse order.

Turning to the question of the State's interest in the flag, it seems to me that the Court's treatment lacks all substance. The suggestion that the State's interest somehow diminishes when the flag is decorated with removable tape trivializes something which is not trivial. The State of Washington is hardly seeking to protect the flag's resale value. Surely the Court does not mean to imply that appellant could be prosecuted if he subsequently tore the flag in the process of trying to take the tape off. Unlike flag-desecration statutes, the Washington statute challenged here seeks to prevent personal use of the flag, not simply particular forms of abuse. The State of Washington has chosen to set the flag apart for a special purpose, and has directed that it not be turned into a common background for an endless variety of superimposed messages. The physical condition of the flag itself is irrelevant to that purpose.

The true nature of the State's interest in this case is not only one of preserving "the physical integrity of the flag," but also one of preserving the flag as "an important symbol of nationhood and unity." Although the Court treats this important interest with a studied in-attention, it is hardly one of recent invention and has previously been accorded considerable respect by this Court. It is the character, not the cloth, of the flag which the State seeks to protect.

What appellant here seeks is simply license to use the flag however he pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.

The fact that the State has a valid interest in preserving the character of the flag does not mean, of course, that it can employ all conceivable means to enforce it. It certainly could not require all citizens to own the flag or compel citizens to salute one. *Board of Education v. Barnette*, 319 U. S. 624 (1943). It presumably cannot punish criticism of the flag, or the principles for which it stands, any more than it could punish criticism of this country's policies or ideas. But the statute in this case demands no such allegiance. Its operation does not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the

flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message. It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. Since I do not believe the Constitution prohibits Washington from making that decision, I dissent.

2. TEXAS v. JOHNSON
491 U.S. 397 (1989)

JUSTICE BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

I
While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined $ 2,000.

II
We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 377 (1968). If the State's regulation is not related to expression, then the less stringent standard we announced in *O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of

O'Brien's test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. A third possibility is that the State's asserted interest is simply not implicated on these facts, and, in that event, the interest drops out of the picture.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, 383 U.S. 131 (1966); and of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58 (1970).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, refusing to salute the flag, and displaying a red flag, we have held, all may find shelter under the First Amendment. That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood."

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy."

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, and this concession seems to us as prudent as was Washington's in *Spence*. Johnson burned an American flag as the culmination of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. *See O'Brien*. It may not, however, proscribe particular conduct because it has expressive elements. [W]e have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which "the governmental interest is unrelated to

the suppression of free expression." In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression. We thus conclude that the State's interest in maintaining order is not implicated on these facts.

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression."

IV

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction. As in *Spence*, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution." Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because

it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much: "The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is intentionally designed to seriously offend other individuals."

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. This restriction on Johnson's expression is content based. Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny."

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "'special place'" reserved for the flag in our Nation. The State's argument is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved. In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role, we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht v. United States*, we invalidated a federal statute permitting an actor portraying a member of one of our Armed Forces to "'wear the uniform of that armed force if the portrayal does not tend to discredit that

armed force.'" This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

There is, moreover, no indication -- either in the text of the Constitution or in our cases interpreting it -- that a separate juridical category exists for the American flag alone. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole -- such as the principle that discrimination on the basis of race is odious and destructive -- will go unquestioned in the marketplace of ideas. *See Brandenburg v. Ohio*, 395 U. S. 444 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." We reject the suggestion that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag -- and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men,

with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad. During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem. The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest and left him with a full panoply of other symbols and every conceivable form of verbal

expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers were profoundly opposed to the message that he sought to convey. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it, for which he was punished.

The Court concludes its opinion with a regrettably patronizing civics lecture. The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government.

JUSTICE STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the rules that the Court has developed in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. So it is with the American flag. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents at home and abroad who may have no interest in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. In my considered judgment, sanctioning the public desecration of the flag will tarnish its value -- both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it.

The Court is quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies.

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for -- and our history demonstrates that they are -- it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

C. Modifying the Spence Standard

HURLEY v. IRISH AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON

515 U.S. 557 (1995)

JUSTICE SOUTER delivered the opinion for a unanimous Court.

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston," the password used in the colonial lines on evacuation day. Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display.

The tradition of formal sponsorship by the city came to an end in 1947, however, when Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day Evacuation Day Parade to the petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn up to 1 million watchers. No other applicant has ever applied for that permit. Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.

In 1992, a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade. Although the Council denied GLIB's application to take part in the 1992 parade, GLIB obtained a state court order to include its contingent, which marched "uneventfully" among that year's 10,000 participants and 750,000 spectators.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws §272:98. After finding that "[f]or at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike," the state trial

court ruled that the parade fell within the statutory definition of a public accommodation, which includes "any place . . . which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment," Mass. Gen. Laws §272:92A. The court found that the Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did "not generally inquire into the specific messages or views of each applicant." The court consequently rejected the Council's contention that the parade was "private" (in the sense of being exclusive), holding instead that "the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event." It found the parade to be "eclectic," containing a wide variety of "patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes," as well as conflicting messages. While noting that the Council had indeed excluded the Ku Klux Klan and ROAR (an antibusing group), it attributed little significance to these facts, concluding ultimately that "[t]he only common theme among the participants and sponsors is their public involvement in the Parade."

The court rejected the Council's assertion that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values," and found the Council's "final position [to be] that GLIB would be excluded because of its values and its message, i.e., its members' sexual orientation." This position, in the court's view, was not only violative of the public accommodations law but "paradoxical" as well, since "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." The court rejected the notion that GLIB's admission would trample on the Council's First Amendment rights since the court understood that constitutional protection of any interest in expressive association would "requir[e] focus on a specific message, theme, or group" absent from the parade. "Given the [Council's] lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." It concluded that the parade is "not an exercise of [the Council's] constitutionally protected right of expressive association," but instead "an open recreational event that is subject to the public accommodations law." The court ruled that "GLIB is entitled to participate in the Parade on the same terms and conditions as other participants."

The Supreme Judicial Court of Massachusetts affirmed, seeing nothing clearly erroneous in the trial judge's findings that GLIB was excluded from the parade based on the sexual orientation of its members, that it was impossible to detect an expressive purpose in the parade, that there was no state action, and that the parade was a public accommodation within the meaning of §272:92A. Turning to petitioners' First Amendment claim that application of the public accommodations law to the parade violated their freedom of speech, the court's majority held that it need not decide on the particular First Amendment theory involved "because, as the [trial] judge found, it is 'impossible to discern any specific expressive purpose entitling the parade to protection under the First Amendment.'"

We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. We hold that it does and reverse.

Our review of petitioners' claim that their activity is in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. The "requirement of independent appellate review . . . is a rule of federal constitutional law," which generally requires us to "review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that "[f]indings of fact . . . shall not be set aside unless clearly erroneous," we are obliged to make a fresh examination of crucial facts. Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non expressive conduct, our obligation is to "'make an independent examination of the whole record,' . . . so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." S. Davis, Parades and Power: Street Theatre in Nineteenth Century Philadelphia 6 (1986). Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed a parade's dependence on watchers is so extreme that nowadays "if a parade or demonstration receives no media coverage, it may as well not have happened." Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. In *Gregory v. Chicago*, 394 U.S. 111, 112 (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Similarly, in *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963), where petitioners had joined in a march of protest and pride, carrying placards and singing The Star Spangled Banner, we held that the activities "reflect an exercise of these basic constitutional rights in their most pristine and classic form."

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943), our cases have

recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an arm band to protest a war, displaying a red flag, and even "[m]arching, walking or parading" in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," *cf. Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages *(e.g.*, "England get out of Ireland," "Say no to drugs"); marching bands and pipers play, floats are pulled along, and the whole show is broadcast over Boston television. To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. The selection of contingents to make a parade is entitled to similar protection.

Respondents' participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. The organization distributed a fact sheet describing the members' intentions, and the record otherwise corroborates the expressive nature of GLIB's participation. In 1993, members of GLIB marched behind a shamrock strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. At common law, innkeepers, smiths, and others who "made profession of a public employment," were prohibited from refusing, without good reason, to serve a customer. After the Civil War, the Commonwealth of Massachusetts was the first State to codify this principle to ensure access to public accommodations regardless of race. In prohibiting discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting," the original statute already expanded upon the common law, which had not conferred any right of access to places of public amusement. As with many public

accommodations statutes across the Nation, the legislature continued to broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . ., deafness, blindness or any physical or mental disability or ancestry" in "the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws §272:98. Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. The petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

. . . .

Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others. Accordingly, the judgment of the Supreme Judicial Court is reversed and the case remanded for proceedings not inconsistent with this opinion.

Note: A section of the *Hurley* opinion that further discusses “speaker autonomy to choose the content of his own message” has been eliminated from this version of the opinion since it is included for its discussion of a parade as a form of expressive conduct. The excluded material is included in a chapter that addresses the issue of compelled expression.

D. Money as Speech

The issue of whether spending or contributing money in support of a political candidate or cause should be treated as speech under the First Amendment has been addressed in a number of Supreme Court cases. The earliest recognition of a connection between money and speech and the possibility that some kinds of spending and contribution limits for political candidates could violate the Free Speech Clause was in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* was a constitutional challenge to major provisions of the Federal Election Campaign Act of 1971. The Court upheld the Act's contribution limits, disclosure requirements, and presidential public financing, but struck down limits on "independent" expenditures. The Court viewed independent expenditure limits, limits on expenditures not coordinated with a candidate's campaign, as a significant restriction on speech, but took the view that contribution limits had only a minimal impact on the speech of the contributor. Excerpts from the *Buckley* opinion addressing the issue of money as speech are below.

BUCKLEY v. VALEO
424 U.S. 1 (1976)

PER CURIAM. [For CHIEF JUSTICE BURGER, (in part), and ASSOCIATE JUSTICES BRENNAN, STEWART, POWELL, MARSHALL (in part), BLACKMUN (in part), REHNQUIST (in part), and WHITE (in part).]

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] 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 (1957). Although First Amendment protections are not confined to "the exposition of ideas," "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . ." *Mills v. Alabama*, 384 U. S. 214, 218 (1966). This no more than reflects our "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 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U. S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U. S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and

private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "'freedom to associate with others for the common advancement of political beliefs and ideas,'" a freedom that encompasses "'[t]he right to associate with the political party of one's choice.'" *Kusper v. Pontikes*, 414 U. S. 51, 56, 57 (1973).

It is with these principles in mind that we consider the primary contentions of the parties with respect to the Act's limitations upon the giving and spending of money in political campaigns. Those conflicting contentions could not more sharply define the basic issues before us. Appellees contend that what the Act regulates is conduct, and that its effect on speech and association is incidental at most. Appellants respond that contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct.

In upholding the constitutional validity of the Act's contribution and expenditure provisions on the ground that those provisions should be viewed as regulating conduct, not speech, the Court of Appeals relied upon *United States v. O'Brien*, 391 U. S. 367 (1968). The *O'Brien* case involved a defendant's claim that the First Amendment prohibited his prosecution for burning his draft card because his act was "'symbolic speech'" engaged in as a "'demonstration against the war and against the draft.'" 391 U. S., at 376. On the assumption that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Court sustained the conviction because it found "a sufficiently important governmental interest in regulating the non-speech element" that was "unrelated to the suppression of free expression" and that had an "incidental restriction on alleged First Amendment freedoms . . . no greater than [was] essential to the furtherance of that interest." *Id.*, at 376-77. The Court expressly emphasized that *O'Brien* was not a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.*, at 382.

We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non speech element or to reduce the exacting scrutiny required by the First Amendment.

Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike *O'Brien*, where

the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U. S. C. § 608 (e) (1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication. Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective

advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP v. Alabama*, 357 U. S., at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents."

In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

E. Nude Dancing as Speech

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court reviewed a case involving a challenge to Indiana’s ban on public nudity as applied to nude dancing. The challenge was brought by individual dancers, a bar where entertainment was provided by women “go-go” dancers, and the operator of an adult bookstore that featured women dancing behind glass panels. Access to see the dancers at the bookstore was controlled by customers who sat in coin-operated booths. Both establishments wanted to feature totally nude dancers, but the state law required that the dancers wear “pasties” and “G-strings” while dancing. The challengers argued that nude dancing was expression protected by the First Amendment and that Indiana was prevented from applying its public indecency law to the nude dancing.

The Supreme Court, by a vote of 5-4 with no majority opinion, upheld the state law as applied to the dancers finding no First Amendment violation. However, in Chief Justice Rehnquist’s plurality opinion, joined by Justices O’Connor and Kennedy, he recognized that “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”

Having concluded the dancing was protected expression, he went on to apply the *O'Brien* test. First, he found that the Indiana statute was within the power of the state to enact. Second, the state had a substantial interest because the law was designed to protect "societal order and morality" Third, he found that the state interest was "unrelated to the suppression of free expression." He rejected the argument that the state's objective was to ban the "erotic message" conveyed by the dancing. Instead, his analysis was based on the fact that the law was not limited to nude dancing, but banned all public indecency. Justice Rehnquist concluded that appearing nude in public as a general matter was not "expressive conduct" so that the state's interest in preventing all instances of public nudity was not an effort to suppress expression. Finally, under the fourth prong of the *O'Brien* test, he found that the restriction on protected expression was "no greater than is essential to the furtherance of the governmental interest." Displaying a sense of humor, his opinion ends with the following comment: "It is without cavil that the public indecency statute is 'narrowly tailored'; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose."

Justice Scalia filed an opinion concurring in the judgment, but based on the conclusion that the activity at issue was not expressive conduct protected by the First Amendment. Justice Souter also concurred in the judgment, but his disagreement with the plurality opinion was limited to a disagreement about the state's substantial interest. He concluded the state's substantial interest was to discourage some of the criminal activities, such as prostitution and sexual assaults, that tend to increase in areas where live erotic entertainment is available.

One other aspect of dancing has been before the Supreme Court. In *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), the Court upheld an ordinance that restricted access to "teenage" dance halls to people between the ages of 14 and 18. In rejecting the argument that the social dancing that took place in the dance halls was speech under the First Amendment, Chief Justice Rehnquist, writing for the Court, stated:

> It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment. *Id.*, at 25.