

Justice Alito , with whom The Chief Justice joins, concurring in the judgment.

[Footnotes and citations omitted]

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

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. *Grayned v. City of Rockford* (1972) . The lack of such notice in a law that regulates expression “raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Reno v. American Civil Liberties Union* (1997). Vague laws force potential speakers to “steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt* (1964). While “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity,” *Ward v. Rock Against Racism* (1989), “government may regulate in the area” of First Amendment freedoms “only with narrow specificity,” *NAACP v. Button* (1963). These principles apply to laws that regulate expression for the purpose of protecting children.

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

Seeking to bring its violent video game law within the protection of *Ginsberg* , the California Legislature began with the obscenity test adopted in *Miller v. California* (1973) , a decision that revised the obscenity tests previously set out in *Roth* and *Memoirs* . The legislature then made certain modifications to accommodate the aim of the violent video game law. . . .

The terms “deviant” and “morbid” are not defined in the statute, and California offers no reason to think that its courts would give the terms anything other than their ordinary meaning. . I therefore assume that “deviant” and “morbid” carry the meaning that they convey in ordinary speech. The adjective “deviant” ordinarily means “deviating . . . from some accepted norm,” and the term “morbid” means “of, relating to, or characteristic of disease.” A “deviant or morbid interest” in violence, therefore, appears to be an interest that deviates from what is regarded—presumably in accordance with some generally accepted standard—as normal and healthy. Thus, the application of the California law is heavily dependent on the identification of generally accepted standards regarding the suitability of violent entertainment for minors.

The California Legislature seems to have assumed that these standards are sufficiently well known so that a person of ordinary intelligence would have fair notice as to whether the kind and

degree of violence in a particular game is enough to qualify the game as “violent.” And because the *Miller* test looks to community standards, the legislature may have thought that the use of undefined community standards in the violent video game law would not present vagueness problems.

There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court’s landmark obscenity cases in the 1960’s, obscenity had long been prohibited, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.

There is no similar history regarding expression related to violence. As the Court notes, classic literature contains descriptions of great violence, and even children’s stories sometimes depict very violent scenes.

Although our society does not generally regard all depictions of violence as suitable for children or adolescents, the prevalence of violent depictions in children’s literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite “deviant” or “morbid” impulses.

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

In this case, California has not provided any evidence that the California Legislature intended the law to be limited in this way, or cited any decisions from its courts that would support an “oldest minors” construction.

For these reasons, I conclude that the California violent video game law fails to provide the fair notice that the Constitution requires. And I would go no further. I would not express any view on whether a properly drawn statute would or would not survive First Amendment scrutiny. . . .

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

For all these reasons, I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.

Justice Breyer , dissenting.

[Footnotes and citations omitted]

. . . In determining whether the statute is unconstitutional, I would apply both this Court’s “vagueness” precedents and a strict form of First Amendment scrutiny. In doing so, the special First Amendment category I find relevant is not (as the Court claims) the category of “depictions of violence,” but rather the category of “protection of children.” This Court has held that the “power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” *Prince v. Massachusetts* (1944). And the “ ‘regulatio[n] of communication addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults.’ ” *Ginsberg* (1968). . .

The majority’s claim that the California statute, if upheld, would create a “new categor[y] of unprotected speech is overstated. . . . In my view, California’s statute provides “fair notice of what is prohibited,” and consequently it is not impermissibly vague. *United States v. Williams* , 304 (2008) . *Ginsberg* explains why that is so. . .

. . . I can find no meaningful vagueness-related differences between California’s law and the New York law upheld in *Ginsberg* . And if there remain any vagueness problems, the state courts can cure them through interpretation. Consequently, for purposes of this facial challenge, I would not find the statute unconstitutionally vague. , , ,

Video games combine physical action with expression. Were physical activity to predominate in a game, government could appropriately intervene, say by requiring parents to accompany children when playing a game involving actual target practice, or restricting the sale of toys presenting physical dangers to children. But because video games also embody important expressive and artistic elements, I agree with the Court that the First Amendment significantly limits the State’s power to regulate. And I would determine whether the State has exceeded those limits by applying a strict standard of review. . . .

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

Nor is the statute, if upheld, likely to create a precedent that would adversely affect other media, say films, or videos, or books. A typical video game involves a significant amount of

physical activity. And pushing buttons that achieve an interactive, virtual form of target practice (using images of human beings as targets), while containing an expressive component, is not just like watching a typical movie. . . .

The interest that California advances in support of the statute is compelling. . . As this Court has previously described that interest, it consists of both (1) the “basic” parental claim “to authority in their own household to direct the rearing of their children,” which makes it proper to enact “laws designed to aid discharge of [parental] responsibility,” and (2) the State’s “independent interest in the well-being of its youth.” *Ginsberg*. . . Both interests are present here. . . .

There are many scientific studies that support California’s views. Social scientists, for example, have found *causal* evidence that playing these games results in harm. Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period. . . . Experimental studies in laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent games. . . . Cutting-edge neuroscience has shown that “virtual violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior.” And “meta-analyses,” *i.e.* , studies of all the studies, have concluded that exposure to violent video games “was positively associated with aggressive behavior, aggressive cognition, and aggressive affect,” and that “playing violent video games is a *causal* risk factor for long-term harmful outcomes.” . . .

Experts debate the conclusions of all these studies. Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions. (I list both sets of research in the appendixes.) I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm. . . .

Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases. The majority, in reaching its own, opposite conclusion about the validity of the relevant studies. Grants the legislature no deference at all. . . .

The industry also argues for an alternative technological solution, namely “filtering at the console level.” But it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls. . . .

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

This anomaly is not compelled by the First Amendment

This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children—by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the First Amendment does not disable government from helping parents make such a choice here—a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children.

For these reasons, I respectfully dissent.

[20+ page appendix of research on impact of violent video games attached to opinion]

CALIFORNIA CIVIL CODE SECTION 1746-1746.5 (2006)

1746. For purposes of this title, the following definitions shall apply:

(a) "Minor" means any natural person who is under 18 years of age.

(b) "Person" means any natural person, partnership, firm, association, corporation, limited liability company, or other legal entity.

(c) "Video game" means any electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own monitor, or is designed to be used with a television set or a computer monitor, that interacts with the user of the device.

(d) (1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

(2) For purposes of this subdivision, the following definitions apply:

(A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

(C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

(E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

(3) Pertinent factors in determining whether a killing depicted in

a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

1746.1.(a) A person may not sell or rent a video game that has been labeled as a violent video game to a minor.

(b) Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence that a purchaser or renter of a violent video game was not a minor or that the manufacturer failed to label a violent video game as required pursuant to Section 1746.2 shall be an affirmative defense to any action brought pursuant to this title. That evidence may include, but is not limited to, a driver's license or an identification card issued to the purchaser or renter by a state or by the Armed Forces of the United States.

(c) This section shall not apply if the violent video game is sold or rented to a minor by the minor's parent, grandparent, aunt, uncle, or legal guardian.

1746.2.Each violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white "18" outlined in black. The "18" shall have dimensions of no less than 2 inches by 2 inches. The "18" shall be displayed on the front face of the video game package.

1746.3. Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars (\$1,000), or a lesser amount as determined by the court. However, this liability shall not apply to any person who violates those provisions if he or she is employed solely in the capacity of a salesclerk or other, similar position and he or she does not have an ownership interest in the business in which the violation occurred and is not employed as a manager in that business.

1746.4. A suspected violation of this title may be reported to a city attorney, county counsel, or district attorney by a parent, legal guardian, or other adult acting on behalf of a minor to whom a violent video game has been sold or rented. A violation of this title may be prosecuted by any city attorney, county counsel, or district attorney.

1746.5. The provisions of this title are severable. If any provision of this title or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

BROWN V. EMA

June 27, 2011

(Footnotes & citations omitted)

Justice Scalia delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment. . . .

California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of “sexual conduct,” *Miller v. California* (1971). . . .

Because speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York* (1968). That case approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child. . .

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

That is unprecedented and mistaken. “[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Erznoznik v. Jacksonville* , (1975) . No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik*.

California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of

gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." The Complete Brothers Grimm Fairy Tales. Cinderella's evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. The *Odyssey* of Homer, Book IX, p. 125 (S. Butcher & A. Lang transl. 1909) ("Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame"). In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. Canto XXI. And Golding's *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island. W. Golding, *Lord of the Flies*

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *American Amusement Machine Assn. v. Kendrick* (CA7 2001) (striking down a similar restriction on violent video games).

Justice Alito has done considerable independent re-search to identify . . . video games in which "the violence is astounding." "Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools." Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito's description of those video games he has discovered that have a racial or ethnic motive for their violence—" 'ethnic cleansing' [of] . . . African Americans, Latinos, or Jews." To what end does he relate this? Does it somehow increase the "aggressiveness" that California wishes to suppress? Who knows? But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, Justice Alito's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an “actual problem” in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. . .

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. . . The State’s evidence is not compelling. . . .

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child’s or putative parent’s, aunt’s, or uncle’s say-so suffices. That is not how one addresses a serious social problem.

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors].” *Erznoznik* .

But leaving that aside, California cannot show that the Act’s restrictions meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. . . . This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can

readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.

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

California's effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them—concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a "well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky*, (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

We affirm the judgment below.

It is so ordered.

Justice Thomas , dissenting.

[Footnotes and citations omitted, including extensive secondary sources]]

The Court’s decision today does not comport with the original public understanding of the First Amendment. The majority strikes down, as facially unconstitutional, a state law that prohibits the direct sale or rental of certain video games to minors because the law “abridg[es] the freedom of speech.” But I do not think the First Amendment stretches that far. The practices and beliefs of the founding generation establish that “the freedom of speech,” as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians. I would hold that the law at issue is not facially unconstitutional under the First Amendment, and reverse and remand for further proceedings.

I

When interpreting a constitutional provision, “the goal is to discern the most likely public understanding of [that] provision at the time it was adopted.” *McDonald v. Chicago* , (2010) Because the Constitution is a written instrument, “its meaning does not alter.” *McIntyre v. Ohio Elections Comm’n* (1995). That which it meant when adopted, it means now.”

As originally understood, the First Amendment ’s protection against laws “abridging the freedom of speech” did not extend to *all* speech. “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire* (1942) ; see also *United States v. Stevens* (2010) Laws regulating such speech do not “abridg[e] the freedom of speech” because such speech is understood to fall outside “the freedom of speech.” *Ashcroft v. Free Speech Coalition* (2002) .

In my view, the “practices and beliefs held by the Founders” reveal another category of excluded speech: speech to minor children bypassing their parents. *McIntyre*. The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood “the freedom of speech” to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors’ parents. The founding generation would not have considered it an abridgment of “the freedom of speech” to support parental authority by restricting speech that bypasses minors’ parents.

A

Attitudes toward children were in a state of transition around the time that the States ratified the Bill of Rights. A complete understanding of the founding generation’s views on children and the parent-child relationship must therefore begin roughly a century earlier, in colonial New England.

In the Puritan tradition common in the New England Colonies, fathers ruled families with absolute authority. “The patriarchal family was the basic building block of Puritan society.” The Puritans rejected many customs, such as godparenthood, that they considered inconsistent with the patriarchal structure.

Part of the father’s absolute power was the right and duty “to fill his children’s minds with knowledge and ... make them apply their knowledge in right action.” The Puritans thought children were “innately sinful and that parents’ primary task was to suppress their children’s natural depravity.”

This conception of parental authority was reflected in laws at that time. In the Massachusetts Colony, for example, it was unlawful for tavern keepers (or anyone else) to entertain children without their parents’ consent.

B

In the decades leading up to and following the Revolution, attitudes towards children changed. Children came to be seen less as innately sinful and more as blank slates requiring careful and deliberate development. But the same overarching principles remained. Parents continued to have both the right and duty to ensure the proper development of their children. They exercised significant authority over their children, including control over the books that children read. And laws at the time continued to reflect strong support for parental authority and the sense that children were not fit to govern themselves.

1

The works of John Locke and Jean-Jacques Rousseau were a driving force behind the changed understanding of children and childhood. Locke taught that children’s minds were blank slates and that parents therefore had to be careful and deliberate about what their children were told and observed. Parents had only themselves to blame if, “by humouring and cockering” their children, they “poison’d the fountain” and later “taste[d] the bitter waters.” All vices, he explained, were sowed by parents and “those about children.” Significantly, Locke did not suggest circumscribing parental authority but rather articulated a new basis for it. Rousseau disagreed with Locke in important respects, but his philosophy was similarly premised on parental control over a child’s development. Although Rousseau advocated that children should be allowed to develop naturally, he instructed that the environment be directed by “a tutor who is given total control over the child and who removes him from society, from all competing sources of authority and influence.”

These writings received considerable attention in America. Locke’s *An Essay Concerning Human Understanding* and his *Some Thoughts Concerning Education* were significantly more popular than his *Two Treatises of Government*, according to a study of 92 colonial libraries between 1700 and 1776. And Rousseau’s *Emile*, a treatise on education, was more widely advertised and distributed than his political work, *The Social Contract*. In general, the most popular books in the Colonies on the eve of the American Revolution were not political discourses but ones concerned with child rearing.

2

2

Locke's and Rousseau's writings fostered a new conception of childhood. Children were increasingly viewed as malleable creatures, and childhood came to be seen as an important period of growth, development, and preparation for adulthood. Noah Webster, called the father of American education, wrote that "[t]he impressions received in early life usually form the characters of individuals." Elizabeth Smith, sister-in-law to John Adams, similarly wrote: "The Infant Mind, I believe[,] is a blank, that easily receives any impression."

Children lacked reason and decisionmaking ability. They "have not Judgment or Will of their own," John Adams noted. Children's "utter incapacity" rendered them "almost wholly at the mercy of their Parents or Instructors for a set of habits to regulate their whole conduct through life."

This conception of childhood led to great concern about influences on children. "Youth are ever learning to do what they see others around them doing, and these imitations grow into habits." Books therefore advised parents "not to put children in the way of those whom you dare not trust."

As a result, it was widely accepted that children needed close monitoring and carefully planned development. Managing the young mind was considered "infinitely important." In an essay on the education of youth in America, Noah Webster described the human mind as "a rich field, which, without constant care, will ever be covered with a luxuriant growth of weeds." He advocated sheltering children from "every low-bred, drunken, immoral character" and keeping their minds "untainted till their reasoning faculties have acquired strength and the good principles which may be planted in their minds have taken deep root."

The Revolution only amplified these concerns. The Republic would require virtuous citizens, which necessitated proper training from childhood. Children were "the pivot of the moral world," and their proper development was "a subject of as high interest, as any to which the human mind ha[d] ever been called."

3

Based on these views of childhood, the founding generation understood parents to have a right and duty to govern their children's growth. Parents were expected to direct the development and education of their children and ensure that bad habits did not take root. They were responsible for instilling "moral prohibitions, behavioral standards, and a capacity for self-government that would prepare a child for the outside world." In short, "[h]ome and family bore the major responsibility for the moral training of children and thus, by implication, for the moral health of the nation."

This conception of parental rights and duties was exemplified by Thomas Jefferson's approach to raising children. He wrote letters to his daughters constantly and often gave specific instructions about what the children should do. He took the same approach with his nephew, Peter Carr, after Carr's father died.

3

Jefferson's rigorous management of his charges was not uncommon. "[M]uch evidence indicates that mothers and fathers both believed in giving their children a strict upbringing, enforcing obedience to their commands and stressing continued subjection to the parental will." Two parenting books published in the 1830's gave prototypical advice. In *The Mother's Book*, Lydia Child advised that "[t]he first and most important step in management is, that whatever a mother says, always *must* be done." John Abbott, the author of *The Mother at Home*, likewise advised that "[o]bedience is absolutely essential to proper family government." Echoing Locke, Abbott warned that parents who indulged a child's "foolish and unreasonable wishes" would doom that child to be indulgent in adulthood.

The concept of total parental control over children's lives extended into the schools. "The government both of families and schools should be absolute," declared Noah Webster. Dr. Benjamin Rush concurred: "In the education of youth, let the authority of our masters be as *absolute* as possible." Through the doctrine of *in loco parentis*, teachers assumed the "'sacred dut[y] of parents ... to train up and qualify their children'" and exercised the same authority "'to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.'" *Morse v. Frederick* (2007) Thus, the quality of teachers and schools had to "be watched with the most scrupulous attention."

For their part, children were expected to be dutiful and obedient. Schoolbooks instructed children to do so and frequently featured vignettes illustrating the consequences of disobedience. An entire genre of books, "loosely termed 'advice to youth,'" taught similar lessons well into the 1800's.

4

Society's concern with children's development extended to the books they read. "Vice always spreads by being published," Noah Webster observed. "[Y]oung people are taught many vices by fiction, books, or public exhibitions, vices which they never would have known had they never read such books or attended such public places." Prominent children's authors harshly criticized fairy tales and the use of anthropomorphic animals.

Adults carefully controlled what they published for children. Stories written for children were dedicated to moral instruction and were relatively austere, lacking details that might titillate children's minds. John Newbery, the publisher often credited with creating the genre of children's literature, removed traditional folk characters, like Tom Thumb, from their original stories and placed them in new morality tales in which good children were rewarded and disobedient children punished.

Parents had total authority over what their children read. Lydia Child put it bluntly in *The Mother's Book*: "Children ... should not read anything without a mother's knowledge and sanction; this is particularly necessary between the ages of twelve and sixteen."

5

4

The law at the time reflected the founding generation's understanding of parent-child relations. According to Sir William Blackstone, parents were responsible for maintaining, protecting, and education their children, and therefore had "power" over their children. Chancellor James Kent agreed. The law entitled parents to "the custody of their [children]," "the value of th[e] [children's] labor and services," and the "right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." Children, in turn, were charged with "obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives."

Thus, in case after case, courts made clear that parents had a right to the child's labor and services until the child reached majority. In 1810, the Supreme Judicial Court of Massachusetts explained, "There is no question but that a father, who is entitled to the services of his minor son, and for whom he is obliged to provide, may, at the common law, assign those services to others, for a consideration to enure to himself." *Day v. Everett*. Similarly, the Supreme Court of Judicature of New Hampshire noted that the right of parents to recover for the services of their child, while a minor, "cannot be contested." *Gale v. Parrot*, (1817). And parents could bring tort suits against those who knowingly enticed a minor away from them.

Relatedly, boys could not enlist in the military without parental consent. Many of those who did so during the Revolutionary War found, afterwards, that their fathers were entitled to their military wages. And after the war, minors who enlisted without parental consent in violation of federal law could find themselves returned home on writs of habeas corpus issued at their parents' request.

Laws also set age limits restricting marriage without parental consent. For example, from 1730 until at least 1849, Pennsylvania law required parental consent for the marriage of anyone under the age of 21.

Indeed, the law imposed age limits on all manner of activities that required judgment and reason. Children could not vote, could not serve on juries, and generally could not be witnesses in criminal cases unless they were older than 14.

C

The history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children. The Puritan tradition in New England laid the foundation of American parental authority and duty. In the decades leading up to and following the Revolution, the conception of the child's mind evolved but the duty and authority of parents remained. Indeed, society paid closer attention to potential influences on children than before. Teachers and schools came under scrutiny, and children's reading material was carefully supervised. Laws reflected these concerns and often supported parental authority with the coercive power of the state.

II

A

In light of this history, the Framers could not possibly have understood “the freedom of speech” to include an unqualified right to speak to minors. Specifically, I am sure that the founding generation would not have understood “the freedom of speech” to include a right to speak to children without going through their parents. As a consequence, I do not believe that laws limiting such speech—for example, by requiring parental consent to speak to a minor—“abridg[e] the freedom of speech” within the original meaning of the First Amendment. .

We have recently noted that this Court does not have “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” *Stevens* , But we also recognized that there may be “some categories of speech that have been historically unprotected [and] have not yet been specifically identified or discussed as such in our case law.” In my opinion, the historical evidence here plainly reveals one such category.

B

Admittedly, the original public understanding of a constitutional provision does not always comport with modern sensibilities. This, however, is not such a case. Although much has changed in this country since the Revolution, the notion that parents have authority over their children and that the law can support that authority persists today. For example, at least some States make it a crime to lure or entice a minor away from the minor’s parent. Every State in the Union still establishes a minimum age for marriage without parental or judicial consent. And minors remain subject to curfew laws across the country and cannot unilaterally consent to most medical procedures.

Moreover, there are many things minors today cannot do at all, whether they have parental consent or not. State laws set minimum ages for voting and jury duty. In California (the State at issue here), minors cannot drive for hire or drive a school bus, purchase tobacco, play bingo for money, or execute a will..

My understanding of “the freedom of speech” is also consistent with this Court’s precedents. To be sure, the Court has held that children are entitled to the protection of the First Amendment *Erznoznik v. Jacksonville* (1975) , and the government may not unilaterally dictate what children can say or hear. But this Court has never held, until today, that “the freedom of speech” includes a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents. To the contrary, “[i]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.” *Erznoznik* .

The Court’s constitutional jurisprudence “historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.” Under that case law, “legislature[s] [can] properly conclude that parents and others, teachers for example, who have ... primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.” *Ginsberg* (1968). This is because “the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.” *Id.*.

III

The California law at issue here prohibits the sale or rental of “violent video game[s]” to minors, defined as anyone “under 18 years of age.” A violation of the law is punishable by a civil fine of up to \$1,000. Critically, the law does not prohibit adults from buying or renting violent video games for a minor or prohibit minors from playing such games. The law also does not restrict a “minor’s parent, grandparent, aunt, uncle, or legal guardian” from selling or renting him a violent video game.

Respondents, associations of companies in the video game industry, brought a preenforcement challenge to California’s law, claiming that on its face the law violates the free speech rights of their members. The Court holds that video games are speech for purposes of the First Amendment and finds the statute facially unconstitutional.. I disagree.

Under any of this Court’s standards for a facial First Amendment challenge, this one must fail. The video game associations cannot show “that no set of circumstances exists under which [the law] would be valid,” “that the statute lacks any plainly legitimate sweep,” or that “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Stevens*.. Even assuming that video games are speech, in most applications the California law does not implicate the First Amendment All that the law does is prohibit the direct sale or rental of a violent video game to a minor by someone other than the minor’s parent, grandparent, aunt, uncle, or legal guardian. Where a minor has a parent or guardian, as is usually true, the law does not prevent that minor from obtaining a violent video game with his parent’s or guardian’s help. In the typical case, the only speech affected is speech that bypasses a minor’s parent or guardian. Because such speech does not fall within “the freedom of speech” as originally understood, California’s law does not ordinarily implicate the First Amendment and is not facially unconstitutional.

* * *

“The freedom of speech,” as originally understood, does not include a right to speak to minors without going through the minors’ parents or guardians. Therefore, I cannot agree that the statute at issue is facially unconstitutional under the First Amendment .

I respectfully dissent.