2

First Amendment Principles

In this chapter we examine decisions in which the courts have outlined the First Amendment's scope and meaning, starting with *Brandenburg v. Ohio*, a 1969 decision stemming from a prosecution for "criminal syndicalism" against a Ku Klux Klan speaker. The *Brandenburg* test, still good law, says that political speech is protected by the First Amendment unless it is likely to produce "imminent lawless action." The second case, *Hess v. Indiana*, is an example of the test's application, and suggests that the Court takes seriously the earlier decision's "imminence" requirement.

Another issue fundamental to the First Amendment's scope is the posited right not to speak. *Wooley v. Maynard*, one of the Supreme Court's many statements on this issue, has often been cited as an elegant paean to silence. Following up on *Wooley*, we offer *Johanns v. Livestock Marketing Association*, in which the Court tells us that the right not to speak is inapplicable when the speaker is the government, even if select individuals are compelled to provide the funds for that speech.

U.S. v. O'Brien asks us to consider in what circumstances communicative conduct that does not involve the vocal cords is to be counted as "speech." The emerging "*O'Brien* test" tells courts how to evaluate government regulations that are aimed at the *non*communicative component of an agent's conduct, but that have an effect on that agent's message.

Our next case also involves symbolic conduct, but in *Morse v. Frederick* the Court discounts the agent's communicative intent, perhaps in part because he himself admitted he was not quite sure what, if anything, he intended to convey with his "Bong Hits for Jesus" banner, and perhaps also because he was a minor and the punishment involved was thus public school disciplinary actions, rather than a fine or a threat of jail time.

Next we examine the matter of prior restraints on the press by reading *U.S. v. The Progressive*, in which a U.S. district judge issued an injunction against

publication of an article the government argued could lead to nuclear annihilation.

Finally we examine *U.S. v. Stevens*, in which the Court declines to remove depictions of "animal cruelty" from the protection of the First Amendment.

▪ *Brandenburg v. Ohio*

395 U.S. 444 (1969)

Per Curiam opinion:

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

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

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews [such as "Bury the niggers," "This is what we are going to do to the niggers," and "Send the Jews back to Israel."]. Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of

free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

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

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.

Reversed.

POINTS FOR DISCUSSION

1. Should incitement of violent illegal action (such as "bury the niggers") be treated differently under the *Brandenburg* test from advocacy of nonviolent action (e.g., tax evasion) or even advocacy of "victimless" crimes (e.g., having an extramarital affair)?
2. The *Brandenburg* test requires courts to consider whether a speaker's utterance is "likely to produce" lawless action. Does this mean that an ineffectual leader incapable of delivering a rousing speech enjoys more First Amendment freedoms than does a dramatic and talented rhetor?

▪ *Hess v. Indiana*

414 U.S. 105 (1973)

Per Curiam opinion:

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

should be reversed because the statute is unconstitutionally vague, because the statute is overbroad in that it forbids activity that is protected under the First and Fourteenth Amendments, and because the statute, as applied here, abridged his constitutionally protected freedom of speech. These contentions were rejected in the City Court, where Hess was convicted, and in the Superior Court, which reviewed his conviction. The Supreme Court of Indiana, with one dissent, considered and rejected each of Hess' constitutional contentions, and accordingly affirmed his conviction.

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

The Indiana Supreme Court placed primary reliance on the trial court's finding that Hess' statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech. Under our decisions, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational

inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.'"

Accordingly, the judgment of the Supreme Court of Indiana is reversed.

POINTS FOR DISCUSSION

1. Clearly the *Hess* decision emphasizes *Brandenburg v. Ohio*'s "imminence" requirement. But why should "imminence" make a difference? Is a speaker who directs audience members to loot the downtown *now* any less culpable than one who advises them to take a brief lunch break first? Is the real issue the presumed opportunity for intervention to stop the violence from taking place?
2. If you were trying to predict in advance whether Hess's utterance was likely to lead to unlawful action, what would your guess have been? After all, he was surrounded by over a hundred followers (unlike the mere dozen or so "hooded figures" who listened to Brandenburg's racist speech) who had already broken the law (by blocking traffic, for example). Are courts likely to use their own "20-20 hindsight" when applying Brandenburg's "likely to produce . . ." requirement (i.e., speeches that *did* result in illegality were therefore "likely to produce" illegality)?

■ *Wooley v. Maynard*

430 U.S. 705 (1977)

Chief Justice Burger:

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die." Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure] the figures or letters on any number plate." The term "letters" in this section has been interpreted by the State's highest court to include the state motto. Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be

repugnant to their moral, religious, and political beliefs, and therefore assert it objectionable to disseminate this message by displaying it on their automobiles. Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates. In May or June 1974 Mr. Maynard actually snipped the words "or Die" off the license plates, and then covered the resulting hole, as well as the words "Live Free," with tape. This was done, according to Mr. Maynard, because neighborhood children kept removing the tape. The Maynards have since been issued new license plates, and have disavowed any intention of physically mutilating them.

On November 27, 1974, Mr. Maynard was issued a citation. On December 6, 1974, he appeared in Lebanon, N.H. District Court to answer the charge. After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objections to the motto. The state trial judge expressed sympathy for Mr. Maynard's situation, but considered himself bound to hold Maynard guilty. [For this and subsequent violations, Maynard was fined $75 and served 15 days in jail.]

On March 4, 1975, appellees brought the present action, [seeking] injunctive and declaratory relief. Following a hearing on the merits, the District Court entered an order enjoining the State "from arresting and prosecuting [the Maynards] at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die."

The District Court held that by covering up the state motto "Live Free or Die" on his automobile license plate, Mr. Maynard was engaging in symbolic speech and that "New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on [appellee's] constitutionally protected expression." We find it unnecessary to pass on the "symbolic speech" issue. We note [however] that appellees' claim of symbolic expression is substantially undermined by their prayer in the District Court for issuance of special license plates not bearing the state motto. This is hardly consistent with the stated intent to communicate affirmative opposition to the motto. Whether or not we view appellees' present practice of covering the motto with tape as sufficiently communicative to sustain a claim of symbolic expression, display of the "expurgated" plates requested by appellees would surely not satisfy that standard.

We find more appropriate First Amendment grounds to affirm the judgment of the District Court. We turn instead to what in our view is the essence of appellees' objection to the requirement that they display the motto "Live Free or Die" on their automobile license plates. This is succinctly summarized in the statement made by Mr. Maynard in his affidavit filed with the District

Court: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent."

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

The Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. The Court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message, or suffer a penalty, as Maynard already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Identifying the Maynards' interests as implicating First Amendment protec-

tions does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates. The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However, the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to the state motto. Even were we to credit the State's reasons and even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.

It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

POINTS FOR DISCUSSION

1. Should the right not to speak be dependent on how strongly one abhors the message? Suppose a Philadelphian covered up her license plate motto ("You have a friend in Pennsylvania"), not because it offends her, but because she thinks it silly? What about an Anchorage resident who thinks that the cosmos, not the state of Alaska, is "the last frontier"?
2. Suppose a state could demonstrate that its automobile license's color scheme is very similar to that of one or two other states, and that the motto therefore helps to identify the driver as a local resident. Should the Court's result have then been different?

▪ *Johanns v. Livestock Marketing Association*

544 U.S. 550 (2005)

Justice Scalia:

For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. In these cases, unlike the previous two, the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

The Beef Promotion and Research Act of 1985 announces a federal policy of promoting the marketing and consumption of "beef and beef products," using funds raised by an assessment on cattle sales and importation. The statute directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order. The Secretary is to impose a $1-per-head assessment (or "checkoff") on all sales or importation of cattle and a comparable assessment on imported beef products, used to fund beef-related projects, including promotional campaigns approved by the Secretary.

More than $1 billion has been collected through the checkoff, and a large fraction of that sum has been spent on promotional projects authorized by the Beef Act—many using the familiar trademarked slogan "Beef. It's What's for Dinner."[1] Many promotional messages funded by the checkoff bear the attribution "Funded by America's Beef Producers." Most print and television messages also bear a Beef Board logo, usually a check-mark with the word "BEEF."

Respondents are two associations whose members collect and pay the checkoff, and several individuals who raise and sell cattle subject to the checkoff. They sued the Secretary, the Department of Agriculture, and the Board in Federal District Court on a number of constitutional and statutory grounds.

1. A sample ad from the campaign is on my website. Go to www.paulsiegelcommlaw.com, and on the left side (*Communication Law in America*), click on "Images from the Book," then "Chapter 2," and then on "Beef Ad."

The District Court ruled for respondents on their First Amendment claims. The Court of Appeals for the Eighth Circuit affirmed.

While the litigation was pending, we held in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), that a mandatory checkoff for generic mushroom advertising violated the First Amendment. Noting that the mushroom program closely resembles the beef program, respondents amended their complaint to assert a First Amendment challenge to the use of the beef checkoff for promotional activity. Respondents noted that the advertising promotes beef as a generic commodity, which, they contended, impedes their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef.

[In *United Foods*] we sustained a compelled-subsidy challenge to an assessment very similar to the beef checkoff, imposed to fund mushroom advertising. Deciding the case on the assumption that the advertising was private speech, not government speech, we concluded that mushroom producers were [improperly] obliged to pay the checkoff. The mandatory fee would be permitted if it were germane to a broader regulatory scheme, [but] in *United Foods* the only regulatory purpose was the funding of the advertising.

In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself. Our compelled-subsidy cases have consistently respected the principle that compelled support of a private association is fundamentally different from compelled support of government.

Compelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.

Respondents do not seriously dispute these principles, nor do they contend that, as a general matter, their First Amendment challenge requires them to show only that their checkoff dollars pay for speech with which they disagree. Rather, they assert that the challenged promotional campaigns differ dispositively from the type of government speech that, our cases suggest, is not susceptible to First Amendment challenge. They point to the role of the Beef Board and its Operating Committee in designing the promotional campaigns,

and to the use of a mandatory assessment on beef producers to fund the advertising. We consider each in turn.

The Secretary of Agriculture does not write ad copy himself. Rather, the Beef Board's promotional campaigns are designed by the Beef Board's Operating Committee, only half of whose members are Beef Board members appointed by the Secretary. Respondents contend that speech whose content is effectively controlled by a nongovernmental entity—the Operating Committee—cannot be considered "government speech." We need not address this contention, because we reject its premise: The message of the promotional campaigns is effectively controlled by the Federal Government itself.

The message set out in the beef promotions is from beginning to end the message established by the Federal Government. Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well). Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. Nor is the Secretary's role limited to final approval or rejection: officials of the Department also attend and participate in the open meetings at which proposals are developed.

Respondents also contend that the beef program does not qualify as "government speech" because it is funded by a targeted assessment on beef producers, rather than by general revenues. This funding mechanism, they argue, has two relevant effects: it gives control over the beef program not to politically accountable legislators, but to a narrow interest group that will pay no heed to respondents' dissenting views, and it creates the perception that the advertisements speak for beef producers such as respondents.

We reject the first point. The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. The First Amendment does not confer a right to pay one's taxes into the general fund, because the injury of compelled funding (as opposed to the injury of compelled speech) does not stem from the Government's mode of accounting.

Some of our cases have justified compelled funding of government speech

by pointing out that government speech is subject to democratic accountability. But [not] every instance of government speech must be funded by a line item in an appropriations bill. Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

As to the second point, respondents' argument proceeds as follows: They contend that crediting the advertising to "America's Beef Producers" impermissibly uses not only their money but also their seeming endorsement to promote a message with which they do not agree. Communications cannot be "government speech," they argue, if they are attributed to someone other than the government; and the person to whom they are attributed, when he is, by compulsory funding, made the unwilling instrument of communication, may raise a First Amendment objection.

We need not determine the validity of this argument—which relates to compelled *speech* rather than compelled subsidy—with regard to respondents' facial challenge. Since neither the Beef Act nor the Beef Order *requires* attribution, neither can be the cause of any possible First Amendment harm. The District Court's order enjoining the enforcement of the Act and the Order thus cannot be sustained on this theory.

The judgment of the Court of Appeals is vacated.

POINTS FOR DISCUSSION

1. Earlier in this chapter you read *Wooley v. Maynard*, in which the Court held that New Hampshire residents could not be forced to espouse the state's motto—"Live Free or Die!"—on their automobile license plates. Are the beef producers who brought the case before you also being forced here to utter a message with which they disagree? In other words, do you buy Justice Scalia's argument that this is government speech, and thus unlike the *Wooley* case? Isn't a car license plate also "government speech"?
2. The Johanns decision rests on the Court's having "framed" the controversy as one of government speech rather than compelled citizen speech. And there is a certain logic to allowing the government to say what it wants. But, as Justice Souter pointed out in dissent, the government might seem a bit confused about its own message. Is the government's case weakened at all in your judgment by the fact that the same Department of Agriculture that created the "Beef: It's What's for Dinner" campaign also publishes "Dietary Guidelines for Americans," which recommends that Americans *reduce* their intake of fats, and suggests that we also get most of our fats not from beef but from fish, nuts, and vegetable oil?

▪ *U.S. v. O'Brien*

391 U.S. 367 (1968)

Chief Justice Warren:

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

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

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b)."

Section 462 (b) is part of the Universal Military Training and Service Act of 1948. Section 462 (b)(3), one of six numbered subdivisions of Section 462 (b), was amended by Congress in 1965, so that at the time O'Brien burned his certificate an offense was committed by any person "who forges, alters, know-

ingly destroys, knowingly mutilates, or in any manner changes any such certificate." In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose. The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech. At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal possession at all times." Wilful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute. The Court of Appeals, therefore, was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the nonpossession regulation, and consequently that the Amendment served no valid purpose; further, that in light of the prior regulation, the Amendment must have been "directed at public as distinguished from private destruction." On this basis, the court concluded that the 1965 Amendment ran afoul of the First Amendment by singling out persons engaged in protests for special treatment. The court ruled, however, that O'Brien's conviction should be affirmed under the statutory provision, 50 U.S.C. App. Section 462 (b)(6), which in its view made violation of the nonpossession regulation a crime, because it regarded such violation to be a lesser included offense of the crime defined by the 1965 Amendment.

The Government petitioned for certiorari, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Courts of Appeals for the Second and Eighth Circuits upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien.

When a male reaches the age of 18, he is required by the Universal Military

Training and Service Act to register with a local draft board. He is assigned a Selective Service number, and within five days he is issued a registration certificate. Subsequently, and based on a questionnaire completed by the registrant, he is assigned a classification denoting his eligibility for induction, and "as soon as practicable" thereafter he is issued a Notice of Classification. This initial classification is not necessarily permanent, and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified. After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.

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

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

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

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. Under the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times.

By the 1965 Amendment, Congress added the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner

changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate.

We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. On its face [the Amendment] deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records. O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft." We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

We find that the 1965 Amendment meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

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

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

- The registration certificate serves as proof that the individual described thereon has registered for the draft. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Further, it is in the interest of the just and efficient administration of the system that [the certificates] be continually available, in the event, for example, of a mix-up in the registrant's file.
- The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further,

each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

- Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status.
- The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the

Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because [the law] is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

POINTS FOR DISCUSSION

1. The *O'Brien* Court says it "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." When, if ever, *should* conduct be treated the same as speech? Are you exercising your right to free speech when you walk on a picket line? What about the civil rights demonstrators of the 1960s who conducted "sit-ins" at lunch counters that refused to serve "Coloreds"?
2. O'Brien was charged with "willfully and knowingly" mutilating, destroying, and burning his draft card. Given the unlikelihood that a young man would take such actions in support of the Vietnam War, what are we to make of Chief Justice Warren's assertion that the statute at issue here was aimed at "the *noncommunicative* aspect of O'Brien's conduct?"

▪ *Morse v. Frederick*

551 U.S. 393 (2007)

Chief Justice Roberts:

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Students were allowed to leave class to ob-

serve the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HITS 4 JESUS."

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it. The superintendent determined that:

> The common-sense understanding of the phrase "bong hits" is that it is a reference to a means of smoking marijuana. Given Frederick's inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. Frederick's speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. Frederick's speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.

The superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." The Juneau School District Board of Education upheld the suspension. Frederick then filed suit, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted summary judgment for the school board and Morse; the Ninth Circuit reversed. Deciding that the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption."

At the outset, we reject Frederick's argument that this is not a school speech case. The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," and the school

district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts.

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one. We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits . . ."—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.

Frederick [of course, maintains that] he "just wanted to get on television." But that is a description of Frederick's *motive* for displaying the banner; it is not an interpretation of what the banner says. The *way* Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students. [Since] not even Frederick argues that the banner conveys any sort of political or religious message, this is plainly not a case about political debate over the criminalization of drug use or possession.

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

[Our leading student speech case, *Tinker v. Des Moines Independent Community School District*],[2] held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school. [But our later student cases have made clear that Tinker's "disruption" standard] is not the only basis for restricting student speech [and that] "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."

2. 393 U.S. 503 (1969).

[Moreover, our Fourth Amendment cases in school settings, governing such matters as locker searches and drug testing, have made clear that] deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people. Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs. Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps the single most important factor leading schoolchildren to take drugs, and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive." [But] much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered.

POINTS FOR DISCUSSION

1. Is the majority guilty of having it both ways, on the one hand infusing young Mr. Frederick's message with serious cognitive content (an incitement to illegal drug use), but also rejecting the notion that the message had any political elements (after all, he "only wanted to get on TV")?
2. Justice Stevens's dissenting opinion reminds the Court that alcohol abuse is far more dangerous than marijuana use. But what if Mr. Frederick's banner had read "Wine Sips for Jesus?" Such a message still would be arguably an incitement to illegal (for minors, anyway) drug use, but it does seem to have religious, perhaps political, overtones. What do you think of Stevens's point here (or of his additional point that almost any message regarding pot use in Alaska cannot avoid being seen as a political one, given the state's highly controversial citizen referenda legalizing private possession of small amounts of the drug, and explicitly accepting its medical uses)?

▪ *U.S. v. The Progressive*

467 F. Supp. 990 (W.D. Wisc. 1979)

Judge Warren:

On March 9, 1979, this Court, at the request of the government, but after hearing from both parties, issued a temporary restraining order enjoining defendants, their employees, and agents from publishing or otherwise communicating or disclosing in any manner any restricted data contained in the article: "The H-Bomb Secret: How We Got It, Why We're Telling It."

In keeping with the Court's order that the temporary restraining order should be in effect for the shortest time possible, a preliminary injunction hearing was scheduled for one week later, on March 16, 1979. At the request of the parties and with the Court's acquiescence, the preliminary injunction hearing was rescheduled for 10:00 A.M. today in order that both sides might have additional time to file affidavits and arguments. The Court continued the temporary restraining order until 5:00 P.M. today.

In order to grant a preliminary injunction, the Court must find that plaintiff has a reasonable likelihood of success on the merits, and that the plaintiff will suffer irreparable harm if the injunction does not issue. In addition, the Court must consider the interest of the public and the balance of the potential harm to plaintiff and defendants.

In its argument and briefs, plaintiff relies on national security, as enunciated by Congress in The Atomic Energy Act of 1954, as the basis for classification of certain documents. Plaintiff contends that, in certain areas, national preservation and self-interest permit the retention and classification of government secrets. The government argues that its national security interest also permits it to impress classification and censorship upon information originating in the public domain, if when drawn together, synthesized and collated, such information acquires the character of presenting immediate, direct and irreparable harm to the interests of the United States.

Defendants argue that freedom of expression as embodied in the First Amendment is so central to the heart of liberty that prior restraint in any form becomes anathema. They contend that this is particularly true when a nation is not at war and where the prior restraint is based on surmise or conjecture. While acknowledging that freedom of the press is not absolute, they maintain that the publication of the projected article does not rise to the level of immediate, direct and irreparable harm which could justify incursion into First Amendment freedoms.

Both parties have already marshaled impressive opinions covering all aspects of the case. The Court has read all this material and has now heard extensive argument. It is time for decision.

From the founding days of this nation, the rights to freedom of speech and of the press have held an honored place in our constitutional scheme. The establishment and nurturing of these rights is one of the true achievements of our form of government. Because of the importance of these rights, any prior restraint on publication comes into court under a heavy presumption against its constitutional validity.

However, First Amendment rights are not absolute. They are not boundless. Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights.

In *Near v. Minnesota*, 283 U.S. 697 (1931), the Supreme Court specifically recognized an extremely narrow area, involving national security, in which interference with First Amendment rights might be tolerated and a prior restraint on publication might be appropriate. The Court stated: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

Thus, it is clear that few things, save grave national security concerns, are sufficient to override First Amendment interests. A court is well admonished to approach any requested prior restraint with a great deal of skepticism.

Juxtaposed against the right to freedom of expression is the government's contention that the national security of this country could be jeopardized by publication of the article.

The Court is convinced that the government has a right to classify certain sensitive documents to protect its national security. The problem is with the scope of the classification system.

Defendants contend that the projected article merely contains data already in the public domain and readily available to any diligent seeker. They say other nations already have the same information or the opportunity to obtain it. How then, they argue, can they be in violation of [the relevant federal laws], which purport to authorize injunctive relief against one who would disclose restricted data "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation"? Although the government states that some of the information is in the public domain, it contends that much of the data is not, and that the Morland article contains a core of information that has never before been published.

Furthermore, the government's position is that whether or not specific information is in the public domain or has been declassified at some point is not determinative. The government states that a court must look at the nature and context of prior disclosures and analyze what the practical impact of the prior disclosures are as contrasted to that of the present revelation.

The government feels that the mere fact that the author, Howard Morland, could prepare an article explaining the technical processes of thermonuclear weapons does not mean that those processes are available to everyone. They lay heavy emphasis on the argument that the danger lies in the exposition of certain concepts never heretofore disclosed in conjunction with one another.

In an impressive affidavit, Dr. Hans A. Bethe states that sizeable portions of the Morland text should be classified as restricted data because the processes outlined in the manuscript describe the essential design and operation of thermonuclear weapons. He later concludes that "the design and operational concepts described in the manuscript are not expressed or revealed in the public literature nor do I believe they are known to scientists not associated with the government weapons programs."

The Court has grappled with this difficult problem and has read and studied the affidavits and other documents on file. After all this, the Court finds concepts within the article that it does not find in the public realm, concepts that are vital to the operation of the hydrogen bomb.

Even if some of the information is in the public domain, due recognition must be given to the human skills and expertise involved in writing this article. The author needed sufficient expertise to recognize relevant, as opposed to irrelevant, information and to assimilate the information obtained. The right questions had to be asked or the correct educated guesses had to be made.

Does the article provide a "do-it-yourself" guide for the hydrogen bomb? Probably not. A number of affidavits make quite clear that a *sine qua non* to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians. One does

not build a hydrogen bomb in the basement. However, the article could possibly provide sufficient information to allow a medium-size nation to move faster in developing a hydrogen weapon. It could provide a ticket to bypass blind alleys.

Although the defendants state that the information contained in the article is relatively easy to obtain, only five countries now have a hydrogen bomb. Yet the United States first successfully exploded the hydrogen bomb some twenty-six years ago.

The point has also been made that it is only a question of time before other countries will have the hydrogen bomb. That may be true. However, there are times in the course of human history when time itself may be very important. This time factor becomes critical when considering mass annihilation weaponry. Witness the failure of Hitler to get his V-1 and V-2 bombs operational quickly enough to materially affect the outcome of World War II.

Defendants have stated that publication of the article will alert the people of this country to the false illusion of security created by the government's futile efforts at secrecy. They believe publication will provide the people with needed information to make informed decisions on an urgent issue of public concern.

However, this Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue. Furthermore, the Court believes that the defendants' position in favor of nuclear non-proliferation would be harmed, not aided, by the publication of this article.

The Court is of the opinion that the government has shown that the defendants had reason to believe that the data in the article, if published, would injure the United States or give an advantage to a foreign nation. Extensive reading and studying of the documents on file lead to the conclusion that not all the data is available in the public realm in the same fashion, if it is available at all.

What is involved here is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself. Stripped to its essence, then, the question before the Court is a basic confrontation between the First Amendment right to freedom of the press and national security.

Our Founding Fathers believed, as we do, that one is born with certain inalienable rights which, as the Declaration of Independence intones, include the right to life, liberty and the pursuit of happiness. The Constitution, including the Bill of Rights, was enacted to make those rights operable in everyday life.

The Court believes that each of us is born seized of a panoply of basic rights, that we institute governments to secure these rights and that there is a hierarchy of values attached to these rights which is helpful in deciding the clash now before us.

Certain of these rights have an aspect of imperativeness or centrality that make them transcend other rights. Somehow it does not seem that the right to life and the right to not have soldiers quartered in your home can be of equal import in the grand scheme of things. While it may be true in the long-run, as Patrick Henry instructs us, that one would prefer death to life without liberty, nonetheless, in the short-run, one cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys the freedom to live.

Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression.

Is the choice here so stark? Only time can give us a definitive answer. But considering another aspect of this panoply of rights we all have is helpful in answering the question now before us. This aspect is the disparity of the risk involved.

The destruction of various human rights can come about in differing ways and at varying speeds. Freedom of the press can be obliterated overnight by some dictator's imposition of censorship or by the slow nibbling away at a free press through successive bits of repressive legislation enacted by a nation's lawmakers. Yet, even in the most drastic of such situations, it is always possible for a dictator to be overthrown, for a bad law to be repealed or for a judge's error to be subsequently rectified. Only when human life is at stake are such corrections impossible. The case at bar is so difficult precisely because the consequences of error involve human life itself and on such an awesome scale.

A mistake in ruling against *The Progressive* will seriously infringe cherished First Amendment rights. If a preliminary injunction is issued, it will constitute the first instance of prior restraint against a publication in this fashion in the history of this country, to this Court's knowledge. Such notoriety is not to be sought. It will curtail defendants' First Amendment rights in a drastic and substantial fashion. It will infringe upon our right to know and to be informed as well. A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.

In the *Near* case, the Supreme Court recognized that publication of troop movements in time of war would threaten national security and could there-

fore be restrained. Times have changed significantly since 1931 when *Near* was decided. Now war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced.

In light of these factors, this Court concludes that publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.

Because the government has met its heavy burden of showing justification for the imposition of a prior restraint on publication of the objected-to technical portions of the Morland article, and because the Court is unconvinced that suppression of the objected-to technical portions of the Morland article would in any plausible fashion impede the defendants in their laudable crusade to stimulate public knowledge of nuclear armament and bring about enlightened debate on national policy questions, the Court finds that the objected-to portions of the article fall within the narrow area recognized by the Court in *Near v. Minnesota* in which a prior restraint on publication is appropriate.

However, the Court is acutely aware of the old legal adage that "bad cases make bad law." This case in its present posture will undoubtedly go to the Supreme Court because it does present so starkly the clash between freedom of press and national security. Does it go there with the blessing of the entire press? The Court thinks not. Many elements of the press see grave risk of permanent damage to First Amendment freedoms if this case goes forward. They feel appellate courts will find, as this Court has, that the risk is simply too great to permit publication.

Furthermore, if there is any one inescapable conclusion that one arrives at after wading through all these experts' affidavits, it is that many wise, intelligent, patriotic individuals can hold diametrically opposite opinions on the issues before us.

The government seeks only the deletion of certain technical material and, in the Court's opinion, would have an interest in settling this case out of court. On the other hand, the Court believes that *The Progressive* does not really require the objected-to material in order to ventilate its views on government secrecy and the hydrogen bomb.

The facts and circumstances as presented here fall within the extremely narrow recognized area, involving national security, in which a prior restraint on publication is appropriate. Issuance of a preliminary injunction does not, under the circumstances presented to the Court, violate defendants' First Amendment rights.

Plaintiff has proven all necessary prerequisites for issuance of a preliminary injunction restraining defendants from publishing or disclosing any Restricted Data contained in the Morland article until a final determination in this action has been made by the Court.

[*Editor's note*: As it turns out, the *Progressive* case never went to the Supreme Court. While an appeal was pending, a number of other publications—including campus newspapers at the University of Wisconsin and Stanford University—printed essays very similar to the Morland article. The case was therefore dismissed as moot in that there was no more damage that could be done by the Morland article itself.]

POINTS FOR DISCUSSION

1. Suppose that a publication wanted to print an essay arguing that the U.S. government is inadequately preparing for the possibility of terrorism using biological weapons. Suppose further that the publisher felt that the point can only be made by showing how easy it would be to wage biologic warfare against this country. Upon the government's request, should a modern-day court do as Judge Warren did? Should publication of the article be stopped?
2. Judge Warren struggled with this case precisely because he was asked to impose a prior restraint on publication, and such restraints were viewed with special disdain by the Founders. He allows that a prior restraint is appropriate here because total annihilation of the human race may result if he permits publication and then determines if the Morland essay was in violation of the Atomic Energy Act. Are there other situations, beyond the possible end of humankind, that you think justify the use of prior restraints on communication?

▪ *U.S. v. Stevens*

130 S. Ct. 1577 (2010)

Chief Justice Roberts:

Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cru-

elty," if done "for commercial gain" in interstate or foreign commerce. A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."

The legislative background of § 48 focused primarily on the interstate market for "crush videos," [which] feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. Crush videos often depict women slowly crushing animals to death with their bare feet or while wearing high heeled shoes, sometimes while talking to the animals in a kind of dominatrix patter over the cries and squeals of the animals, obviously in great pain. Apparently these depictions appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. But crush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct.

This case, however, involves an application of § 48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, and has been restricted by federal law since 1976. Respondent Robert J. Stevens ran a business, "Dogs of Velvet and Steel," and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were *Japan Pit Fights* and *Pick-A-Winna: A Pit Bull Documentary*, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960s and 1970s. A third video, *Catch Dogs and Country Living*, depicts the use of pit bulls to hunt wild boar, as well as a gruesome scene of a pit bull attacking a domestic farm pig. On the basis of these videos, Stevens was indicted on three counts of violating § 48. Stevens moved to dismiss the indictment, arguing that § 48 is facially invalid under the First Amendment.

The Government's primary submission is that § 48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Section 48 explicitly regulates

expression based on content: The statute restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, § 48 is presumptively invalid, and the Government bears the burden to rebut that presumption.

From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations. These historic and traditional categories include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.

The Government argues that "depictions of animal cruelty" should be added to the list. It contends that depictions of illegal acts of animal cruelty that are made, sold, or possessed for commercial gain necessarily lack expressive value, and may accordingly be regulated as *unprotected* speech. The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether.

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. But we are unaware of any similar tradition excluding *depictions* of animal cruelty from "the freedom of speech" codified in the First Amendment, and the Government points us to none.

The Government contends that historical evidence about the reach of the First Amendment is not a necessary prerequisite for regulation today, and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's legislative judgment that depictions of animals being intentionally tortured and killed are of such minimal redeeming value as to render them unworthy of First Amendment protection, and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that

judgment simply on the basis that some speech is not worth it. The Constitution is not a document prescribing limits, and declaring that those limits may be passed at pleasure

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. [When] we classified child pornography as such a category, we noted that the State has a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. But our decision did not rest on this balance of competing interests alone. We made clear that child pornography was a special case, intrinsically related to the underlying abuse, and was therefore an integral part of the production of such materials, an activity illegal throughout the Nation.

Our decisions cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that depictions of animal cruelty is among them. Because we decline to carve out from the First Amendment any novel exception for § 48, we review Stevens's First Amendment challenge under our existing doctrine.

Stevens challenged § 48 on its face, arguing that any conviction secured under the statute would be unconstitutional. To succeed in a typical facial attack, Stevens would have to establish that no set of circumstances exists under which § 48 would be valid, or that the statute lacks any plainly legitimate sweep. Here the Government asserts that Stevens cannot prevail because § 48 is plainly legitimate as applied to crush videos and animal fighting depictions. Deciding this case through a traditional facial analysis would require us to resolve whether these applications of § 48 are in fact consistent with the Constitution.

In the First Amendment context, however, this Court recognizes a second

type of facial challenge whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.

Stevens argues that § 48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of § 48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. As the parties have presented the issue, therefore, the constitutionality of § 48 hinges on how broadly it is construed. It is to that question that we now turn.

The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers. We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." "Maimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation. The Government contends that the terms in the definition should be read to require the additional element of "accompanying acts of cruelty." The Government bases this argument on the [the fact that the phrase being defined is] "depiction of animal *cruelty*," and on the commonsense [notion] that an ambiguous term may be given more precise content by the neighboring words with which it is associated.

But the phrase "wounded or killed" at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to "'kill' is 'to deprive of life.'" We agree that "wounded" and "killed" should be read according to their ordinary meaning. Nothing about that meaning requires cruelty.

While not requiring cruelty, § 48 does require that the depicted conduct be "illegal." But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the *humane* wounding or killing of living animals. Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of § 48(c) draws no distinction based on the reason the intentional killing of an

animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.

What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the wounding or killing took place in that State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be a broad societal consensus against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, and hunting television programs, videos, and Web sites are equally popular. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions. Some States permit hunting with crossbows, while others forbid it, or restrict it only to the disabled. Missouri allows the "canned" hunting of ungulates held in captivity but Montana restricts such hunting to certain bird species. The sharp-tailed grouse may be hunted in Idaho, but not in Washington.

The disagreements among the States extend well beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. Even cockfighting, long considered immoral in much of America, is legal in Puerto Rico, and was legal in Louisiana until 2008. An otherwise-lawful image of any of these practices, if sold or possessed for commercial gain within a State that happens to forbid the practice, falls within the prohibition of § 48(a).

The only thing standing between defendants who sell such depictions and five years in federal prison—other than the mercy of a prosecutor—is the statute's exceptions clause. Subsection (b) exempts from prohibition "any depiction that has serious religious, political, scientific, educational, journalistic,

historical, or artistic value." The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have "journalistic" value; pictures of bullfights in Spain have "historical" value; and instructional hunting videos have "educational" value. Thus, the Government argues, § 48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting) and perhaps other depictions of "extreme acts of animal cruelty."

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with "redeeming societal value," "at least some minimal value," or anything more than "scant social value" is excluded under § 48(b). But the text says "serious" value, and "serious" should be taken seriously. We decline the Government's invitation—advanced for the first time in this Court—to regard as "serious" anything that is not "scant." "Serious" ordinarily means a good bit more.

Quite apart from the requirement of "serious" value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen's Foundation, many popular videos "have primarily entertainment value" and are designed to "entertain the viewer, market hunting equipment, or increase the hunting community." The Government offers no principled explanation why depictions of hunting or depictions of Spanish bullfights would be *inherently* valuable while those of Japanese dogfights are not. There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.

The Government explains that the language of § 48(b) was largely drawn from our opinion in *Miller v. California* (1973), which excepted from its definition of obscenity any material with "serious literary, artistic, political, or scientific value." In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. Limiting *Miller*'s exception to "serious" value ensured that "a quotation from Voltaire in the flyleaf of a book would not constitutionally redeem an otherwise obscene publication." We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation.

Not to worry, the Government says: The Executive Branch construes § 48

to reach only "extreme" cruelty, and it neither has brought nor will bring a prosecution for anything less.

The Government hits this theme hard, invoking its prosecutorial discretion several times. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret § 48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." No one suggests that the videos in this case fit that description. The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Our construction of § 48 decides the constitutional question; the Government makes no effort to defend the constitutionality of § 48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of § 48.

Nor does the Government seriously contest that the presumptively impermissible applications of § 48 (properly construed) far outnumber any permissible ones. However "growing" and "lucrative" the markets for crush videos and dogfighting depictions might be, they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of § 48. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

POINTS FOR DISCUSSION

1. Can you think of ways in which the law at issue here might be rewritten so as to forbid "crush videos" but not videos of hunting? Do you think your reworked statute would be found constitutional?

2. The Court's reference to *Miller v. California* reminds us that American communication law is far more concerned with sex than with violence. Hard-core sexual images can be outlawed outright, but not violent ones. What are your thoughts about this pattern? Are we more squeamish about sex than about violence in general?