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## Secondary Speech and the Protective Approach to Interpretive Dualities in the Roberts Court

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## SECONDARY SPEECH AND THE PROTECTIVE APPROACH TO INTERPRETIVE DUALITIES IN THE ROBERTS COURT

Nat Stern\*

INTRODUCTION .....	133
I. CHOOSING A SUITABLE CONSTRUCT: THE DECISIVE ROLE OF CLASSIFICATION .....	136
A. <i>Defining the Speech at Issue</i> .....	136
1. Words as Conduct .....	136
2. Identification of Speech’s Genre .....	140
B. <i>Relevant Classification of Restriction</i> .....	144
C. <i>Defining an Issue by Government Interest: The Case of Minors</i> .....	148
1. Minors’ Subordinate Status Under the Bill of Rights .....	149
2. <i>Brown and Fox: Free Speech over Generalizations About Children as Central Framework</i> .....	154
II. CHOOSING THE POTENT FORM OF VARIABLE DOCTRINES: OVERBREADTH AND VAGUENESS .....	157
A. <i>Overbreadth Doctrine as Sword</i> .....	158
B. <i>Voiding for Vagueness</i> .....	161
III. SPEECH-FRIENDLY STARE DECISIS: EXPANSIVE CONSTRUCTION OF PRECEDENTS’ PROTECTIVE IMPLICATIONS .....	163
IV. HISTORY AS SPEECH-PROTECTIVE .....	168
V. A SKEPTICAL VIEW OF OFFICIAL FACTUAL CLAIMS .....	170
CONCLUSION .....	175

### INTRODUCTION

On the day the Supreme Court’s decision upholding the Affordable Care Act<sup>1</sup> drew massive attention, a less publicized ruling displayed a striking feature of the Court’s recent First Amendment jurisprudence. In *United States v. Alvarez*,<sup>2</sup> the Court overturned the respondent’s conviction for violating the Federal Stolen Valor Act by falsely claiming to hold the Congressional Medal of Honor.<sup>3</sup> However “contemptible”<sup>4</sup> this

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<sup>1</sup> See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). The Court sustained the Act’s individual mandate for health insurance coverage, though it struck down a penalty for states electing not to participate in the Act’s expansion of Medicaid. *Id.* at 2600–01, 2608.

<sup>2</sup> 132 S. Ct. 2537 (2012).

<sup>3</sup> *Id.* at 2551. All of the cases summarized in this Introduction are discussed in greater detail later in the Article.

<sup>4</sup> *Id.* (Kennedy, J., plurality opinion). Justices Breyer and Kagan concurred in the judgment. *Id.* Justice Alito dissented in an opinion joined by Justices Scalia and Thomas. *Id.* at 2556.

apparent “pathetic attempt to gain respect”<sup>5</sup> might seem to most, Alvarez’s unequivocal lie fell within the sphere of expression guarded by the First Amendment. Justice Kennedy’s plurality opinion noted the similarity between Alvarez’s falsehood and speech the Court addressed in its previous term in *Snyder v. Phelps*.<sup>6</sup> Both involved statements that “can disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle.”<sup>7</sup> In *Snyder*, Phelps and other members of his church were held liable for intentional infliction of emotional distress for picketing the funeral of a soldier killed in the line of duty; their signs’ central theme was that deaths of American soldiers and other devastations reflected God’s wrath for the nation’s tolerance of homosexuality, especially in the military.<sup>8</sup> There, too, Justices left little doubt of their dim estimate of the disputed speech<sup>9</sup>—among the signs’ proclamations were “Thank God for 9/11,” “Thank God for Dead Soldiers,” and “God Hates Fags”<sup>10</sup>—even as they found the signs shielded by the First Amendment.<sup>11</sup>

While *Alvarez* and *Snyder* present vivid examples of protecting “the thought that we hate,”<sup>12</sup> they do not amount to isolated phenomena. In four other cases in the Court’s last three terms, the Court has likewise struck down restrictions on what could be regarded as “secondary” speech.<sup>13</sup> The term as used here refers to types of expression that the government seeks to restrict on colorable grounds that such expression causes harm<sup>14</sup> and is of such a nature as not to merit full-blown First Amendment recognition.<sup>15</sup>

<sup>5</sup> *Id.* at 2542 (Kennedy, J., plurality opinion).

<sup>6</sup> 131 S. Ct. 1207 (2011); *see Alvarez*, 132 S. Ct. at 2542.

<sup>7</sup> 132 S. Ct. at 2542.

<sup>8</sup> *Snyder*, 131 S. Ct. at 1213–14.

<sup>9</sup> *See id.* at 1220 (describing picketing as “certainly hurtful” and suggesting that the church could be considered “morally flawed” and its contribution to public discourse “negligible”); *see also Alvarez*, 132 S. Ct. at 2542 (describing picketing in *Snyder* as “hateful protests”).

<sup>10</sup> *Snyder*, 131 S. Ct. at 1213.

<sup>11</sup> *Id.* at 1219. Justice Alito was the lone dissenter in *Snyder*. *Id.* at 1212.

<sup>12</sup> *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

<sup>13</sup> *See infra* notes 18–27 and accompanying text.

<sup>14</sup> For a discussion of the role of harm in *Snyder* and in two other cases discussed in this Article—*Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011), and *United States v. Stevens*, 130 S. Ct. 1577 (2010)—*see Frederick Schauer, Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 84–93.

<sup>15</sup> The concept of secondary speech should be distinguished from the Court’s famous enumeration in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), of forms of speech—e.g., obscenity and “‘fighting’ words”—that categorically warrant no protection because they “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.” *Id.* at 572. (*Chaplinsky* is discussed at text accompanying note 373 *infra*.) Secondary expression, by contrast, describes the state’s contention, rather than a First Amendment tenet, and includes speech that the government asserts deserves lesser protection rather than none at all. In the latter sense, it resembles Cass Sunstein’s identification of “low value speech” whose restriction is subject to less scrutiny than “core” expression. *See* Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 555, 559 (1989) (setting forth criteria for distinguishing high-value speech from low-value speech). *But see* Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989)

In each of these six cases, the state<sup>16</sup> could argue plausibly—if unsuccessfully—that relative to its cost, the disputed speech failed to appreciably advance the principal aims of freedom of speech: to facilitate the search for truth, to promote democratic self-government, and to protect individual self-realization.<sup>17</sup> In the first of the cases to be decided, *United States v. Stevens*,<sup>18</sup> the Court invalidated a conviction for selling videos of dogfighting on the basis of the facial invalidity of a federal ban on depictions of animal cruelty.<sup>19</sup> The next term, in addition to *Snyder*, the Court rejected two other attempts to limit expression of purportedly subordinate rank. In *Sorrell v. IMS Health Inc.*,<sup>20</sup> the Court struck down a Vermont law that sought to curb the commercial exploitation by pharmaceutical companies of information acquired about the prescribing practices of individual physicians.<sup>21</sup> Absent express consent by prescribers, the law forbade the sale by pharmacies to data-mining companies, and by data-mining companies to pharmaceutical companies, of “prescriber-identifiable data . . . for any commercial purpose.”<sup>22</sup> A few days later, the Court, in *Brown v. Entertainment Merchants Association*,<sup>23</sup> invalidated a statute that barred the sale or rental of “violent video games” to minors and required their packaging to be labeled “18.”<sup>24</sup> And shortly before issuing its decision in *Alvarez* last term, the Court, in *FCC v. Fox Television Stations, Inc.*,<sup>25</sup> found impermissibly vague the FCC’s policy against “broadcast indecency”<sup>26</sup> as applied to actions taken against networks for three incidents that aired on broadcast television.<sup>27</sup>

These six decisions display not only general resistance to deeming secondary speech unworthy of normal First Amendment safeguards, but also speech-protective resolutions of dualities that recur in constitutional jurisprudence. Part I of this Article examines this pattern in the context of classification: the Court’s threshold choice of alternatives of what the case is “about.” Also present in a number of the cases is a

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(criticizing the project of making this distinction). Again, however, secondary speech—as illustrated in the cases discussed in this Article—encompasses speech whose arguably deficient value did not persuade the Court to uphold its restriction.

<sup>16</sup> The state in this context comprises government generally, including federal statutes and administrative regulations as well as state courts’ enforcement of common law.

<sup>17</sup> These rationales for protecting speech can be found in myriad judicial opinions and scholarly works. Perhaps their best-known collective articulation appears in Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–87 (1963).

<sup>18</sup> 130 S. Ct. 1577 (2010).

<sup>19</sup> *Id.* at 1592; *see* 18 U.S.C. § 48 (2006).

<sup>20</sup> 131 S. Ct. 2653 (2011).

<sup>21</sup> *Id.* at 2659.

<sup>22</sup> N.H. REV. STAT. ANN. § 318:47-f (2011).

<sup>23</sup> 131 S. Ct. 2729 (2011).

<sup>24</sup> *Id.* at 2741–42; *see* CAL. CIV. CODE §§ 1746–1746.5 (West 2009).

<sup>25</sup> 132 S. Ct. 2307 (2012).

<sup>26</sup> Indus. Guidance on Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999 (2001).

<sup>27</sup> 132 S. Ct. at 2309–10.

contrast between vigorous and mild versions of protective doctrines relevant to the case; Part II traces the Court's enforcement of the robust forms of these doctrines. Part III addresses a central problem of jurisprudence as it appears among these cases: the application of precedent. A number of the cases turn largely on the proper scope of a salient precedent's core meaning, and the Court has preferred both the breadth of interpretations protecting speech and the narrowness of constructions allowing its denial. Additionally, as with specific precedent, history more broadly can lend itself to either sustaining or constricting constitutional rights. Part IV describes the Court's invocation of historical boundaries to deflect restrictions on speech, and highlights the Court's refusal in each of these three terms—in *Stevens*, *Brown*, and *Alvarez*—to augment the list of historically established categories of unprotected expression. A final realm where competing modes of analysis typically produce antithetical results is the choice between deference and skepticism toward asserted factual predicates for banning speech. As discussed in Part V, the Court in these cases did not hesitate to reject justifications for speech prohibitions urged by the government.

#### I. CHOOSING A SUITABLE CONSTRUCT: THE DECISIVE ROLE OF CLASSIFICATION

Constitutional outcomes often hinge on the conceptual lens through which the Court views the issue before it. Rather than simply competing constructions of cases or doctrines, a case may offer alternative frameworks for understanding and resolving the case. Where secondary speech is involved, the difference can be over the character of the banned expression, the nature of its prohibition, or even a less well-defined but discernible sense of the underlying subject matter involved. The cases examined here present instances in each of these areas where the Court's choice led to invalidation of restrictions.

##### *A. Defining the Speech at Issue*

One way to reduce or qualify First Amendment protection is to view the essence of speech at issue as not amounting to pure expression, but rather largely comprising conduct.<sup>28</sup> Another is to assign the speech to a category that, while acknowledged as expressive, is readily subject to rational restriction.<sup>29</sup> The group of recent cases involving secondary speech includes the Court's rejection of both of these strategies.

##### 1. Words as Conduct

The notion that some utterances are subject to restriction because they do not function primarily as expression is not new. For example, "fighting words" have been

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<sup>28</sup> This concept should be distinguished from its inverse, symbolic speech, under which conduct intended to convey a message is accorded a limited degree of First Amendment protection because of its expressive elements. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

<sup>29</sup> See *id.* at 376–77.

deemed unprotected by the First Amendment in part because they are considered “no essential part of any exposition of ideas”;<sup>30</sup> insults and epithets have been described as closer to “physical assaults” than to protected expression.<sup>31</sup> In *Cohen v. California*,<sup>32</sup> Justice Blackmun protested the Court’s invalidation of Cohen’s conviction for wearing a jacket bearing the words “Fuck the Draft” by dismissing this “absurd and immature antic” as “mainly conduct and little speech.”<sup>33</sup> Justices in the majority in *FCC v. Pacifica Foundation*<sup>34</sup> seemed to regard George Carlin’s monologue on “Seven Filthy Words” as partaking largely of conduct when, upholding its exclusion from broadcast, they likened it to a “nuisance”<sup>35</sup> and “assault[.]”<sup>36</sup> Variations in this strain of logic were pressed in *Sorrell, Brown, Snyder, Alvarez*, and—obliquely—*Stevens*, failing in each instance to persuade the Court.

In *Sorrell*, the Court rebuffed Vermont’s contention that its restrictions on dealing with physician-specific prescription information did not substantially implicate the Free Speech Clause.<sup>37</sup> Echoing the logic of the First Circuit, which had sustained a similar law,<sup>38</sup> Vermont characterized the sale, transfer, and use of such information as conduct rather than speech.<sup>39</sup> The Court, however, scorned the notion that this information should be treated as merely a “commodity” with the same First Amendment standing as “beef jerky.”<sup>40</sup> Rather, here as elsewhere, the conveyance of facts formed an integral part of potentially valuable communication; facts, observed the Court, “are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.”<sup>41</sup> For the Court, then, speech that facilitated pharmaceutical marketing was undoubtedly “a form of expression protected by the Free Speech Clause of the First Amendment.”<sup>42</sup>

In *Snyder*, the case for regarding Westboro’s picketing as predominantly conduct was tacitly pressed in Justice Alito’s dissent<sup>43</sup> and did not rest on denial of the signs’

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<sup>30</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>31</sup> See Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 293 (1990).

<sup>32</sup> 403 U.S. 15 (1971).

<sup>33</sup> *Id.* at 27 (Blackmun, J., dissenting).

<sup>34</sup> 438 U.S. 726 (1978).

<sup>35</sup> *Id.* at 750–51 (quoting *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926)).

<sup>36</sup> *Id.* at 759–60 (Powell, J., concurring).

<sup>37</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

<sup>38</sup> See *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008).

<sup>39</sup> *Sorrell*, 131 S. Ct. at 2666.

<sup>40</sup> *Id.* (quoting *Ayotte*, 550 F.3d at 52–53) (internal quotation marks omitted).

<sup>41</sup> *Id.* at 2667.

<sup>42</sup> *Id.* at 2659.

<sup>43</sup> The argument had been made more explicitly in support of upholding *Snyder*’s damages award. See Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 487 (2011) (analogizing the Phelps’ picketing to their using signs “as weapons in a physical thrashing and beating of persons on the sidewalk in Westminster, Maryland”); Brief for the American Legion as Amicus Curiae Supporting

obvious verbal dimension.<sup>44</sup> Instead, Justice Alito’s manner of describing Westboro’s activity and its effects reflected his belief that the picketing smacked far more of tortious action than meaningful expression.<sup>45</sup> The defendants’ stance on appeal, he stated, was to “maintain[ ] that the First Amendment gave them a license to engage in such *conduct*.”<sup>46</sup> While the respondents undoubtedly engaged in expression, Justice Alito described their communication in terms associated with aggressive physical behavior.<sup>47</sup> The respondents, he asserted, had “brutalize[d]” the father of the slain soldier with their “vicious verbal assault.”<sup>48</sup> When the respondents issued a press release to announce their intentions, they “began the wounding process”<sup>49</sup> that culminated in their “launch[ing] a malevolent verbal attack” on the soldier’s family.<sup>50</sup>

Chief Justice Roberts’s opinion for the majority did not dispute that Westboro’s picketing caused severe emotional injury; the Court acknowledged that the signs had “inflict[ed] great pain”<sup>51</sup> and compounded Snyder’s “incalculable grief.”<sup>52</sup> Rather, the Court’s conclusion flowed from its unshakable premise that the picketing constituted pure—if revolutive—speech.<sup>53</sup> Indeed, the opinion refers to the “speech” involved dozens of times.<sup>54</sup> Thus, the case was governed by the First Amendment’s mandate “to protect even hurtful speech on public issues.”<sup>55</sup>

In *Brown*, California did not argue that violent video games fall wholly outside the ambit of speech,<sup>56</sup> but rather that the visceral experience of immersion in the games overwhelms their expressive aspect.<sup>57</sup> The State claimed that the games exert a harmful effect absent from more passive media because the player “participates in the violent action on screen and determines its outcome.”<sup>58</sup> Nor was the notion that video games’

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Petitioner, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2224730 at \*1–2 (asserting that this form of picketing “is ‘a mixture of conduct and communication,’ and thus is ‘qualitatively different from other modes of communication’” (citations omitted)).

<sup>44</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

<sup>45</sup> *Id.* (arguing that intentional infliction of emotional distress would be an appropriate cause of action); see also *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting) (describing respondent’s flag burning as part of protest as “an inarticulate grunt or roar” underserving of First Amendment protection).

<sup>46</sup> *Snyder*, 131 S. Ct. at 1223 (Alito, J., dissenting) (emphasis added).

<sup>47</sup> See, e.g., *id.* (“[The] respondents brutally attacked Matthew Snyder.”).

<sup>48</sup> *Id.* at 1222.

<sup>49</sup> *Id.* at 1225.

<sup>50</sup> *Id.* at 1222.

<sup>51</sup> *Id.* at 1220 (majority opinion).

<sup>52</sup> *Id.* at 1218.

<sup>53</sup> *Id.* at 1219.

<sup>54</sup> See generally *id.* (describing the content of respondents’ signs).

<sup>55</sup> *Id.* at 1220. The Court’s designation of the respondents’ speech as addressing a matter of public concern is discussed at text accompanying notes 85, 92–95 *infra*.

<sup>56</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

<sup>57</sup> *Id.* at 2739.

<sup>58</sup> *Id.* at 2737–38.

interactivity eclipses their communicative function in minors without support. As Justice Breyer noted in dissent, studies exist that conclude violent video games pose a material risk of promoting aggression in minors.<sup>59</sup>

The majority, however, rejected the notion that playing violent video games is an activity profoundly distinct from exposure to violence in books, plays, movies, television, and other entertainment traditionally available to children.<sup>60</sup> For the Court, all these modes of expression formed an undifferentiated whole in the eyes of the First Amendment. As Justice Scalia's opinion bluntly stated, "All literature is interactive."<sup>61</sup> While the Court had recognized a category of unprotected speech obscene as to minors in *Ginsberg v. New York*,<sup>62</sup> that principle was confined to sexual material.<sup>63</sup> Though obscenity's unprotected status<sup>64</sup> has sometimes been linked to its having a primary effect outside the realm of communication,<sup>65</sup> the Court refused to apply this rationale to violent narratives.

In *Alvarez*, as in *Snyder*, it was Justice Alito in dissent who supplied a basis for ascribing the attributes of conduct to the forbidden speech involved.<sup>66</sup> To Justice Alito, Alvarez, through his lie, had "misappropriated" the honor due to those who had earned the Congressional Medal of Honor.<sup>67</sup> Indeed, the Court had precedent for treating reputation as a possession susceptible to theft. Sustaining a cause of action for libel in *Milkovich v. Lorain Journal Co.*,<sup>68</sup> the Court quoted from Shakespeare's *Othello*: "Who steals my purse steals trash; / 'tis something, nothing; / 'Twas mine, 'tis his, and has been slave to thousands; / But he that filches from me my good name / Robs me of that which not enriches him, / And makes me poor indeed."<sup>69</sup> Moreover, unlike the

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<sup>59</sup> See *id.* at 2768 (Breyer, J., dissenting).

<sup>60</sup> See *id.* at 2736–38 (majority opinion).

<sup>61</sup> *Id.* at 2738. The Court's opinion drew from an opinion by Judge Posner for this observation and further quoted Judge Posner's elaboration of the proposition. See *id.* ("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." (quoting *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (internal quotation marks omitted) (invalidating a similar restriction))).

<sup>62</sup> 390 U.S. 629, 636–38 (1968).

<sup>63</sup> *Id.* at 638.

<sup>64</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973); *Miller v. California*, 413 U.S. 15, 23–24 (1973).

<sup>65</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1019 (3d ed. 2006) ("A third argument often made for excluding obscenity from First Amendment protection is that it should be regarded as a sex aid, not as speech. Professor Fred Schauer argued that 'hardcore pornography is designed to produce a purely physical effect. [It is] essentially a physical rather than a mental stimulus.'" (citation omitted)).

<sup>66</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2565 (2012) (Alito, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> 497 U.S. 1 (1990).

<sup>69</sup> *Id.* at 12 (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3); see also Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 590 (1997) ("Reputation

defamer who “[r]obs me of that which not enriches him,”<sup>70</sup> false claimants of military honors may not only dilute the value of awards to actual recipients<sup>71</sup> but also “enrich” themselves by reveling in counterfeit glory.

To other Justices, however, it was speech that requires protection from “the substantial and expansive threats to free expression” when government takes aim at content.<sup>72</sup> While Justice Kennedy’s plurality opinion referred to Alvarez’s lie as an “attempt to steal [ ] honor that belongs to those who fought for this Nation in battle,”<sup>73</sup> he would not extend the metaphor of theft to deny this lie the constitutional safeguards for speech.<sup>74</sup> Though the Court had allowed penalties for harmful falsehoods like defamation and fraud under certain conditions, Justice Kennedy concluded, “[F]alsity alone may not suffice to bring the speech outside the First Amendment.”<sup>75</sup> Rather, the Stolen Valor Act’s ban would be subject to ordinary principles governing speech—including invalidation where counter-speech could accomplish the government’s goal.<sup>76</sup>

## 2. Identification of Speech’s Genre

In some instances, protection of secondary speech may hinge on the formal category to which what is undoubtedly speech (as opposed to conduct or quasi-conduct) is assigned. Designation as a disfavored type may relegate the speech to substantially lesser protection or even no protection at all; conversely, a finding that the speech falls into an alternative category tilts the odds heavily or decisively in favor of the defendant. One area where choice of characterization looms large is determining whether an allegedly libelous statement can be reasonably construed as essentially factual. While the Supreme Court has rejected a “wholesale defamation exemption for anything that might be labeled ‘opinion,’”<sup>77</sup> a ruling that a statement does not assert a provably false fact effectively shields the plaintiff from liability.<sup>78</sup> On the other

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provides an excellent example of a ‘fundamental’ property interest. Many (if not most) people would agree that reputation constitutes a precious commodity, a commodity that they expect the state to protect under its laws.”).

<sup>70</sup> *Milkovich*, 497 U.S. at 12 (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3).

<sup>71</sup> See Brian Schlect, Comment and Note, *The New York Times Solution to the Ninth Circuit’s ‘Stolen Valor’ Problem*, 48 *IDAHO L. REV.* 175, 177–78 (2011).

<sup>72</sup> *Alvarez*, 132 S. Ct. at 2544 (Kennedy, J., plurality opinion).

<sup>73</sup> *Id.* at 2542.

<sup>74</sup> *Id.* at 2543.

<sup>75</sup> *Id.* at 2545.

<sup>76</sup> *Id.* at 2549–50. The opinion’s determination that counter-speech would suffice here is discussed *infra* at text accompanying notes 411–12.

<sup>77</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (citation omitted).

<sup>78</sup> See, e.g., *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998) (describing the Supreme Court’s approach as “examin[ing] the statement’s language and context to determine if it could be interpreted as asserting a fact”); *Tronfeld v. Nationwide Mut. Ins. Co.*, 636 S.E.2d 447, 450 (Va. 2006) (declaring as nonactionable speech “that [which] does not contain a provably false factual connotation, or statements which cannot reasonably be

hand, where a form of expression—e.g., obscenity—is categorically proscribable, a conclusion that the speech at issue falls into that category generally sustains the government’s action.<sup>79</sup> The manner in which identification of expression’s character shapes outcomes is notably at play in two of the cases considered here: *Snyder* and *Stevens*.<sup>80</sup>

Much of the debate in *Snyder*, both within the Court and among commentators, revolved around whether the picketing at Matthew Snyder’s funeral addressed a matter of public or private concern.<sup>81</sup> While the case presented a novel setting for this determination, this dichotomy had proved pivotal in other areas of expression.<sup>82</sup> In defamation doctrine, a private figure seeking presumed or punitive damages over a statement on a matter of nonpublic concern need not make the showing of actual malice required where a statement addressing a public concern is involved.<sup>83</sup> Similarly, government employers bear a far lighter burden to dismiss employees over speech found not to pertain to a public concern.<sup>84</sup>

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interpreted as stating actual facts about a person”); 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 23 (2005) (describing as not defamatory statements that “cannot reasonably be interpreted as stating actual facts about an individual”).

<sup>79</sup> See *supra* note 64 and accompanying text. *But see* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (stating that government may not single out particular viewpoints for prohibition even within proscribable categories).

<sup>80</sup> A third decision, *Sorrell*, had potentially hinged on whether to treat the regulated expression as commercial speech. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) (describing factors for determining whether expression is commercial speech); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (setting forth a four-part test to examine the validity of commercial speech restrictions). However, the Court announced that the outcome would be the same irrespective of “whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011). For the *Sorrell* Court’s application of the *Central Hudson* test, see *id.* at 2667–68.

<sup>81</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

<sup>82</sup> The privileged position of speech on matters of public concern is a major tenet of First Amendment doctrine. See *FCC v. League of Women Voters*, 468 U.S. 364, 375–76 (1984) (stating that communication regarding matters of public importance “is entitled to the most exacting degree of First Amendment protection”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (holding speech on “matters of public concern” lies “at the heart of the First Amendment’s protection” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940))).

<sup>83</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (Powell, J., plurality opinion); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

<sup>84</sup> Compare *Rankin v. McPherson*, 483 U.S. 378, 384–87 (1987) (holding that a comment by a clerical employee expressing approval of an assassination attempt on the President was insufficient grounds for removal because the remark in context constituted speech on a matter of public concern), with *Connick v. Myers*, 461 U.S. 138, 146 (1983) (holding that the circulation of a questionnaire by an assistant district attorney concerning operation of the District Attorney’s office was a permissible basis for dismissal where the questionnaire could not “be fairly considered as relating to any matter of political, social, or other concern to the community”). The distinction was qualified in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that protection of a public employee’s speech on matters of public concern was confined to expression as a private citizen rather than performance of official duties).

Here, too, the Court's conclusion that the picketing amounted to commentary on matters of public concern proved central to its ruling that the speech was protected.<sup>85</sup> That conclusion was by no means self-evident. Justice Alito was hardly alone in thinking that at least some of the signs, viewed in context, did not qualify as expression on topics of public concern because they "specifically attacked" Matthew Snyder.<sup>86</sup> After all, the respondents had chosen the site of Snyder's funeral to display placards denouncing the Catholic Church<sup>87</sup> and the military,<sup>88</sup> and Snyder had belonged to both.<sup>89</sup> Moreover, the signs addressed to "you"—"You're Going to Hell" and "God Hates You"<sup>90</sup>—could have been construed as directed at Snyder or his family. Finally, in an online "epic" posted after the funeral, the picketers had singled out Snyder's parents for condemnation for raising him as a Catholic and supporting his participation in military combat.<sup>91</sup>

For the majority, however, all of these details were submerged beneath the "overall thrust and dominant theme"<sup>92</sup> of the demonstration. Assessing the "content, form, and context"<sup>93</sup> of Westboro's picketing, Chief Justice Roberts reasoned that church members had obviously aimed to air their views on matters of public importance: "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy."<sup>94</sup> That the respondents had sought to amplify their message by synchronizing their activity with Matthew Snyder's funeral did not detract from the overriding fact that they had "addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials."<sup>95</sup>

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<sup>85</sup> See *Snyder*, 131 S. Ct. at 1219 ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment.").

<sup>86</sup> *Id.* at 1226–27 (Alito, J., dissenting); see, e.g., Leslie Kendrick, Essay, *Content Neutrality and Compelling Interests: The October 2010 Term*, 98 VA. L. REV. IN BRIEF 14, 21–22 (2012); Jeffrey Shulman, *Epic Considerations: The Speech that the Supreme Court Would Not Hear in Snyder v. Phelps*, 2011 CARDOZO L. REV. DE NOVO 35, 40–41; see also Zipursky, *supra* note 43, at 507–08 (asserting that Snyder had a viable claim of infliction of emotional distress available to those subjected to emotional harm while grieving the loss of a loved one).

<sup>87</sup> Two of the signs read "Pope in Hell" and "Priests Rape Boys." *Snyder*, 131 S. Ct. at 1217.

<sup>88</sup> Examples include "Thank God for IEDs" and "Thank God for Dead Soldiers." *Id.* at 1216–17.

<sup>89</sup> See *id.* at 1226 (Alito, J., dissenting). In addition, Justice Alito argued that the anti-homosexual theme of several of the placards would have been reasonably perceived as falsely suggesting that Matthew was gay. *Id.* at 1225.

<sup>90</sup> *Id.* at 1213 (majority opinion).

<sup>91</sup> See *id.* at 1225–26 (Alito, J., dissenting). The "epic" was not considered by the Court.

<sup>92</sup> *Id.* at 1217 (majority opinion).

<sup>93</sup> *Id.* at 1216 (citation omitted).

<sup>94</sup> *Id.* at 1217.

<sup>95</sup> *Id.* at 1220; see also Paul E. Salamanca, *Snyder v. Phelps: A Hard Case That Did Not Make Bad Law*, 2011 CATO SUP. CT. REV. 57, 67 ("Human beings are social beings, and much

While the *Snyder* Court's designation of Westboro's speech as directed to public issues assured its protection, it was the Court's rejection of a classification urged by the government that determined the outcome in *Stevens*. Though Stevens was convicted for selling videos of pit bulls engaging in dogfights and attacking other animals,<sup>96</sup> the federal ban on depictions of animal cruelty had been animated by what many would regard as an even more disturbing phenomenon: "crush videos."<sup>97</sup> Appealing to a distinctive sexual fetish, crush videos typically showed women slowly crushing helpless animals to death with their feet or high-heeled shoes.<sup>98</sup> Obviously, the torture of these animals occurred for the purpose of recording the act and disseminating the resulting videos.<sup>99</sup> Moreover, even with dogfighting videos, it seems reasonable to assume that the prospect of selling such videos had stimulated at least a significant portion of the activity depicted in them.<sup>100</sup> Thus, the government had grounds for contending that crush videos and depictions of animal fighting are "intrinsically related to criminal conduct"<sup>101</sup>—a category of expression that the Court acknowledged is not protected by the First Amendment.<sup>102</sup>

The *Stevens* majority, however, bypassed the question of whether legislation aimed specifically at these types of depictions would survive constitutional scrutiny.<sup>103</sup> For the Court, the "alarming breadth" of the statute rendered it facially invalid.<sup>104</sup> By appearing to encompass depictions of activities such as hunting that are legal in some jurisdictions and illegal in others, the statute swept within its prohibitions a wide swath of protected speech.<sup>105</sup> Adopting this construction, the Court found implausible the notion that the expression criminalized by the statute was categorically related to criminal conduct.<sup>106</sup>

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of what they do is bound up with matters of public concern. Mere 'relation to' another person, without more, should not exclude speech on a matter of public concern from protection.").

<sup>96</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1583 (2010).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* at 1599 (Alito, J., dissenting) ("[Crush] videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos.").

<sup>100</sup> *See* Abigail Lauren Perdue, *When Bad Things Happen to Good Laws: The Rise, Fall, and Future of Section 48*, 18 VA. J. SOC. POL'Y & L. 469, 522 (2011) (endorsing the view that in some cases of dogfighting videos, "the cruelty would never have occurred but for the creation and sale of the film").

<sup>101</sup> *Stevens*, 130 S. Ct. at 1592.

<sup>102</sup> *Id.* at 1584 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

<sup>103</sup> *Id.* at 1592 ("We . . . do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.").

<sup>104</sup> *Id.* at 1588.

<sup>105</sup> *Id.* at 1588–90. In banning the creation, sale, or possession of depictions of animal cruelty for commercial gain, the statute applied to depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if the conduct depicted violated federal or state law where "the creation, sale, or possession takes place." 18 U.S.C. § 48(c)(1) (2006). The Court's overbreadth analysis is further discussed *infra* at Part II.A.

<sup>106</sup> The government has well conceded that this rationale collapsed under the Court's interpretation of the statute's reach. *See Stevens*, 131 S. Ct. at 1592.

*B. Relevant Classification of Restriction*

Another source of dispute sometimes posed by restrictions on secondary speech is over-classification of the restriction itself. As a practical matter, judicial characterization of the nature of regulation of expression frequently determines its validity. For example, a conclusion that public property constitutes a public forum typically confers access to the speaker seeking to engage in expressive activity there,<sup>107</sup> while designation as a non-public forum almost invariably leads to exclusion.<sup>108</sup> Even more starkly dispositive is resolution of the question of state action; determination that a privately imposed restriction cannot be ascribed to the state eliminates First Amendment scrutiny altogether.<sup>109</sup>

Perhaps nowhere is this dynamic more prominent than disputes over whether a particular limitation on speech is essentially aimed at its content. And nowhere was this debate more notably joined among the Court's recent decisions on secondary speech than in *Sorrell*. The case arose against a backdrop of frequent Court pronouncements on the dangers and presumed invalidity of content-based restrictions on expression.<sup>110</sup> On the

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<sup>107</sup> See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98–99 (1972); see also *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (describing the burden on government to justify exclusion from a public forum).

<sup>108</sup> See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680, 683 (1998); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808–09 (1985); *Greer v. Spock*, 424 U.S. 828, 837–38 (1976); see also *Perry Educ. Ass'n*, 460 U.S. at 46 (“In addition to time, place, and manner regulations, the state may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”). See generally Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 (considering the current framework of the public forum doctrine and proposing a structured, risk-correlated approach).

<sup>109</sup> Compare, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (finding a First Amendment right to distribute religious literature on the premises of a company-owned town), with *Hudgens v. NLRB*, 424 U.S. 507 (1976) (rejecting a First Amendment right to conduct labor picketing at a shopping center). Similarly, in the realm of compelled expression, objections to mandatory charges to producers to fund generic advertising messages can gain no First Amendment traction when the advertisements are deemed government speech. Compare *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (sustaining a mushroom producer’s objection to compelled assessment spent mostly on generic advertising of mushrooms), with *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005) (rejecting beef producers’ challenge to tax on sales and imports of cattle to fund a promotional campaign for beef where content of the advertising was “effectively controlled by the Federal Government itself”).

<sup>110</sup> See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 768, 781 (2002) (invalidating a law prohibiting a candidate for judicial election from announcing “his or her views on disputed legal or political issues” where the State failed to meet “the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests”); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 827 (2000) (striking down limitations on the telecast

other hand, the Court has applied less stringent scrutiny to content-neutral regulations of the “time, place, and manner”<sup>111</sup> of expression,<sup>112</sup> and to content-based restrictions of speech seeking to address the “secondary effects” of that speech.<sup>113</sup> Thus, outcomes can hinge on the sometimes debatable question of whether suppression of certain content for its own sake is the salient feature of a challenged restriction.<sup>114</sup>

In *Sorrell*, that debate came in the form of a longstanding difference over the proper paradigm for assessing regulation of commercial speech.<sup>115</sup> The debate began at the dawn of the Court’s modern commercial speech doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>116</sup> In striking down a state’s ban on advertising prescription drug prices, the Court announced that restrictions on commercial speech would be largely governed by normal First Amendment principles.<sup>117</sup> Fundamentally disturbing was that the statute “singles out speech of a *particular content* and seeks to prevent its dissemination completely.”<sup>118</sup> The state had asserted several potential adverse consequences from advertising, including the prospect of consumers flocking to cheaper but less professional pharmacists.<sup>119</sup> Though approving latitude for measures to assure commercial speech’s accuracy,<sup>120</sup> the Court refused to countenance a ban premised on the “advantages of [citizens] being kept in ignorance.”<sup>121</sup> Four years later in *Central Hudson Gas & Electric Corporation v. Public Service Commission*,<sup>122</sup>

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of sexually explicit programming under strict scrutiny where the government “failed to show that [the statute] is the least restrictive means for addressing a real problem”); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (observing that regulations aimed at content of speech “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion”); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (describing the rationale for presumed invalidity of content discrimination as its “rais[ing] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace”); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383–84 (1984) (invalidating a statute prohibiting any noncommercial station that receives a grant from the Corporation for Public Broadcasting to “engage in editorializing”).

<sup>111</sup> *Turner Broad. Sys.*, 512 U.S. at 676 (O’Connor, J., concurring).

<sup>112</sup> *Id.* at 642.

<sup>113</sup> *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986) (sustaining a zoning restriction targeting adult theaters because of its content-neutral purpose of curbing the non-speech-related “secondary effects” of such theaters).

<sup>114</sup> *See* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 242 (2012) (“Perhaps the biggest difficulty with content discrimination is that ‘content’ is hardly self-defining.”); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 83 (1978).

<sup>115</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2012).

<sup>116</sup> 425 U.S. 748 (1976).

<sup>117</sup> *Id.* at 770.

<sup>118</sup> *Id.* at 771 (emphasis added).

<sup>119</sup> *Id.* at 768.

<sup>120</sup> *See id.* at 771–72 n.24.

<sup>121</sup> *Id.* at 769.

<sup>122</sup> 447 U.S. 557 (1980).

the Court similarly took note that “[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message.”<sup>123</sup> While again acknowledging that distinctive aspects of commercial speech allowed for some regulation of content,<sup>124</sup> the general presumption against content-based restrictions rather than its exceptions governed the case.<sup>125</sup> The Court struck down a ban on all advertising by electric utilities to promote the use of electricity because it failed the requirement that regulation not be “more extensive than is necessary to serve [the state’s] interest.”<sup>126</sup>

For Justice Rehnquist, who dissented in both *Virginia Board* and *Central Hudson*, the Court’s entire approach to restrictions on commercial speech in these cases was fundamentally misconceived.<sup>127</sup> The crucial feature of the regulations at issue was not that they were aimed at the content of speech, but that they formed part of a larger regulatory scheme designed to further important state interests.<sup>128</sup> In *Virginia Board*, Justice Rehnquist objected to “elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas . . .”<sup>129</sup> and suggested that the Court had returned to the *Lochner*<sup>130</sup> era’s judicial intrusion into social and economic policy.<sup>131</sup> Likewise in *Central Hudson*, Justice Rehnquist asserted that the Commission’s order was “more akin to an economic regulation to which virtually complete deference should be accorded by this Court”<sup>132</sup> and again accused the majority of moving toward the revival of *Lochnerism*.<sup>133</sup>

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<sup>123</sup> *Id.* at 564 n.6.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 570.

<sup>126</sup> *Id.* at 566, 570–71 (finding that the Commission had “not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation,” including a requirement that advertisements include information about efficiency and the expense of services).

<sup>127</sup> See *Central Hudson*, 447 U.S. at 583–606 (Rehnquist, J., dissenting); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 781–89 (1978) (Rehnquist, J., dissenting).

<sup>128</sup> See *Central Hudson*, 447 U.S. at 599–602 (Rehnquist, J., dissenting); *Va. State Bd.*, 425 U.S. at 790 (Rehnquist, J., dissenting).

<sup>129</sup> *Va. State Bd.*, 425 U.S. at 781 (Rehnquist, J., dissenting).

<sup>130</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>131</sup> See *Va. State Bd.*, 425 U.S. at 784 (Rehnquist, J., dissenting) (“[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws.” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)) (internal quotation marks omitted)); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30 (1979) (“[E]conomic due process is resurrected [in *Virginia Board*], clothed in the ill-fitting garb of the first amendment [sic] . . .”); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2586 (2008). For an overview of the *Lochner* era, see Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009).

<sup>132</sup> *Central Hudson*, 447 U.S. at 591.

<sup>133</sup> See *id.*

Though the framework announced in *Central Hudson* continued as the standard for reviewing commercial speech regulation,<sup>134</sup> *Sorrell* evoked renewed argument that some regulation impinging on commercial speech—especially in the field of health<sup>135</sup>—should be judged by standards for commercial regulatory schemes rather than doctrines governing political and other “core” expression.<sup>136</sup> For Justice Breyer, the First Amendment’s solicitude for the “maintenance of a free marketplace for goods and services”<sup>137</sup> was markedly less than that for the marketplace of ideas for “social, political, esthetic, moral, and other ideas and experiences.”<sup>138</sup> Invoking a classic statement of the Court’s permissive philosophy in this area, he observed that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional” if it is based on “some rational basis within the knowledge and experience of the legislators.”<sup>139</sup> Thus, the skepticism toward content-based and speaker-based restrictions appropriate to the realm of ideas was profoundly misplaced in a commercial regulatory regime whose impact on speech was “indirect, incidental, and entirely commercial.”<sup>140</sup> Like Justice Rehnquist earlier, Justice Breyer feared that the decision threatened a return to the *Lochner* era’s judicial usurpation of legislative prerogative in economic policy.<sup>141</sup>

For the *Sorrell* majority, however, the First Amendment’s skepticism toward restrictions aimed at particular content transcended commercial boundaries.<sup>142</sup> What was

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<sup>134</sup> See, e.g., *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

<sup>135</sup> In a sense, the debate and outcome in *Sorrell* were foreshadowed nearly a decade earlier in *Thompson*, a case that also involved health care policy. 535 U.S. at 360. *Thompson* invalidated a federal law allowing pharmacists to dispense compounded drugs tailored to particular patients only if they did not advertise or solicit prescriptions for the compounding of a specific drug or type of drug. *Id.* The law regarded advertising as reflecting a scale of operation that warranted activation of extensive testing procedures from which small-scale compounding was otherwise exempt. *Id.* at 368–70. The Court held that this restriction failed to meet *Central Hudson*’s fourth requirement that restrictions on commercial speech be no more extensive than necessary because the government had failed to demonstrate that its aim could not be achieved through other methods that did not inhibit speech: e.g., limiting the amount of particular compounded drugs that pharmacists could sell in a certain period. *Id.* at 371–73. Invoking *Virginia Board*, the majority rejected the four dissenters’ contention that the restriction advanced the government’s interest in curbing the sale of compounded drugs to “patients who may not clearly need them.” *Id.* at 373 (referring to Justice Breyer’s dissent). In both cases, the First Amendment forbade measures “preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.” *Id.* at 374–75.

<sup>136</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2673–74 (2011) (Breyer, J., dissenting).

<sup>137</sup> *Id.* at 2674.

<sup>138</sup> *Id.* (citations omitted) (internal quotation marks omitted).

<sup>139</sup> *Id.* at 2675 (Breyer, J., dissenting) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)) (internal quotation marks omitted).

<sup>140</sup> *Id.* at 2685.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* at 2664. For the view that the Court’s post–New Deal distinction between economic and non-economic liberty should be abandoned, see Ernest A. Young, *Sorrell v. IMS Health and the End of the Constitutional Double Standard*, 36 VT. L. REV. 903 (2012).

crucial was not that the ban sought to implement an otherwise legitimate commercial program but that it did so by tendentiously suppressing certain speech.<sup>143</sup> The law sought to prevent marketing representatives of pharmaceutical manufacturers, known as “detailers,” from utilizing their knowledge of individual prescribing practices when visiting physicians.<sup>144</sup> However, the bar against communication and exploitation of this information was selective; the information could be “purchased or acquired by other speakers with diverse purposes and viewpoints”—e.g., academic organizations seeking to counter the promotion of brand-name pharmaceutical drugs.<sup>145</sup> To the Court, Vermont had attempted to stack the deck in a debate of public import; legislative findings supporting the law revealed that its “express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs.”<sup>146</sup> Accordingly, the law imposed both a “content-based” and “speaker-based” burden on speech.<sup>147</sup> Such a law triggered “heightened” scrutiny;<sup>148</sup> predictably, the Court determined that “[t]he law cannot satisfy that standard.”<sup>149</sup> Ultimately, then, the outcome was governed by the logic of central First Amendment principles rather than by the commercial setting in which they operated: “If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it.”<sup>150</sup>

*C. Defining an Issue by Government Interest: The Case of Minors*

A different sense of what a case is “about” that can shape outcomes rests on judicial perception of the interest that is fundamentally implicated in the case. For example, a belief that what is centrally at stake is the government’s capacity to preserve national security can override assertions of rights that might well be sustained in other contexts.<sup>151</sup> While restrictions ascribed to national security do not invariably prevail,<sup>152</sup> assessing them through this framework tilts heavily in the government’s favor.

A similar duality pervades cases involving government efforts to withhold from children the full measure of rights enjoyed by adults. On the one hand, the Supreme

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<sup>143</sup> *Sorrell*, 131 S. Ct. at 2671.

<sup>144</sup> *See id.* at 2661.

<sup>145</sup> *Id.* at 2663.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2667.

<sup>149</sup> *Id.* at 2659.

<sup>150</sup> *Id.* at 2670.

<sup>151</sup> *See, e.g.,* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728–30 (2010); *Regan v. Wald*, 468 U.S. 222, 242–43 (1984); *Haig v. Agee*, 453 U.S. 280, 306–08 (1981); *Zemel v. Rusk*, 381 U.S. 1, 15–16 (1965).

<sup>152</sup> *See, e.g.,* *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–35 (2004); *Mitchell v. Forsyth*, 472 U.S. 511, 520–23 (1985); *N.Y. Times Co. v. United States*, 403 U.S. 713, 718–19 (1971) (Black, J., concurring).

Court has not formulated a cohesive “law of minors.” On the other hand, a distinct strain in the Court’s jurisprudence has sustained limitations on rights whose rationale has been largely cast as the protection of children.<sup>153</sup> While government attempts to characterize such regulation as needed safeguards for minors do not invariably prevail,<sup>154</sup> such efforts on the whole have enjoyed a large measure of success.<sup>155</sup> Against this backdrop, it is noteworthy that two of the Court’s recent decisions on secondary speech—*Brown* and (to a less prominent degree) *Fox*—rejected speech restrictions based on sweeping assumptions about youth.<sup>156</sup>

### 1. Minors’ Subordinate Status Under the Bill of Rights

Modification of rights stemming from the distinctive nature of youth has been upheld across a range of settings. One of the most conspicuous of these is schools. Notwithstanding the Court’s famous pronouncement that students in public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>157</sup> in recent decades they have seen their rights repeatedly shrunk when crossing that threshold. In *Hazelwood v. Kuhlmeier*,<sup>158</sup> the Court sustained a public high school’s deletion from a student newspaper of an article describing one student’s experiences with pregnancy and another discussing the effect of divorce on students at the school.<sup>159</sup> Since the newspaper was published by students in a journalism class, the deletion fell within educators’ authority to “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities”<sup>160</sup> to the extent such control is “reasonably related to legitimate pedagogical concerns.”<sup>161</sup> Here, school officials were entitled to shield student readers from material thought inappropriate to their level of emotional maturity.<sup>162</sup> A similar solicitude for youthful sensibilities shaped the outcome in *Bethel School District No. 403 v. Fraser*,<sup>163</sup> where the Court sustained disciplinary action against a high school student for a nomination speech for school office

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<sup>153</sup> See *infra* notes 157–214 and accompanying text.

<sup>154</sup> See *infra* notes 215–27 and accompanying text.

<sup>155</sup> For an argument that children’s speech should be determined by a graduated scale of expressive maturity, see Jonathan David Shaub, *Children’s Freedom of Speech and Expressive Maturity*, 36 LAW & PSYCHOL. REV. 191, 229–38 (2012).

<sup>156</sup> See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2727 (2011).

<sup>157</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). *Tinker* is discussed *infra* at text accompanying note 217.

<sup>158</sup> 484 U.S. 260 (1988).

<sup>159</sup> *Id.* at 274–76.

<sup>160</sup> *Id.* at 273.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 274–76.

<sup>163</sup> 478 U.S. 675 (1986).

laced with thinly veiled double entendres.<sup>164</sup> In order to avert harm to a “less mature audience,”<sup>165</sup> schools may forbid “lewd, indecent, or offensive speech”<sup>166</sup> like that engaged in by this “confused boy.”<sup>167</sup> In *Morse v. Frederick*,<sup>168</sup> the Court confirmed that educators’ authority over student speech is not confined to the physical premises of school.<sup>169</sup> At an off-campus event sanctioned and supervised by the school, students displayed a banner saying “BONG HiTS 4 JESUS.”<sup>170</sup> The *Morse* Court sustained confiscation of the banner and Frederick’s suspension on the ground that schools may “safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”<sup>171</sup>

Nor is free speech the only guarantee of the Bill of Rights whose strictures have been relaxed at public schools; the Fourth Amendment and procedural due process apply with less rigor there as well. In *New Jersey v. T.L.O.*,<sup>172</sup> the Court ruled that teachers and school officials need not have probable cause in order to conduct a search.<sup>173</sup> Rather, they can search a student “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>174</sup> This relatively low threshold, explained the Court, comports with schools’ need for flexibility in disciplinary procedures and the “value of preserving the informality of the student-teacher relationship.”<sup>175</sup> Elaborating on the benign premise of this latter consideration, Justice Powell’s concurrence pointed to the “special relationship”<sup>176</sup> between teacher and student in which a “commonality of interests” generally prevails.<sup>177</sup> A decade later, in *Vernonia School District 47J v. Acton*,<sup>178</sup> the Court expanded school authorities’ exemption from ordinary Fourth Amendment requirements when it upheld a school’s policy of random urinalysis drug testing of students participating in its athletic programs.<sup>179</sup> There, the Court frankly embraced the notion that public schools constitute a zone of sharply diminished Fourth Amendment

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<sup>164</sup> See *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1357 (9th Cir. 1985); see also *Fraser*, 478 U.S. at 677–78 (describing *Fraser* as having “referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor”).

<sup>165</sup> *Fraser*, 478 U.S. at 683.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> 551 U.S. 393 (2007).

<sup>169</sup> *Id.* at 400–01.

<sup>170</sup> *Id.* at 396, 397.

<sup>171</sup> *Id.* at 397.

<sup>172</sup> 469 U.S. 325 (1985).

<sup>173</sup> *Id.* at 341.

<sup>174</sup> *Id.* at 341–42.

<sup>175</sup> *Id.* at 340.

<sup>176</sup> *Id.* at 349.

<sup>177</sup> *Id.* at 350 (Powell, J., concurring).

<sup>178</sup> 515 U.S. 646 (1995).

<sup>179</sup> *Id.* at 656–57.

rights.<sup>180</sup> These rights “are different in public schools than elsewhere” because the reasonableness of a search “cannot disregard the schools’ custodial and tutelary responsibility for children.”<sup>181</sup> Subsequently, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,<sup>182</sup> the Court extended this rationale and latitude to encompass an “entirely reasonable”<sup>183</sup> policy of compelling all students who participate in competitive extracurricular activities to submit to drug testing.<sup>184</sup>

With respect to due process, the school environment has justified swift and severe discipline with a minimum of procedure. This principle was dramatically illustrated in *Ingraham v. Wright*,<sup>185</sup> where the Court held that the Eighth Amendment’s prohibition against cruel and unusual punishment does not apply to paddling of students in public schools and that the availability of common-law remedies for excessive paddling satisfied procedural due process.<sup>186</sup> The Court was satisfied that “[t]he openness of the public school and its supervision by the community” offered adequate safeguards against potential abuse.<sup>187</sup> Additionally, the Court found scant risk of unjustified paddling when summary discipline is meted out because “paddlings are usually inflicted in response to conduct directly observed by teachers in their presence . . . .”<sup>188</sup>

In the justice system and other modes of potential confinement as well, the constitutionally compelled process has been streamlined for minors. The Court, in *McKeiver v. Pennsylvania*,<sup>189</sup> held that juveniles involved in juvenile court adjudicative proceedings to determine their delinquency are not entitled to trial by jury.<sup>190</sup> Writing for a plurality, Justice Blackmun credited authorities at juvenile proceedings with benevolent intentions that counseled against “remak[ing] the juvenile proceeding into a fully adversary process and . . . put[ting] an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.”<sup>191</sup> The safeguards offered by juries did not match the benefits “of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.”<sup>192</sup> In *Schall v. Martin*,<sup>193</sup> the Court approved pretrial detention of accused juvenile delinquents found to present a “serious risk” that, before their return date, they would commit what would constitute criminal

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 656.

<sup>182</sup> 536 U.S. 822 (2002).

<sup>183</sup> *Id.* at 836.

<sup>184</sup> *Id.* at 836–38.

<sup>185</sup> 430 U.S. 651 (1977).

<sup>186</sup> *Id.* at 683.

<sup>187</sup> *Id.* at 670.

<sup>188</sup> *Id.* at 677–78; *see also* *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (“Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.”).

<sup>189</sup> 403 U.S. 528 (1971).

<sup>190</sup> *Id.* at 545 (plurality opinion).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 550.

<sup>193</sup> 467 U.S. 253 (1984).

acts but for their juvenile status.<sup>194</sup> The normal bar against pretrial detention could be waived because of minors' diminished liberty interest and capacity; juveniles "are always in some form of custody,"<sup>195</sup> and "by definition, are not assumed to have the capacity to take care of themselves."<sup>196</sup> A similar attitude toward minors, coupled with generous assumptions about parental authority and intent, informed the Court's decision in *Parham v. J.R.*<sup>197</sup> There, the Court upheld procedures under which parents could commit their children to a mental hospital without a pre-admission adversary proceeding as long as the decision was approved by a "neutral factfinder."<sup>198</sup> The Court found assurance against erroneous commitment in the "natural bonds of affection [that] lead parents to act in the best interests of their children."<sup>199</sup>

Moreover, the Court has sometimes adjusted rights already limited as to adults to further restrict their scope for minors. For adult women, the Court has reviewed regulation of abortion under an "undue burden" standard,<sup>200</sup> sustaining some measures that potentially hamper women's access to abortion<sup>201</sup> but invalidating those—e.g., a spousal notification provision—thought to place a "substantial obstacle" in the way of women seeking abortions.<sup>202</sup> At the same time, the Court has allowed states to require parental consent for dependent, immature minors seeking abortions, unless such a minor can persuade a court either that she is mature or that an abortion would be in her best interest.<sup>203</sup> Similarly, while the Court has approved suppression of materials meeting the constitutional criteria for obscenity,<sup>204</sup> it has permitted states to forbid the sale to minors of sexually oriented content that would not be obscene as to adults.<sup>205</sup> Society's "transcendent interest in protecting the welfare of children," the Court stated, justified calibration of the meaning of obscenity for youth.<sup>206</sup>

Finally, the government's authority to "adjust its legal system to account for children's vulnerability"<sup>207</sup> has included restraints on adults' expression deemed to risk the

<sup>194</sup> *Id.* at 255–57.

<sup>195</sup> *Id.* at 265.

<sup>196</sup> *Id.*

<sup>197</sup> 442 U.S. 584 (1979).

<sup>198</sup> *Id.* at 606 (citation omitted).

<sup>199</sup> *Id.* at 602.

<sup>200</sup> *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–79 (1992) (O'Connor, Kennedy & Souter, JJ., joint opinion).

<sup>201</sup> *See id.* at 885–86 (upholding a twenty-four hour waiting period).

<sup>202</sup> *See id.* at 897–98 (opinion of Court).

<sup>203</sup> *See id.* at 899–900 (upholding a one-parent consent requirement with a judicial bypass alternative for unemancipated women under eighteen).

<sup>204</sup> *See Miller v. California*, 413 U.S. 15, 24–25 (1973).

<sup>205</sup> *Ginsberg v. New York*, 390 U.S. 629, 634–37 (1968).

<sup>206</sup> *Id.* at 640 (quoting *People v. Kahan*, 15 N.Y.2d 311, 312 (1965) (Fuld, J., concurring)); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[T]here is a compelling interest in protecting the physical and psychological well being of minors . . . [that] extends to shielding minors from the influence of literature that is not obscene by adult standards.").

<sup>207</sup> *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (Powell, J., plurality opinion).

well-being of minors. Perhaps the most compelling application of this rationale occurred in *New York v. Ferber*,<sup>208</sup> where the Court upheld a statute prohibiting the knowing promotion of a sexual performance by a child under the age of sixteen by distributing material depicting such a performance.<sup>209</sup> The Court accepted the legislative judgment that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”<sup>210</sup> To a lesser but noteworthy extent, the sensibilities of children also informed the Court’s unanimous decision in *Rowan v. Post Office Department*<sup>211</sup> to uphold a statute “whereby any householder may insulate himself from advertisements that offer for sale ‘matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.’”<sup>212</sup> While resting mainly on the principle that “a mailer’s right to communicate must stop at the mailbox of an unreceptive addressee,”<sup>213</sup> the Court also endorsed Congress’s support for householders seeking to avoid the risk that their children be exposed to offensive material.<sup>214</sup>

Of course, the Court has not invariably ruled against the assertion of minors’ constitutional rights. Recognizing that “[t]he child is not the mere creature of the State”<sup>215</sup> even in public schools, the Court struck down a requirement that public school pupils salute the flag while reciting the Pledge of Allegiance<sup>216</sup> and the suspension of public school students for wearing black armbands as a symbolic protest against American prosecution of the Vietnam War.<sup>217</sup> Likewise, minors retain a significant core of procedural rights when threatened with confinement for alleged misconduct. Under the Court’s ruling in *In re Gault*,<sup>218</sup> the procedural guarantees of notice of charges, right to counsel, privilege against self-incrimination, and right of confrontation and cross-examination protect minors in proceedings to determine delinquency when confinement may result.<sup>219</sup> In addition, when a minor in juvenile proceedings is charged with conduct that would constitute a crime if committed by an adult, the State must establish proof beyond a reasonable doubt.<sup>220</sup> Moreover, while the Court has qualified

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<sup>208</sup> 458 U.S. 747 (1982).

<sup>209</sup> *Id.* at 774.

<sup>210</sup> *Id.* at 758.

<sup>211</sup> 397 U.S. 728 (1970).

<sup>212</sup> *Id.* at 730 (citation omitted).

<sup>213</sup> *Id.* at 736–37.

<sup>214</sup> *Id.* at 738.

<sup>215</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (invalidating a requirement that all parents send their children to public schools).

<sup>216</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (acknowledging children’s “right of self-determination in matters that touch individual opinion and personal attitude”).

<sup>217</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

<sup>218</sup> 387 U.S. 1 (1967).

<sup>219</sup> *See id.* at 1–3.

<sup>220</sup> *In re Winship*, 397 U.S. 358, 368 (1970); *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 365 (2009) (ruling that a school official’s reasonable suspicion that a student was distributing contraband drugs did not justify a strip search).

minors' rights to abortion,<sup>221</sup> it has struck down a statute prohibiting the sale or distribution of contraceptives to minors under sixteen.<sup>222</sup> And in recent decisions, the Court has even looked to youths' lack of fully developed capacity as grounds for mitigating the constitutionally permissible penalty for certain criminal conduct.<sup>223</sup>

Nor has the Court reflexively upheld restrictions on expression suitable for adults in order to avoid their availability to impressionable youth. Especially in the realm of more advanced technologies, the Court has invalidated wholesale bans on classes of sexually oriented material designed to prevent access by minors.<sup>224</sup> Thus, the Court struck down portions of a federal statute forbidding the transmission of "indecent" or "patently offensive" communications by means of telecommunications devices,<sup>225</sup> as well as a ban on virtual child pornography.<sup>226</sup> In addition, the Court disapproved a federal requirement that cable operators either scramble sexually explicit channels or limit programming on such channels to certain hours because the government had failed to show that less-restrictive means would not serve its interest of enabling parents to shield their children from this type of material.<sup>227</sup>

## 2. *Brown* and *Fox*: Free Speech over Generalizations About Children as Central Framework

The Court in *Brown* and *Fox* thus had ample precedent on which to draw to uphold the restrictions there as falling within the sphere of governmental power to address dangers attendant to youth. That the Court instead ignored this body of jurisprudence to sustain the challenges in these cases underscores the depth of its commitment to free speech tenets. Especially in *Brown*, where this debate came to the forefront, the Court pointedly declined a plausible opportunity to situate the case within the extensive line of decisions premised on the peculiar status of minors.

The appeal of casting *Brown* in terms of presumptions about children is reflected by the failure of Justice Scalia's opinion to command more than a bare majority of the

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<sup>221</sup> See *supra* note 203 and accompanying text.

<sup>222</sup> See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

<sup>223</sup> See *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that a mandatory sentence of life in prison without the possibility of parole for juvenile homicide offenders violates the Eighth Amendment); *Graham v. Florida*, 130 S. Ct. 2011, 2028–29 (2010) (ruling that a sentence of life imprisonment without the possibility of parole for juveniles who did not commit homicide violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005) (invalidating as violative of the Eighth Amendment the application of the death penalty to juvenile conduct).

<sup>224</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>225</sup> *Id.* at 864–65; see also *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124–31 (1989) (invalidating a federal prohibition of adult access to telephone messages that were "indecent" but not obscene).

<sup>226</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

<sup>227</sup> *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811–15 (2000).

Court.<sup>228</sup> Justice Breyer's dissent was particularly blunt in charging the Court with having misclassified the dominant aspect of the case.<sup>229</sup> For him, the pertinent First Amendment category was not "depictions of violence"<sup>230</sup> but rather "the category of 'protection of children.'"<sup>231</sup> Justice Breyer found *Ginsberg* particularly instructive, and its acknowledgement of states' power to enact "laws designed to aid discharge of [parental] responsibility"<sup>232</sup> and promote their "interest in the well-being of [their] youth" controlling.<sup>233</sup> He believed that California had furnished sufficient data to demonstrate that the measure served these interests<sup>234</sup> as well as its separate aim of protecting potential victims of video-inspired violence.<sup>235</sup> Indeed, for Justice Breyer, the Court's ruling left "a serious anomaly"<sup>236</sup> in which states could ban depictions of nudity but not interactive depictions of extreme violence.<sup>237</sup>

Justice Alito, too, whose concurrence on vagueness grounds was joined by Chief Justice Roberts,<sup>238</sup> endorsed state authority to cope with "the effect of exceptionally violent video games on impressionable minors."<sup>239</sup> For minors, he believed, "the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie."<sup>240</sup> Justice Alito expressed particular concern that evolving technology would soon develop 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."<sup>241</sup> Accordingly, he wished to reserve the possibility that a properly crafted statute would pass constitutional muster.<sup>242</sup>

The majority opinion's sweeping language, however, rendered such a prospect unlikely. Writing for the Court, Justice Scalia cast the issue presented in stark constitutional terms. He readily conceded California's prerogative to believe that violent video

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<sup>228</sup> *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2732 (2011).

<sup>229</sup> *Id.* at 2761–71 (Breyer, J., dissenting).

<sup>230</sup> *Id.* at 2762 (quoting *Brown*, 131 S. Ct. at 2736) (internal quotation marks omitted).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 2767 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)) (internal quotation marks omitted).

<sup>233</sup> *Id.* (internal quotation marks omitted).

<sup>234</sup> See Schauer, *supra* note 14, at 108 ("[I]f the claim [in *Brown*] is . . . about the safety of those who become the victims of media-inspired juvenile violence, then arguments focused on and deflecting the concern to the importance of parental control are largely beside the point.").

<sup>235</sup> *Brown*, 131 S. Ct. at 2766–70 (Breyer, J., dissenting).

<sup>236</sup> *Id.* at 2771.

<sup>237</sup> *Id.* Justice Thomas dissented on the ground that the original intent of the First Amendment's protection of freedom of speech did not encompass a right to communicate with a minor without going through the minor's parents or guardians. See *id.* at 2751–61 (Thomas, J., dissenting).

<sup>238</sup> *Id.* at 2742–46 (Alito, J., concurring).

<sup>239</sup> *Id.* at 2742.

<sup>240</sup> *Id.* at 2751.

<sup>241</sup> *Id.* at 2750.

<sup>242</sup> See *id.* at 2751.

games “corrupt the young or harm their moral development.”<sup>243</sup> The Court’s own prerogative and duty, however, was to determine whether this content-based restriction of speech that fell outside traditionally unprotected categories of expression<sup>244</sup> met strict scrutiny.<sup>245</sup> It was the imperatives of the First Amendment, not the state’s asserted protection of children, that would define that duty: “Even where the protection of children is the object, the constitutional limits on governmental action apply.”<sup>246</sup> In thus refusing to defer to legislative judgment about the welfare of minors, the Court echoed its earlier insistence in *Barnette* that the state’s power to formulate policy concerning children did not warrant abdication of judicial duty: “[W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.”<sup>247</sup> Given a choice between adhering to its frequent willingness to qualify minors’ rights or to its stated recognition of minors’ presumptive freedom of speech, the Court opted decisively for the latter: “[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.”<sup>248</sup>

In *Fox*, by contrast, the Court’s reliance on vagueness grounds to invalidate the FCC’s enforcement actions<sup>249</sup> skirted the question of whether the government’s interest in protecting children could justify the Commission’s indecency policy.<sup>250</sup> Nevertheless, it is telling that the government’s own reliance on its power to shield minors from inappropriate material proved unavailing. The FCC sought to locate its actions within the Court’s earlier recognition of government’s “interest in protecting minors from exposure to vulgar and offensive spoken language,”<sup>251</sup> and from comparably harmful images.<sup>252</sup> Believing that this interest justified lowered scrutiny, the Commission

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<sup>243</sup> *Id.* at 2741 (majority opinion).

<sup>244</sup> *See id.* at 2733–38; *see also supra* note 15 and accompanying text.

<sup>245</sup> *Brown*, 131 S. Ct. at 2738.

<sup>246</sup> *Id.* at 2741.

<sup>247</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

<sup>248</sup> *Brown*, 131 S. Ct. at 2735–36 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975)) (internal quotation marks omitted).

<sup>249</sup> *See Fox v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2316–20; *see also infra* notes 301–07 and accompanying text.

<sup>250</sup> *See Fox*, 132 S. Ct. at 2320 (noting that the Court was not ruling on the validity of the FCC’s indecency policy under the First Amendment).

<sup>251</sup> Brief for Petitioners at 41, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 3947560, at \*41 [hereinafter Brief for Petitioners] (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)) (internal quotation marks omitted).

<sup>252</sup> *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 631–32, 637–43 (1968)); *id.* at 23 (“The Commission’s indecency-enforcement rules remain a reasonable and constitutional implementation of the government’s compelling interest in protecting children from harmful exposure to sexual or excretory words and images.”); *see also* Brief of Amici Curiae of Judith A. Reisman,

pointed to *Ginsburg*'s approval of a rationale for restriction that did not claim empirical rigor.<sup>253</sup> In addition, the Commission specifically sought to deflect concerns about adequate notice by asserting that Fox must have realized that the “gratuitous broadcast of the F-Word and the S-Word, during primetime awards shows with millions of *children* in the audience,” would have been considered indecent.<sup>254</sup> As in *Brown*, however, the Court refused to waive fundamental constitutional safeguards simply because the government wished to frame the issue as a matter of protecting children.<sup>255</sup>

## II. CHOOSING THE POTENT FORM OF VARIABLE DOCTRINES: OVERBREADTH AND VAGUENESS

Constitutional outcomes may rest largely on whether to apply the “strong” or “weak” version of a formal doctrine. A recurring example is the Court’s pronouncement in *Police Department of Chicago v. Mosley*<sup>256</sup> that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>257</sup> The Court has repeatedly invoked this sweeping formulation of the First Amendment’s bar against discriminatory regulation to invalidate selective restrictions of speech.<sup>258</sup> At the same time, the Court has often sustained laws that might well fail a vigorous application of this principle.<sup>259</sup> A similar duality pervades the operation of the overlapping doctrines of overbreadth and vagueness.<sup>260</sup> As noted below, the Court has exercised both alacrity in facially invalidating

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Ph.D. & Liberty Counsel in Support of Petitioners at 20–21, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 4352233, at \*20–21 (arguing that the restriction should be upheld as “a narrowly tailored means of achieving the state’s ends of protecting young people from indecent language, images and collateral ideations”).

<sup>253</sup> See Brief for Petitioners, *supra* note 251, at 38 (citing *Ginsberg*, 390 U.S. at 641 (“In upholding regulation of indecent material in the interest of protecting children, this Court has not required ‘scientific’ proof that dissemination of the materials to minors would actually have the feared effect.”)).

<sup>254</sup> *Id.* at 18 (emphasis added).

<sup>255</sup> *Fox*, 132 S. Ct. at 2319 (acknowledging that the government imposed sanctions on Fox for failing to protect children from exposure to “the indecent material broadcast”).

<sup>256</sup> 408 U.S. 92 (1972).

<sup>257</sup> *Id.* at 95.

<sup>258</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975).

<sup>259</sup> See, e.g., *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 601 (1998) (Souter, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 208 (1991) (Blackmun, J., dissenting); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 571 (1987) (Brennan, J., dissenting); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 58 (1986) (Brennan, J., dissenting).

<sup>260</sup> See Joe Bant, *United States v. Rosen: Pushing the Free Press Onto a Slippery Slope?*, 55 U. KAN. L. REV. 1027, 1039–40 (2007); Thomas Regnier, “Civilizing” *Drug Paraphernalia Policy: Preserving Our Free Speech and Due Process Rights While Protecting Children*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 115, 129 (2011).

statutes on one of these grounds and reluctance to strike down an entire law because it suffers from one of these defects. In recent cases of secondary speech where an overbreadth or vagueness challenge was mounted, however, the Court routinely applied the more robust version of these doctrines.

#### *A. Overbreadth Doctrine as Sword*

Overbreadth doctrine holds that “a statute is facially invalid if it prohibits a substantial amount of protected speech.”<sup>261</sup> Thus, laws that banned “opprobrious words or abusive language, tending to cause a breach of the peace”;<sup>262</sup> forbade charitable organizations from allocating to expenses more than twenty-five percent of money produced by fundraising activity;<sup>263</sup> and prohibited drive-in movie theaters from displaying films containing nudity when the screen is visible from a public place<sup>264</sup> have been ruled invalid for their excessive facial encroachment on protected expression. However, another powerful thread has also run through the Court’s overbreadth jurisprudence: the warning that wholesale invalidation under this doctrine when the challenging party’s own expression or conduct is unprotected is “strong medicine”<sup>265</sup> to be employed “sparingly and only as a last resort.”<sup>266</sup> Under this philosophy, the Court has refused to facially strike down laws forbidding (with limited exceptions) possession or viewing of any material or performance showing a minor who was not one’s child in a state of nudity,<sup>267</sup> barring only commercial users’ access to the addresses of arrested individuals,<sup>268</sup> and prohibiting discrimination by any “place of public accommodation, resort or amusement”<sup>269</sup> based on race, creed, sex, and other specified grounds unless the discriminating entity was “in its nature distinctly private.”<sup>270</sup> In *Stevens, Brown*, and *Alvarez*, though, the Court put aside any qualms about applying this medicine and facially invalidated statutes for the breadth of expression that they reached.

The Court’s emphatic application of overbreadth principles to strike down the statute in *Stevens* was especially striking, since plausible grounds existed by which the Court could have construed the ban on depictions of animal cruelty to constrain its literal “alarming breadth.”<sup>271</sup> Addressing the statute’s potential for trenching on a large swathe of protected expression, the statute exempted videos with “serious religious,

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<sup>261</sup> *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).

<sup>262</sup> *Gooding v. Wilson*, 405 U.S. 518, 519 (1972).

<sup>263</sup> *See Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

<sup>264</sup> *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>265</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

<sup>266</sup> *Id.*

<sup>267</sup> *See Osborne v. Ohio*, 495 U.S. 103, 112–14 (1990).

<sup>268</sup> *See L.A. Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 39–40 (1999).

<sup>269</sup> *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 4 (1988).

<sup>270</sup> *Id.* at 5.

<sup>271</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010); *see also supra* note 104 and accompanying text.

political, scientific, educational, journalistic, historical, or artistic value.<sup>272</sup> Moreover, the Court seemed to imply that a ban on depictions of crush videos—which record an exceptionally abhorrent activity<sup>273</sup>—or “other depictions of extreme animal cruelty” might withstand constitutional scrutiny.<sup>274</sup> Accordingly, the Court might have applied one of the long-established “*Ashwander* rules”<sup>275</sup> calling for statutes to be interpreted where possible to render them constitutional to ascribe to the act a permissible scope.<sup>276</sup>

The Court, however, firmly rejected the government’s contention that the statute’s reach could be confined to crush videos and depictions of animal fighting.<sup>277</sup> Dissecting the actual language of the statute, the Court noted that its prohibitions extended to depictions of conduct that was illegal but arguably not cruel and of conduct, such as hunting, that was illegal in a single jurisdiction.<sup>278</sup> Nor did the statute’s exceptions clause salvage its validity by sufficiently narrowing the range of applications; again turning to depictions of hunting to illustrate the statute’s flaws, the Court asserted that hunting videos would generally not qualify for an exception.<sup>279</sup> Thus construed, the statute fell afoul of the principle that a First Amendment facial challenge to legislation will be sustained where “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”<sup>280</sup>

In *Brown*, the Court’s reliance on overbreadth worked in conjunction with the defect of underinclusiveness to whipsaw the state’s effort at regulation into an untenable position. While California’s statute was defended in part as a means of aiding parents who disapproved of violent video games, its restriction applied to minors whose parents did not object to their children’s access to these games; this incongruity between the law’s rationale and its scope rendered the act “vastly overinclusive.”<sup>281</sup> In addition, the

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<sup>272</sup> 18 U.S.C. § 48(b) (2006). The language obviously drew from one of the bases for excluding material from characterization as obscenity. *See Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>273</sup> *See* Andrew A. Beerworth, *United States v. Stevens: A Proposal for Criminalizing Crush Videos Under Current Free Speech Doctrine*, 35 VT. L. REV. 901, 902 (2011) (characterizing crush videos as “the product of the most depraved and sadistic elements in our society”); *see also* Perdue, *supra* note 100, at 470–71 (describing a crush video in detail).

<sup>274</sup> *Stevens*, 130 S. Ct. at 1592. In response to *Stevens*, Congress enacted a more “narrowly tailored” statute. *Id.* at 1584; *see* 18 U.S.C. § 48 (2000 & Supp. 2010).

<sup>275</sup> *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (footnotes omitted) (setting forth a series of established “rules”—e.g., requirement of ripeness—by which the Court avoids consideration of a substantial portion of constitutional questions presented to it).

<sup>276</sup> *See id.* at 348; *see also* *Clark v. Martinez*, 543 U.S. 371, 380–82 (2005); *Jones v. United States*, 526 U.S. 227, 251–52 (1999).

<sup>277</sup> *See Stevens*, 130 S. Ct. at 1592.

<sup>278</sup> *See id.* at 1588–90. The Court observed that hunting was banned in the District of Columbia but permitted elsewhere, and that an “enormous national market” existed for hunting-related depictions. *Id.* at 1589.

<sup>279</sup> *See id.* at 1590.

<sup>280</sup> *Id.* at 1587 (citation omitted).

<sup>281</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741 (2011).

Court attacked the statute's *lack* of regulation in relation to the danger against which it purportedly sought to guard.<sup>282</sup> While the law was premised on the violent tendencies that video games were thought to induce in minors, it authorized widespread access to the game through the consent of parents, uncles, and aunts.<sup>283</sup> This "seriously under-inclusive"<sup>284</sup> feature was compounded by an even greater one. The testimony to which California had pointed also contended that comparable feelings of aggression are stimulated by exposure to children's cartoons on television portraying violence, some video games approved for children, and pictures of guns.<sup>285</sup> For the Court, exclusion of these media from the law's regulation left it "wildly"—and fatally—underinclusive.<sup>286</sup> At the same time, the Court broadly implied that extending the regulation to such media would impart to the law the same overreaching for which the Court faulted the act's intrusion into parental decisionmaking.<sup>287</sup> Ultimately, then, the Court's analysis placed the state in an impossible bind: "[T]he 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."<sup>288</sup>

Finally, the majority of Justices in *Alvarez* took square aim at the breadth of the Stolen Valor Act. Brushing aside Justice Alito's assertion that Congress had crafted "a narrow statute that presents no threat to the freedom of speech,"<sup>289</sup> Justice Kennedy's plurality opinion condemned the Act's "sweeping, quite unprecedented reach."<sup>290</sup> He decried the Orwellian implications of ceding to government the power to criminalize a vast range of innocuous false assertions.<sup>291</sup> In its application to false claims of military honor doing no demonstrable harm and in the disturbing specter of a "broad censorial power" over speech, the statute suffered from overbreadth's classic vice of chilling protected speech.<sup>292</sup> Justice Breyer, too—while indicating that Congress was entitled to enact a more "finely tailored" statute directed at false claims likely to cause specific harm<sup>293</sup>—voiced dread of the breadth of expression that approving the statute would allow government to proscribe.<sup>294</sup>

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<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 2742.

<sup>284</sup> *Id.* at 2740.

<sup>285</sup> *Id.* at 2739.

<sup>286</sup> *Id.* at 2740.

<sup>287</sup> *See id.* ("California has (*wisely*) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns." (emphasis added)).

<sup>288</sup> *Id.* at 2742.

<sup>289</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2556 (2012) (Alito, J., dissenting).

<sup>290</sup> *Id.* at 2547 (Kennedy, J., plurality opinion).

<sup>291</sup> *See id.* at 2547–48 (citing GEORGE ORWELL, 1984 (1949)).

<sup>292</sup> *See id.* at 2548; *see also* *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991).

<sup>293</sup> *See Alvarez*, 132 S. Ct. at 2555–56 (Breyer, J., concurring).

<sup>294</sup> *See id.* at 2553 ("[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more.").

*B. Voiding for Vagueness*

Under the vagueness doctrine, a law regulating speech is facially invalid if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>295</sup> As with overbroad laws, the First Amendment vagueness principle emanates largely from a concern that vague statutes will deter a substantial amount of protected expression.<sup>296</sup> As with overbreadth’s contrasting lines of decisions as well, however, the Supreme Court has variously displayed both an insistence on holding restriction of speech to a relatively high degree of precision and clarity and a reluctance to overturn entire statutes because they may supply insufficient guidance to parties not before the Court. At times vigorously enforcing the concept of void-for-vagueness, the Court has struck down, for example, an obscenity law that deemed criminally obscene the publication of “collections of criminal deeds of bloodshed or lust . . . ‘so massed as to become vehicles for inciting violent and depraved crimes against the person . . . ’”<sup>297</sup> and a statute that held criminally liable anyone who “publicly . . . treats contemptuously the flag of the United States.”<sup>298</sup> On other occasions, the Court has sustained against vagueness challenges an ordinance prohibiting “the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class”<sup>299</sup> and a state statute making it illegal to “knowingly approach” someone outside a health-care facility, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”<sup>300</sup>

When the issue of vagueness was posed in *Fox*, however, the Court displayed no ambivalence. The unanimous decision invalidating FCC enforcement of its indecency rule against Fox and ABC for vagueness included Justice Alito, who conspicuously dissented in *Stevens*, *Snyder*, and *Alvarez*.<sup>301</sup> The Commission had defined indecency as the depiction of sexual or excretory organs or activities in a manner that was patently offensive as measured by contemporary community standards for the broadcast

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<sup>295</sup> *United States v. Williams*, 553 U.S. 285, 304 (2008); *accord Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

<sup>296</sup> *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997); *Smith v. California*, 361 U.S. 147, 151 (1959); see Kathryn Marie Dessayer & Arthur J. Burke, *Leaving Them Speechless: A Critique of Speech Restrictions on Campus*, 14 HARV. J.L. & PUB. POL’Y 565, 572–73 (1991); Fallon, *supra* note 292, at 904.

<sup>297</sup> *Winters v. New York*, 333 U.S. 507, 513 (1948).

<sup>298</sup> *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (citation omitted) (internal quotation marks omitted).

<sup>299</sup> *Grayned*, 408 U.S. at 108, 114 (citation omitted) (internal quotation marks omitted).

<sup>300</sup> *Hill*, 530 U.S. at 707 (citation omitted) (internal quotation marks omitted).

<sup>301</sup> *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2310 (2012). Justice Ginsburg concurred in the judgment; Justice Sotomayor did not participate. *Id.* at 2308.

medium, and it elaborated on the factors that would enter into this determination.<sup>302</sup> Having previously rejected a challenge to the rule on administrative grounds,<sup>303</sup> the Court now held that the enforcement actions against Fox and ABC failed constitutionally because they lacked sufficient notice that what they had televised was proscribed under the rule.<sup>304</sup> The three incidents of alleged indecency consisted of two unscripted utterances of profanity during live broadcasts of awards shows and the seven-second appearance of the nude buttocks of an adult female character in an episode of a scripted series as well as the momentary display of the side of her breast.<sup>305</sup> Neither the Commission's stated policy nor its regulatory history, the Court found, placed Fox and ABC on notice that "a fleeting expletive or a brief shot of nudity could be actionably indecent."<sup>306</sup> Tapping the more vigorous strain of its vagueness jurisprudence, the Court emphasized the heightened need for fair notice when regulations "touch upon 'sensitive areas of basic First Amendment freedoms.'"<sup>307</sup>

*Brown* as well, though the majority's invalidation of California's regulation of video games did not address vagueness, was notable for Justice Alito's willingness to strike down the statute as impermissibly vague.<sup>308</sup> For example, to determine whether a game contained the requisite violence to fall under the restriction, the statute included as elements "prevailing standards in the community as to what is suitable for minors"<sup>309</sup> and assessment of whether "[a] reasonable person, considering [a] game as a whole," would find that it "appeals to a deviant or morbid interest of minors."<sup>310</sup> Though such terms had sufficiently understood meanings in the realm of sex to serve as adequate guideposts for bans on obscenity, Justice Alito observed that no such assumption was warranted with respect to depictions of violence.<sup>311</sup> Accordingly, individuals would lack fair notice as to whether the violence in a particular game fell within the law's proscription.<sup>312</sup>

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<sup>302</sup> *Id.* at 2313 (citations omitted). The Commission ascribed significance to three factors:

- (1) [T]he explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
- (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;
- (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

*Id.* (citation omitted).

<sup>303</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ("*Fox I*").

<sup>304</sup> *Fox*, 132 S. Ct. at 2317–20.

<sup>305</sup> *See id.* at 2314–15.

<sup>306</sup> *Id.* at 2318.

<sup>307</sup> *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

<sup>308</sup> *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742–46 (Alito, J., concurring).

<sup>309</sup> *Id.* at 2745 (citations omitted).

<sup>310</sup> *Id.*

<sup>311</sup> *See id.* at 2745–46.

<sup>312</sup> *Id.* at 2746.

### III. SPEECH-FRIENDLY STARE DECISIS: EXPANSIVE CONSTRUCTION OF PRECEDENTS' PROTECTIVE IMPLICATIONS

Interpretation of precedent is the lifeblood of judicial decisionmaking. While the Supreme Court may sometimes overturn earlier holdings, it generally seeks to maintain at least the veneer of continuity with previous decisions.<sup>313</sup> The relatively few cases that the Court selects for its docket, however, are almost assured to be ones that require its resolution because the application of precedent is ambiguous.<sup>314</sup> In at least five of the Court's six recent decisions on secondary speech explored here, the Court had obvious precedent on which it could have drawn to sustain the restriction on speech at issue. In each instance, though, the Court either construed a salient holding to withhold authority to limit that speech or sustained a facial challenge that declined application of powerful speech-restrictive precedent.

*Snyder* offers a pointed illustration of extending a holding in favor of speech beyond the specific principle originally announced in that decision. In *Hustler Magazine v. Falwell*,<sup>315</sup> the Court overturned a verdict for intentional infliction of emotional distress (IIED) for publication of a parody advertisement featuring a mock interview with the plaintiff.<sup>316</sup> The opinion set forth clearly the basis for the decision:

[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.<sup>317</sup>

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<sup>313</sup> See *Welch v. Tex. Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (stating that the doctrine of stare decisis is "of fundamental importance to the rule of law"); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification."). Stare decisis, however, is thought to operate with less force in constitutional cases than in statutory construction. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command . . . This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting))).

<sup>314</sup> See SUP. CT. R. 10 (setting forth as two of three principal bases for granting petition for writ of certiorari conflicts among certain lower courts).

<sup>315</sup> 485 U.S. 46 (1988).

<sup>316</sup> *Id.* The obviously fictitious interview portrayed the plaintiff "stat[ing] that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 48.

<sup>317</sup> *Id.* at 56 (emphasis added). It was not disputed that the plaintiff was a public figure. *Id.* at 57 n.5.

In light of this language, the *Snyder* Court could logically have ruled that private figures like Snyder<sup>318</sup> did not have to show actual malice.<sup>319</sup> Instead, the Court invoked *Hustler*'s broader concern that IIED's subjective standard of "outrageousness" could serve as an instrument for venting jurors' aversion toward particular speech,<sup>320</sup> and it ruled that the defendants' lawful, peaceful protest on public property on a matter of public concern<sup>321</sup> could not be subject to the plaintiff's claim for liability.<sup>322</sup> Whatever government's power to restrict targeted picketing under other circumstances,<sup>323</sup> or to allow for IIED claims on matters of private concern,<sup>324</sup> the *Snyder* Court refused to limit the First Amendment's shield against IIED claims to the literal boundaries of its opinion in *Hustler*.<sup>325</sup>

*Brown*, in turn, demonstrates the opposite phenomenon: insistence on confining the class of speech found proscribable in a relevant precedent to the specific bounds addressed in that decision.<sup>326</sup> As suggested earlier—and as Justice Breyer urged—the Court could plausibly have identified the animating principle of *Ginsberg v. New York*<sup>327</sup> as state authority to adjust standards for regulating sensitive material to the fragile sensibilities of children.<sup>328</sup> Under this expansive construction of *Ginsberg*, the defects found fatal by *Brown*'s majority and concurrence could have received the

<sup>318</sup> The Court's reasoning did not require it to determine Snyder's status. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011) (focusing the analysis on speech about the public nature of the issue). It seems reasonable to assume, however, that Snyder would have been characterized as a private figure. See *id.* at 1228 (Alito, J., dissenting) (referring to Snyder as "a vulnerable private figure").

<sup>319</sup> See Salamanca, *supra* note 95, at 59 (stating that the *Snyder* opinion "may have recast *Hustler*"); see also Zipursky, *supra* note 43, at 516 (criticizing the *Snyder* opinion for failing to confront the argument that *Hustler*'s standard for IIED claims was limited to public figures).

<sup>320</sup> See *Snyder*, 131 S. Ct. at 1219 (quoting *Hustler*, 485 U.S. at 55).

<sup>321</sup> See *supra* notes 85–95 and accompanying text.

<sup>322</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>323</sup> See *id.* at 1218–19 (distinguishing *Frisby v. Schultz*, 487 U.S. 474, 477 (1988) (sustaining a ban on picketing "before or about" a particular residence) and *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (upholding "a buffer zone between protesters and an abortion clinic entrance")).

<sup>324</sup> See Caroline C. Pace, *Snyder v. Phelps: The United States Supreme Court Rules that the First Amendment Protects Public Speech that Exploits Family's Grief*, 48 HOUS. LAW. 44, 45 (2011), available at <http://www.thehoustonlawyer.com/mayjune11.htm> (asserting that the *Snyder* opinion "provide[s] assurances that the Court will not expand the First Amendment to protect emotionally harmful speech that is predominantly directed at a non-public persons or emotionally harmful speech that is staged on private property"); see also Thomas G. Krattenmaker, *Looking Back at Cohen v. California: A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 651, 682 (2012) (indicating the view that *Snyder* "does not address the regulation of private, apolitical interpersonal speech").

<sup>325</sup> See *Snyder*, 131 S. Ct. at 1220.

<sup>326</sup> See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741–42 (2011).

<sup>327</sup> 390 U.S. 629 (1968).

<sup>328</sup> See *supra* notes 204–06, 233 and accompanying text.

same indulgent scrutiny that left intact New York's ban on material deemed obscene as to minors.<sup>329</sup> The Court, however, drew a firm demarcation between the sexually oriented material restricted in *Ginsberg* and the violence depicted in the video games involved in *Brown*.<sup>330</sup> "Because speech about violence is not obscene,"<sup>331</sup> California's statute instead was subjected to the strict scrutiny that proved its undoing.<sup>332</sup>

*Alvarez* went even further in its parsing of speech-restrictive precedent. Invalidation of the Stolen Valor Act entailed distinguishing not a single case but a cluster of them, and might be viewed as flying in the face of earlier pronouncements. As even Justice Kennedy's plurality opinion acknowledged, the Court on multiple occasions had indicated that false statements of fact do not deserve constitutional protection.<sup>333</sup> Thus, it would hardly have been illogical to extrapolate from these repeated assertions a governmental power to punish indisputably false claims of federal military honors.<sup>334</sup> Indeed, prior to the Court's decision, a number of courts and commentators had drawn exactly that conclusion.<sup>335</sup>

For the plurality, however, such reasoning amounted to tearing these "isolated statements" from their "proper context."<sup>336</sup> Any inference that "false statements are unprotected when made to any person, at any time, in any context"<sup>337</sup> overlooked two crucial features of these earlier pronouncements. First, the specific categories of false expression that the Court had deemed unworthy of protection—e.g., defamation—were

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<sup>329</sup> See *Brown*, 131 S. Ct. at 2763–65 (Breyer, J., dissenting) (arguing that the breadth and imprecision of California's restriction on violent video games did not exceed those features in New York's ban on "nudity").

<sup>330</sup> *Id.* at 2735.

<sup>331</sup> *Id.*

<sup>332</sup> See *id.* at 2738.

<sup>333</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (Kennedy, J., plurality opinion) ("For instance, the Court has stated '[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas, . . . and that false statements 'are not protected by the First Amendment in the same manner as truthful statements.'" (citations omitted)).

<sup>334</sup> See *Alvarez*, 132 S. Ct. at 2557 (Alito, J., dissenting) ("These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.").

<sup>335</sup> See, e.g., *United States v. Strandlof*, 667 F.3d 1146, 1151 (10th Cir. 2012); *United States v. Swisher*, 790 F. Supp. 2d 1215, 1243–45 (D. Idaho 2011); *United States v. Robbins*, 759 F. Supp. 2d 815, 819–22 (W.D. Va. 2011); *United States v. Perelman*, 737 F. Supp. 2d 1221, 1237–39 (D. Nev. 2010); *United States v. McGuinn*, No. 07 Cr. 471 (KNF), 2007 WL 3050502, at \*2–3 (S.D.N.Y. Oct. 18, 2007); Josh M. Parker, Comment, *The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions*, 78 U. CHI. L. REV. 1503 (2011); Mark Tushnet, "Telling Me Lies": *The Constitutionality of Regulating False Statements of Fact* 24 (Harv. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-02 2011), available at <http://ssrn.com/abstract=1737930>; Eugene Volokh, Comment, *Amicus Curiae Brief: Boundaries of the First Amendment's "False Statements of Fact" Exception*, 6 STAN. J. C.R. & C.L. 343, 348 (2010).

<sup>336</sup> *Alvarez*, 132 S. Ct. at 2544–45 (Kennedy, J., plurality opinion).

<sup>337</sup> *Id.* at 2546.

associated with some “legally cognizable harm.”<sup>338</sup> Second, even in these instances, the Court had generally withheld approval of per se liability for falsehood; a public official suing for libel, for example, could recover damages only if the defamatory falsehood was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>339</sup> Thus, rather than enshrining a “categorical rule”<sup>340</sup> that false statements are devoid of constitutional protection, the cited language reflected more limited government authority to penalize false speech.<sup>341</sup> The Stolen Valor Act, which “target[ed] falsity and nothing more,”<sup>342</sup> exceeded that authority.

In *Stevens*, the Court’s reliance on overbreadth to strike down the law forbidding depictions of animal cruelty<sup>343</sup> sidestepped a powerful argument that the depictions targeted at the statute’s core could be banned under the rationale of *New York v. Ferber*.<sup>344</sup> In *Ferber*, the Court ruled that child pornography—regardless of whether it meets the criteria for obscenity—is categorically unprotected.<sup>345</sup> Central to the Court’s reasoning was its determination that child pornography is “intrinsically related”<sup>346</sup> to criminal behavior because the production of such material constitutes child abuse.<sup>347</sup> A wholesale ban on child pornography was justified as the most effective method to “dry up the market” for such material.<sup>348</sup> The statute at issue in *Stevens* thus furnished obvious parallels with *Ferber*. Both crush videos and dogfighting videos record crimes and produce (non-human) victims; their creation is therefore the occasion for commission of a crime.<sup>349</sup>

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<sup>338</sup> *Id.* at 2545; *see also id.* at 2555 (Breyer, J., concurring) (“[I]n virtually all these instances [in which statutes prohibit lies] limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur.”).

<sup>339</sup> *Id.* at 2545 (Kennedy, J., plurality opinion) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)) (internal quotation marks omitted).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010).

<sup>344</sup> 458 U.S. 747 (1982).

<sup>345</sup> *Id.* at 764.

<sup>346</sup> *Id.* at 759–61.

<sup>347</sup> *Id.* *See* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002) (distinguishing *Ferber* in striking down a ban on virtual child pornography because the absence of actual children meant that no crime was recorded or victims created). *But see* *United States v. Williams*, 553 U.S. 285, 307 (2008) (sustaining a prohibition of offers to provide and solicitations to obtain child pornography regardless of whether actual children are depicted).

<sup>348</sup> *Ferber*, 458 U.S. at 760.

<sup>349</sup> *See* *United States v. Stevens*, 130 S. Ct. 1577, 1599 (2010) (Alito, J., dissenting) (“[I]t appears that these crimes [shown in crush videos] are committed for the sole purpose of creating the videos.”); Meredith L. Shafer, Note, *Perplexing Precedent: United States v. Stevens Confounds a Century of Supreme Court Conventionalism and Redefines the Limits of “Entertainment,”* 19 *VILL. SPORTS & ENT. L.J.* 281, 326 (2012) (noting that “factual evidence that dogfighting videos drive the illegal act of dogfighting” (citation omitted) (internal quotation marks omitted)).

Accordingly, a ban on distribution of these videos could be seen as an indispensable tool for curbing the criminal conduct depicted.<sup>350</sup>

For the *Stevens* Court, however, *Ferber* represented a “special case”<sup>351</sup> in which the market for child pornography was “an integral part of conduct in violation of a valid criminal statute.”<sup>352</sup> Under the Court’s refusal to construe the statute narrowly, the same could not be said for the range of expression encompassed by the general category of depictions of animal cruelty.<sup>353</sup> Thus, the *Stevens* opinion represents a twofold diminution of *Ferber*’s significance. First, by retroactively characterizing *Ferber* as a case involving suppression of speech that was an “integral part” of criminal conduct, the Court undercut its potential significance as a template for carving out new categories of unprotected expression. Rather, *Stevens* reduced *Ferber*’s holding to identification of “a previously recognized, long-established category of unprotected speech.”<sup>354</sup> Additionally, even if this rationale for *Ferber* could be applied to crush videos and dogfighting videos,<sup>355</sup> *Stevens*’s willingness to apply the “strong medicine”<sup>356</sup> of overbreadth suggests that only prohibitions finely tailored to the imperatives of “dry[ing] up the market”<sup>357</sup> will survive the doctrine’s newfound vigor.

Finally, the *Fox* Court’s ruling that the FCC’s enforcement of its indecency policy was impermissibly vague<sup>358</sup> enabled the Court to deflect consideration of whether to overrule its 1978 decision in *FCC v. Pacifica Foundation*.<sup>359</sup> In *Pacifica*, the Court rejected a First Amendment challenge to the FCC’s ruling that the comedian George Carlin’s monologue on “Filthy Words” could be barred from broadcast under the Commission’s indecency policy.<sup>360</sup> The Court’s reasoning was grounded in the

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<sup>350</sup> See *Stevens*, 130 S. Ct. at 1600 (Alito, J., dissenting) (“[T]he criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by [the statute] . . . .”); Beerworth, *supra* note 273, at 914–15 (“As in *Ferber*, laws targeting the crushing acts themselves are inefficacious due to the secretive, subterranean market for crush videos and the undisputed fact that the perpetrators almost never show their faces in the videos.” (citation omitted)). But see Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 103 (doubting that this rationale could apply to dogfighting videos because of evidence that “dogfights are conducted for reasons other than producing and selling videos”).

<sup>351</sup> *Stevens*, 130 S. Ct. at 1586 (citation omitted).

<sup>352</sup> *Id.* (citations omitted).

<sup>353</sup> See *supra* notes 105–06 and accompanying text.

<sup>354</sup> *Stevens*, 130 S. Ct. at 1586. See Strossen, *supra* note 350, at 85 (“*Ferber* has only limited capacity to serve as a springboard for judicial recognition of additional categories of unprotected expression . . . .”). The Court’s cautious approach to recognizing new categories of proscribable speech is discussed *infra* at text accompanying notes 372–79.

<sup>355</sup> See *Stevens*, 130 S. Ct. at 1602 (Alito, J., dissenting) (asserting that the statute contained “a substantial core of constitutionally permissible applications”).

<sup>356</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

<sup>357</sup> *New York v. Ferber*, 458 U.S. 747, 760 (1982).

<sup>358</sup> See *supra* notes 26, 301–07 and accompanying text.

<sup>359</sup> 438 U.S. 726 (1978).

<sup>360</sup> *Id.* at 729.

distinctive capacity of broadcast media, which had “established a uniquely pervasive presence in the lives of all Americans”<sup>361</sup> and were “uniquely accessible to children, even those too young to read.”<sup>362</sup> In recent years, however, commentators had contended that the proliferation of alternative media—especially the advent of cable television and the Internet—had rendered outmoded *Pacifica*’s premise that radio broadcasting and television network programming were “uniquely pervasive.”<sup>363</sup> This argument was advanced by the networks as well in *Fox* as grounds for overruling *Pacifica*.<sup>364</sup> By invalidating the Commission’s enforcement policy for lack of fair notice, though, the Court found it “unnecessary to reconsider *Pacifica* at [that] time.”<sup>365</sup>

#### IV. HISTORY AS SPEECH-PROTECTIVE

A striking feature of three of the recent decisions involving secondary speech is their invocation of history as grounds for constraining government power to regulate speech. While the Court sometimes looks to the “broader, organic purpose”<sup>366</sup> originally underlying a constitutional provision to determine its modern application,<sup>367</sup> reliance on specific historical practice and tradition often operates to limit constitutional rights. Thus, for example, the Court has denied the presence of state action where the function in question has not been “traditionally exclusively reserved to the State,”<sup>368</sup> and it has sustained restrictions on access to public property for expressive activity when that type

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<sup>361</sup> *Id.* at 748.

<sup>362</sup> *Id.* at 749.

<sup>363</sup> *See, e.g.*, Matthew C. Hohlan, Note, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 366–68 (2005); Kristin L. Rakowski, *Branding as an Antidote to Indecency Regulation*, 16 UCLA ENT. L. REV. 1, 41 (2009); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 306 (2003).

<sup>364</sup> *See* Brief for Petitioners at 48–53, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 3947560, at \*48–53; Brief for Respondents at 15–26, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5373702, at \*15–26.

<sup>365</sup> *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012).

<sup>366</sup> *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

<sup>367</sup> *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 906 (2010) (“The Framers may not have anticipated modern business and media corporations . . . but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.”); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (stating, in deeming the use of sense-enhancing technology to gather information about the interior of home a “search,” that “we must take the long view, from the original meaning of the Fourth Amendment forward”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–48 (1992).

<sup>368</sup> *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55–56 (1999) (emphasis added) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)) (internal quotation marks omitted).

of property has not historically been held open for such expression.<sup>369</sup> In the realm of substantive due process as well, insistence that a right be “objectively[ ] ‘deeply rooted in this Nation’s history and tradition’”<sup>370</sup> to qualify as fundamental has caused the asserted right to be rejected.<sup>371</sup> In *Stevens*, *Brown*, and *Alvarez*, however, reliance on particular strains of history and tradition served to limit the government’s ability to restrict expression. In each case, the Court refused to designate as unprotected a class of speech whose proscribability had not been clearly established by historic and traditional sanction.

The Court in *Stevens* announced its reluctance to carve out novel categories of expression beyond the reach of the First Amendment. To support its contention that depictions of animal cruelty do not warrant protection, the government had pointed to the Court’s famous characterization of certain categories of unprotected speech in *Chaplinsky v. New Hampshire*<sup>372</sup> 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.”<sup>373</sup> The Court, however, denied that this passage signified the Court’s willingness to forge new categories of unprotected speech through an “ad hoc balancing of relative social costs and benefits.”<sup>374</sup> Rather than employing such a “simple cost-benefit analysis”<sup>375</sup> to identify classes of expression outside the scope of the First Amendment, the Court emphasized the exacting standard of specific historic lineage.<sup>376</sup> Looking all the way back to the passage of the Bill of Rights, the Court underscored the age and sparseness of existing categories: “‘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.’”<sup>377</sup> In the same vein, the Court observed that “[t]hese ‘historic and traditional categories long familiar to the bar[ ]’ . . . are ‘well-defined and narrowly limited classes of speech . . . .’”<sup>378</sup> Given these stringent criteria, it was unsurprising that the Court declined to add depiction of animal cruelty to the roster of recognized categories. While actual animal cruelty had a long history of prohibition, the same could not be said of depictions of animal cruelty.<sup>379</sup>

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<sup>369</sup> See, e.g., *United States v. Kokinda*, 497 U.S. 720, 727 (1990); *Greer v. Spock*, 424 U.S. 828, 838 (1976).

<sup>370</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citation omitted).

<sup>371</sup> See, e.g., *id.* (rejecting right to assistance in committing suicide); see also *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009).

<sup>372</sup> 315 U.S. 568 (1942).

<sup>373</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (citation omitted).

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 1586.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 1584 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)).

<sup>378</sup> *Id.* (citations omitted).

<sup>379</sup> *Id.* at 1585.

A year later, the Court in *Brown* affirmed both historical tradition as the touchstone for ascertaining unprotected speech and its protective approach to identifying the relevant tradition.<sup>380</sup> Only a handful of areas—e.g., obscenity, incitement, fighting words—had traditionally been deemed wholly unworthy of protection.<sup>381</sup> The Court acknowledged the possibility of speech that has been historically unprotected but not addressed in the Court’s jurisprudence, and thus of sustaining a new ban on content as “part of a long (if heretofore unrecognized) tradition of proscription.”<sup>382</sup> No such “longstanding tradition” existed, however, of restricting minors’ access to depictions of violence.<sup>383</sup> In seeking to limit children’s access to violent video games, California had not “adjust[ed] the boundaries of an *existing category* of unprotected speech” to make its definition appropriate for children.<sup>384</sup> Rather, the state had justified its restriction through the type of balancing test rejected in *Stevens*, which *Brown* described as holding 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.”<sup>385</sup> As in *Stevens*, the Court refused to allow this calculus to replace the license of history.

In *Alvarez* as well, the Court adhered to a strict historical criterion for classes of unprotected expression. Spurning the government’s attempt to treat lies about military honors as categorically proscribable, Justice Kennedy’s opinion repeated *Stevens*’s observation that content-based restrictions have generally been limited to a few “historic and traditional categories [of expression] long familiar to the bar.”<sup>386</sup> The categories’ “historical foundation in the Court’s free speech tradition” had demonstrated the compatibility of these enclaves with the Court’s larger commitment to free expression.<sup>387</sup> By contrast, the government had failed to meet its heavy burden of showing that false statements generally should be newly recognized as a category of speech traditionally subject to proscription.<sup>388</sup>

## V. A SKEPTICAL VIEW OF OFFICIAL FACTUAL CLAIMS

It is a commonplace of constitutional law that the level of scrutiny applied to challenged legislation typically disposes of its validity. Thus, statutes reviewed under the rational relationship standard almost invariably survive this exceedingly lenient

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<sup>380</sup> See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

<sup>381</sup> *Id.* at 2733.

<sup>382</sup> *Id.* at 2734.

<sup>383</sup> *Id.* at 2736.

<sup>384</sup> *Id.* at 2735 (emphasis added).

<sup>385</sup> *Id.* at 2734.

<sup>386</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (Kennedy, J., plurality opinion) (citations omitted) (internal quotation marks omitted).

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 2547.

approach.<sup>389</sup> Conversely, laws subjected to the demanding justification required by strict scrutiny are rarely upheld.<sup>390</sup> In the cases discussed in this Article, the Court has often displayed notable skepticism toward the rationale offered by the government for limiting expression. While the Court has sometimes afforded significant latitude to factual premises underlying restrictions of secondary speech,<sup>391</sup> its examination of explanations for the speech regulations in these recent cases has been anything but deferential.

This note of skepticism was emphatically struck by the *Stevens* Court in the first of these cases. Indeed, the Court in *Stevens* disavowed not only the factual predicate of

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<sup>389</sup> See *City of Dallas v. Stanglin*, 490 U.S. 19, 26–28 (1989); *Ferguson v. Skrupa*, 372 U.S. 726, 730–32 (1963) (stating that in reviewing for compliance with substantive due process in the commercial and business sphere, “[w]e refuse to sit as a ‘superlegislature to weigh the wisdom of legislation’” (citation omitted)); *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) (stating that in general equal protection is violated “only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective” and that “[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it” (citations omitted)); *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955); RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.3 (3d ed. 1999) (stating that a classification will be sustained if “it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution”).

<sup>390</sup> See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (striking down a state statute providing matching funds for political candidates under certain circumstances under the principle that laws burdening political speech are “subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest” (citation omitted)); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (striking down a restriction on voting not shown to be “necessary to promote a compelling state interest”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1451 (2d ed. 1988) (“When expressed as a standard for judicial review, strict scrutiny is . . . ‘strict’ in theory and usually ‘fatal’ in fact.”) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

<sup>391</sup> See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (O’Connor, J., plurality opinion); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 641 (1995) (Kennedy, J., dissenting) (objecting to the Court’s permitting “a few pages of self-serving and unsupported statements by the State” to serve as the basis for upholding a rule forbidding lawyers to use direct mail to solicit personal injury or wrongful death clients within thirty days of an accident); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (“The First Amendment does not require a city, before enacting . . . an ordinance [restricting the location of adult motion picture theaters], to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58, 60–61 (1973) (upholding a ban on the display of obscenity at an adult theater on the basis that “there is at least an arguable correlation between obscene material and crime” and stating that “[a]lthough there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist”).

the sweeping ban on depictions of animal cruelty, but also the larger project of enlarging the list of unprotected categories of speech through empirical calculation.<sup>392</sup> Moreover, while Chief Justice Roberts's opinion left open the possibility that a more narrowly crafted statute aimed at dogfighting videos and crush videos might be upheld,<sup>393</sup> the opinion is equivocal on this score. At a minimum, the opinion appeared to place on the government a heavy burden of justification to demonstrate that a designated class of speech could be suppressed because it was "intrinsically related"<sup>394</sup> to criminal conduct.<sup>395</sup>

In *Brown*, the Court's repudiation of a "simple balancing test"<sup>396</sup> for identifying unprotected classes of speech<sup>397</sup> was coupled with an assessment of the State's evidence that verged on the incredulous.<sup>398</sup> Assessing the research on which California based the putative link between exposure to violent video games and harm to children, Justice Scalia caustically observed that these studies had been "rejected by every court to consider them."<sup>399</sup> He then explained the flaws in the studies' methodology.<sup>400</sup> For the Court, this tenuous foundation fell well short of meeting the state's burden to justify such a restriction: "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."<sup>401</sup> Nor does the Court's opinion appear to hold out much prospect—as Justice Alito argued in his concurrence<sup>402</sup>—that evolving technology could later change the Court's calculus. The Court's disdain for the evidence presented by the State suggests a broader presumption of invalidity that only the most exhaustive and cogent data might overcome.<sup>403</sup> Indeed, the Court's suspicion of

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<sup>392</sup> See *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (refusing to rely on "ad hoc balancing of relative social costs and benefits" or "simple cost-benefit analysis" to identify such categories).

<sup>393</sup> See *supra* note 274 and accompanying text.

<sup>394</sup> *Stevens*, 130 S. Ct. at 1586 (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

<sup>395</sup> See *id.*; see also Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 358–59 (2009) ("[T]he linkage requirements—the doctrinal rules that express the required connection between the potentially dangerous utterance and the ensuing harm—have tightened."); Strossen, *supra* note 350, at 86 ("[T]he Court has consistently resisted attempts to extend the drying-up-the-market rationale beyond the specific context of child pornography." (footnote omitted)).

<sup>396</sup> *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (quoting *Stevens*, 130 S. Ct. at 1585) (internal quotation marks omitted).

<sup>397</sup> *Id.*

<sup>398</sup> See *id.* at 2734–35.

<sup>399</sup> *Id.* at 2739.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 2738 (citations omitted).

<sup>402</sup> *Id.* at 2742–46 (Alito, J., concurring).

<sup>403</sup> See Robert Corn-Revere, *Moral Panics, the First Amendment, and the Limits of Social Science*, 28 COMM. LAW. 3, 4 (2011) ("The Supreme Court reaffirmed in *Brown* that when Mom

California's factual rationale seems the virtual antithesis of the deference that Justice Breyer called for in his dissent.<sup>404</sup>

A similar debate and outcome occurred in *Sorrell* as well. There, Justice Breyer urged deference toward Vermont's determination that limitations on the purchase of physician-identifiable prescription data would constructively address serious problems: "[I]t is the job of regulatory agencies and legislatures to make just these kinds of judgments."<sup>405</sup> The *Sorrell* majority, however, flatly disputed the State's judgment. The Court chided the State for its failure to demonstrate that detailers' use of prescriber-identifying information posed unique harms to the doctor-patient relationship.<sup>406</sup> In addition, it summarily dismissed Vermont's asserted interest in preserving physician confidentiality: "Given the information's widespread availability and many permissible uses, the State's asserted interest in physician confidentiality does not justify the burden that [the restriction] places on protected expression."<sup>407</sup>

In *Alvarez*, the skepticism displayed by Justice Kennedy's plurality opinion toward the government's showing was twofold. First, as in *Brown*, the government failed to establish to the plurality's satisfaction "a direct causal link between the restriction imposed and the injury to be prevented."<sup>408</sup> Here, the government had not demonstrated that the Stolen Valor Act's prohibition on false claims of military honors fostered the integrity of the awards system.<sup>409</sup> Moreover, even if the ban promoted that goal, the government could not persuade the plurality that other means less restrictive of speech were unavailable.<sup>410</sup> In particular, the plurality proposed creation of an online government database officially listing winners of the Congressional Medal of Honor.<sup>411</sup> Consistent with the doubting tenor of the opinion, the plurality found the government's contention that such a database was not feasible simply unsupported by the record.<sup>412</sup>

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or Dad chooses which games are appropriate for the kids, it is called parenting; but when the government does so, it is called censorship."); James Dunkelberger, Comment, *The New Resident Evil? State Regulation of Violent Video Games and the First Amendment*, 2011 B.Y.U. L. REV. 1659, 1679–92 (anticipating that future attempts to restrict minors' access to violent video games will be judicially thwarted).

<sup>404</sup> See *Brown*, 131 S. Ct. at 2770 (Breyer, J., dissenting).

<sup>405</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2682 (2011) (Breyer, J., dissenting); see *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 480–81, 485–91 (1988) (O'Connor, J., dissenting) (arguing that the Court should grant greater latitude to states to regulate attorneys' advertising and solicitation).

<sup>406</sup> See *Sorrell*, 131 S. Ct. at 2670–71.

<sup>407</sup> *Id.* at 2668.

<sup>408</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (Kennedy, J., plurality opinion) (citing *Brown*, 131 S. Ct. at 2738).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* ("The Government has not shown, and *cannot show*, why counter-speech would not suffice to achieve its interest." (emphasis added)).

<sup>411</sup> *Id.* at 2551.

<sup>412</sup> See *id.*

While the remaining cases—*Fox* and *Snyder*—did not explicitly hinge on questioning the government’s factual premises, the decisions nonetheless involved judicial imposition of contrary perceptions of circumstances. Because *Fox*’s invalidation of the FCC’s enforcement action rested on vagueness doctrine, the Court did not need to confront the issue of whether advances in communications since *Pacifica* had rendered that decision’s technological assumptions obsolete.<sup>413</sup> Still, the Court’s ruling that the networks had been given inadequate notice by the Commission’s indecency policy<sup>414</sup> entailed rejection of the FCC’s contention that the networks must have realized that their broadcasts had offended the policy.<sup>415</sup> Confronted with the FCC’s and networks’ competing versions of reality, the Court dismissed the government’s argument.<sup>416</sup>

In *Snyder*, too, the debate swirled not over the accuracy of specific facts but over characterization of mindsets. For example, the Court did not dispute expert testimony at trial that Snyder’s anguish over the picketing had caused him severe depression and had aggravated pre-existing health conditions,<sup>417</sup> indeed, the Court virtually endorsed that diagnosis.<sup>418</sup> Conversely, Snyder did not assert that he was immediately affected by the picket signs; he acknowledged that he did not see their messages until watching a news broadcast later.<sup>419</sup> Rather, the dispute between the majority and Justice Alito—who supported this action under Maryland law—ultimately involved clashing assessments of the understanding that typical viewers would take from the signs.<sup>420</sup> As discussed earlier, protection of Westboro’s speech derived from treating it as expression on a matter of public concern.<sup>421</sup> In regarding the signs as essentially commentary on public issues instead of a personal attack on Snyder’s family, the Court effectively ascribed this perspective to those who saw the signs. As in defamation law, liability or its absence was rooted in the meaning that contested speech conveyed to reasonable readers.<sup>422</sup> This amounts to a factual determination, if an inevitably speculative one.

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<sup>413</sup> See *supra* notes 363–64 and accompanying text.

<sup>414</sup> *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317–20 (2012).

<sup>415</sup> See *id.* at 2319.

<sup>416</sup> *Id.*

<sup>417</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011).

<sup>418</sup> See *id.* at 1217–18 (“The record makes clear that the applicable legal term—‘emotional distress’—fails to capture fully the anguish Westboro’s choice added to Mr. Snyder’s already incalculable grief.”).

<sup>419</sup> *Id.* at 1213–14.

<sup>420</sup> See, e.g., *id.* at 1225 (Alito, J., dissenting) (describing the possible interpretations of the signs).

<sup>421</sup> See *supra* notes 85, 92–95 and accompanying text.

<sup>422</sup> See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515–16 (1991) (holding that liability in a libel action for an altered quotation depends on the meaning placed on the quoted statement by a reasonable reader); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 1 n.3 (1989) (Brennan, J., dissenting) (stating that “[t]he operative question” to determine whether a plaintiff may recover for an allegedly libelous implication is “whether reasonable readers would have actually interpreted the statement as implying defamatory facts”).

## CONCLUSION

It is no novelty to observe that free speech doctrine often lends itself to ambiguous application in cases the Court is called on to decide. The striking feature of recent decisions discussed in this Article is the consistency with which the Court has resolved such ambiguities to shield speech where restriction offered a plausible alternative. At every turn, a majority of Justices chose to safeguard expression widely thought unworthy of solicitude. Such expression may have been secondary in the eyes of the government, but the Court saw its protection as primary.