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.
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> 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 . . . .
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> 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. . . .
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> 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 . . . .
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> . . . 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? . . .
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> . . . [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.
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> 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.