BROWN v. ENTERTAINMENT MERCHANTS ASSOCIATION
131 S. Ct. 2729 (2011)

JUSTICE SCALIA delivered the opinion of the Court.

I

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

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Court of Appeals affirmed, and we granted certiorari.

II

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." 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 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." *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002). There are of course exceptions. "'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *United States* v. *Stevens*, 130 S. Ct. 1577 (2010). 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 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 content-based restriction on speech. There was no American tradition of forbidding the *depiction of* animal cruelty.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. We emphatically rejected that "startling and dangerous" proposition. "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 without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs."

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. The obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct."

Because speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg* v. *New York*, 390 U.S. 629 (1968). That case approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child. We held that the legislature could "adjus[t] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . ' of . . . minors. " And because "obscenity is not protected expression," the statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children "was not irrational."

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

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 212-213 (1975). 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, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." Cinderella's evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus by grinding out his eye with a heated stake. In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch. And Lord of the Flies recounts how a schoolboy is savagely murdered *by other children* while marooned on an island.[1]

This is not to say that minors' consumption of violent entertainment has never encountered resistance. In the 1800's, dime novels depicting crime and "penny dreadfuls" were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead. Radio dramas were next, and then came comic books. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. 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. "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."

Justice Alito has done considerable independent research to identify video games in which "the violence is astounding." "Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools." Justice Alito recounts all these disgusting video games in order to disgust us -- but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito's description of those video games he has discovered that have a racial or ethnic motive for their violence. To what end does he relate this? Does it somehow increase the "aggressiveness" that California wishes to suppress? Who

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[1] Justice Alito accuses us of pronouncing that playing violent video games "is not different in 'kind'" from reading violent literature. Well of course it is different in kind, but not in a way that causes the provision and viewing of violent video games, unlike the provision and reading of books, not to be expressive activity and hence not to enjoy First Amendment protection. Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not *constitutional* ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny. Even if we can see in them "nothing of any possible value to society . . ., they are as much entitled to the protection of free speech as the best of literature."

knows? But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, Justice Alito's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech -- whether it be violence, or gore, or racism -- and not its objective effects, may be the real reason for governmental proscription.

III

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny -- that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. 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.

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." 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."[2]

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[2] JUSTICE ALITO is mistaken in thinking that we fail to take account of "new and rapidly evolving technology." The studies in question pertain to that new and rapidly evolving technology, and fail to show, with the degree of certitude that strict scrutiny requires, that this subject-matter restriction on speech is justified. Nor is JUSTICE ALITO correct in attributing to us the view that "violent video games really present no serious problem." Perhaps they do present a problem, and perhaps none of us would allow our own children to play them. But there are all sorts of "problems" -- some of them surely more serious than this one -- that cannot be addressed by governmental restriction of free expression: for example, the problem of

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 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. The California Legislature is perfectly willing to leave this dangerous material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. That is not how one addresses a serious social problem.

California claims that the Act is justified in aid of parental authority. We note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]."

But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted. The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell "M" rated games to minors only with parental consent. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, "the video game industry outpaces the movie and music industries" in "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated products at retail." This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.

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

We have no business passing judgment on the view of the California Legislature that violent

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encouraging anti-Semitism, the problem of spreading a political philosophy hostile to the Constitution, or the problem of encouraging disrespect for the Nation's flag.

video games corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a "well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky*, 315 U.S. at 571-572 (the answer plainly is no); and if not, whether the regulation of such works is justified by a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. 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 cannot survive strict scrutiny.

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

The California statute that is before us in this case represents a pioneering effort to address a potentially serious social problem: the effect of exceptionally violent video games on impressionable minors. Although the statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree that this law cannot be sustained.

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

In the view of the Court, those concerned about the effects of violent video games are unduly fearful, for violent video games present no serious problem. Spending hour upon hour controlling the actions of a character who guns down innocent victims is not different in "kind" from reading a description of violence in a work of literature. The Court is sure of this; I am not. There are reasons to suspect that playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.

I

Respondents in this case ask us to strike down the California law on two grounds: The broad ground adopted by the Court and the narrower ground that the law's definition of "violent video game" is impermissibly vague. Because I agree with the latter argument, I see no need to reach the broader First Amendment issues addressed by the Court.

A

Due process requires that laws give people fair notice of what is prohibited. The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," "government may regulate in the area" of First Amendment freedoms "only with narrow specificity." These principles apply to laws that regulate expression for the purpose of protecting children.

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

B

The law at issue in *Ginsberg* prohibited the sale to minors of materials that were deemed "harmful to minors," and the law defined "harmful to minors" simply by adding the words "for minors" to each element of the definition of obscenity. Seeking to bring its violent video game law within the protection of *Ginsberg*, the California Legislature began with the obscenity test adopted in *Miller* v. *California*, 413 U.S. 15 (1973). The legislature then made certain modifications to accommodate the aim of the violent video game law.

Under *Miller*, an obscenity statute must contain a threshold limitation that restricts the statute's scope to specifically described "hard core" materials. Materials that fall within this "hard core" category may be deemed to be obscene if three additional requirements are met. Adapting these standards, the California law imposes the following threshold limitation: "[T]he range of options available to a player [must] includ[e] killing, maiming, dismembering, or sexually assaulting an image of a human being." Any video game that meets this threshold test is subject to the law's restrictions if it also satisfies three further requirements:

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

The first important difference between the *Ginsberg* law and the California violent video game statute concerns their respective threshold requirements. As noted, the *Ginsberg* law built upon the test for adult obscenity, and the current adult obscenity test requires an obscenity statute to contain a threshold limitation that restricts the statute's coverage to specifically defined "hard core" depictions. The *Miller* Court clearly viewed this threshold limitation as serving a vital notice function.

By contrast, the threshold requirement of the California law does not perform the narrowing function served by the limitation in *Miller*. It provides that a video game cannot qualify as "violent" unless "the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being." For better or worse, our society has long regarded many depictions of killing and maiming as suitable features of popular entertainment, including entertainment that is widely available to minors. The California law's threshold requirement would more closely resemble the limitation in *Miller* if it targeted a narrower class of graphic depictions.

Because of this feature of the law's threshold test, the work of providing fair notice is left in large part to the three requirements that follow, but those elements are also not up to the task. In drafting the law, the California Legislature relied on undefined societal or community standards. One of the three elements at issue here refers expressly to "prevailing standards in the community as to what is suitable for minors." Another element points in the same direction, asking whether "[a] reasonable person, considering [a] game as a whole," would find that it "appeals to a *deviant* or *morbid* interest of minors."

The terms "deviant" and "morbid" are not defined in the statute, and California offers no reason to think that its courts would give the terms anything other than their ordinary meaning. A "deviant or morbid interest" in violence, therefore, appears to be an interest that deviates from what is regarded -- presumably in accordance with some generally accepted standard -- as normal and healthy. Thus, the application of the California law is heavily dependent on the identification of generally accepted standards regarding the suitability of violent entertainment for minors.

California seems to have assumed that these standards are sufficiently well known so that a person would have fair notice. And because the *Miller* test looks to community standards, the legislature may have thought that the use of undefined community standards would not present vagueness problems. There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court's landmark obscenity cases in the 1960's, obscenity had long been prohibited, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.

There is no similar history regarding expression related to violence. As the Court notes, classic literature contains descriptions of great violence, and even children's stories sometimes depict very violent scenes. Although our society does not generally regard all depictions of violence as suitable for children, the prevalence of violent depictions in children's literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite "deviant" or "morbid" impulses.

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

For these reasons, I conclude that the California violent video game law fails to provide the fair notice that the Constitution requires. And I would go no further.

II

Having outlined how I would decide this case, I will now briefly elaborate on my reasons for questioning the wisdom of the Court's approach.

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C

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

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

These present-day and emerging characteristics of video games must be considered together with characteristics of the violent games that have already been marketed. In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including guns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown.

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

If the technological characteristics of the sophisticated games that are likely to be

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

The Court is untroubled by this possibility. According to the Court, the "interactive" nature of video games is "nothing new" because "all literature is interactive." But only an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game. To take an example, think of a person who reads the passage in Crime and Punishment in which Raskolnikov kills the old pawn broker with an axe. Compare that reader with a video-game player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an axe, to raise it above the head of the victim, and then to bring it down; who hears the thud of the axe hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands. For most people, the two experiences will not be the same.

When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio, or viewing a movie. If this is so, then for some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.

JUSTICE THOMAS, dissenting.

The Court's decision does not comport with the original public understanding of the First Amendment. In my view, the historical evidence shows that the founding generation believed parents had absolute authority over their minor children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents. Therefore, I cannot agree that the statute at issue is facially unconstitutional under the First Amendment.

JUSTICE BREYER, dissenting.

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

I

In determining whether the statute is unconstitutional, I would apply both this Court's "vagueness" precedents and a strict form of First Amendment scrutiny. In doing so, the special First Amendment category I find relevant is not the category of "depictions of violence," but rather the category of "protection of children." This Court has held that the "'regulatio[n] of communication addressed to [children] need not conform to the

requirements of the [F]irst [A]mendment in the same way as those applicable to adults.'"

The majority's claim that the California statute, if upheld, would create a "new categor[y] of unprotected speech" is overstated. No one here argues that depictions of violence, even extreme violence, *automatically* fall outside the First Amendment's protective scope. But where, as here, careful analysis must precede a narrower judicial conclusion, we do not normally describe the result as creating a "new category of unprotected speech." See *Schenck* v. *United States*, 249 U.S. 47, 52 (1919). Here the issue is whether, applying traditional First Amendment standards, this statute does, or does not, pass muster.

II

In my view, California's statute provides "fair notice of what is prohibited," and consequently it is not impermissibly vague. *Ginsberg* explains why that is so. Comparing the language of California's statute with the language of New York's statute, it is difficult to find any vagueness-related difference. All that is required for vagueness purposes is that the terms "kill," "maim," and "dismember" give fair notice as to what they cover, which they do. The remainder of California's definition copies, almost word for word, the language this Court used in *Miller* v. *California*.

Both the *Miller* standard and the law upheld in *Ginsberg* lack perfect clarity. But that fact reflects the difficulty of the Court's long search for words capable of protecting expression without depriving the State of a legitimate constitutional power to regulate. This Court accepted the "community standards" tests used in *Miller* and *Ginsberg*. They reflect the fact that sometimes, even when a precise standard proves elusive, it is easy enough to identify instances that fall within a legitimate regulation. And they seek to draw a line, which, while favoring free expression, will nonetheless permit a legislature to find the words necessary to accomplish a legitimate constitutional objective.

What, then, is the difference between *Ginsberg* and *Miller* on the one hand and the California law on the other? As in *Miller* and *Ginsberg*, the California law clearly *protects* even the most violent games that possess serious literary, artistic, political, or scientific value. And it is easier here than in *Miller* or *Ginsberg* to separate the sheep from the goats at the statute's border. That is because here the industry itself has promulgated standards and created a review process.

There is, of course, one obvious difference: The *Ginsberg* statute concerned depictions of "nudity," while California's statute concerns extremely violent video games. But for purposes of vagueness, why should that matter? I can find no difference -- historical or otherwise -- that is *relevant* to the vagueness question. Consequently, for purposes of this facial challenge, I would not find the statute unconstitutionally vague.

III

Video games combine physical action with expression. Were physical activity to predominate in a game, government could appropriately intervene, say by requiring parents to accompany children when playing a game involving actual target practice. But because video games also embody important expressive and artistic elements, I agree that

the First Amendment significantly limits the power to regulate.

Like the majority, I believe that the California law must be "narrowly tailored" to further a "compelling interest," without there being a "less restrictive" alternative that would be "at least as effective." I would not apply this strict standard "mechanically." Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying "compelling interests," the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, "the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide." First Amendment standards applied in this way are difficult but not impossible to satisfy.

A

California's law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17.

Nor is the statute, if upheld, likely to create a precedent that would adversely affect other media, say films, or videos, or books. A typical video game involves a significant amount of physical activity. And pushing buttons that achieve an interactive, virtual form of target practice (using images of human beings as targets), while containing an expressive component, is not just like watching a typical movie.

B

The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the "basic" parental claim "to authority in their own household to direct the rearing of their children," which makes it proper to enact "laws designed to aid discharge of [parental] responsibility," and (2) the State's "independent interest in the well-being of its youth." And where these interests work in tandem, it is not fatally "underinclusive" for a State to advance its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish.

Both interests are present here. As to the need to help parents guide their children, the Court noted in 1968 that "'parental control or guidance cannot always be provided.'" Today, 5.3 million grade-school-age children of working parents are routinely home alone. Thus, it has, if anything, become more important to supplement parents' authority to guide their children's development.

As to the State's independent interest, we have pointed out that juveniles are more likely to show a "'lack of maturity'" and are "more vulnerable or susceptible to negative influences and outside pressures," and that their "character . . . is not as well formed as that of an adult." And we have therefore recognized "a compelling interest in protecting the

physical and psychological well-being of minors."

Extremely violent games can harm children by rewarding them for being violently aggressive in play, and thereby often teaching them to be violently aggressive in life. And video games can cause more harm in this respect than can passive media. There are many scientific studies that support California's views. Unlike the majority, I would find sufficient grounds in these studies for this Court to defer to an elected legislature's conclusion that the video games in question are likely to harm children. This Court has always thought it owed an elected legislature some deference in respect to legislative facts of this kind, particularly when they involve technical matters beyond our competence. The majority grants the legislature no deference at all.

C

I can find no "less restrictive" alternative to California's law that would be "at least as effective." The majority points to a voluntary alternative: The industry tries to prevent those under 17 from buying extremely violent games by labeling those games with an "M" (Mature) and encouraging retailers to restrict their sales to those 17 and older. But this voluntary system has serious enforcement gaps. As of the FTC's most recent update to Congress, 20% of those under 17 are still able to buy M-rated video games, and, breaking down sales by store, one finds that this number rises to nearly 50% in the case of one large national chain. The industry also argues for an alternative technological solution, namely "filtering at the console level." But it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls.

IV

The upshot is that California's statute imposes a restriction on speech that is modest at most. That restriction is justified by a compelling interest (supplementing parents' efforts to prevent their children from purchasing potentially harmful violent, interactive material). And there is no equally effective, less restrictive alternative. California's statute is consequently constitutional on its face.

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

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