

High court's support of 'free speech' comes at a - Register-Guard, The (Eugene, OR) - May 3, 2010 - page 9A

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On April 20, the U.S. Supreme Court declared unconstitutional a federal statute making it a crime to create, sell or possess depictions of unlawful animal cruelty for commercial purposes.

The statute - which contained an exemption for depictions having serious religious, political, scientific, educational, journalistic, historical or artistic value - was Congress' reaction to the proliferation of so-called "crush videos."

Justice Samuel Alito's sole dissenting opinion - astonishingly, it was an 8-1 decision - contained a description of a typical "crush video":

"(A) kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone."

Thousands of such videos were produced and sold on the Internet. Within months of the statute's enactment, the market for crush videos dried up. That statute is now null and void.

The case before the court involved a conviction for selling videos showing pit bulls tearing into each other and into other terrified animals (including a farm pig). The defendant claimed that the conviction violated his free speech rights. The Supreme Court agreed.

The ruling, as badly reasoned and morally bankrupt as it is, was welcomed by a host of organizations, including the American Civil Liberties Union, the National Rifle Association and various newspapers, among them The Register-Guard (see the April 22 editorial, "Court upholds free speech").

What was the legal reasoning in this much-lauded decision? The court declined to decide whether "crush videos" or videos showing deadly dog fights were protected by the First Amendment. Instead, the court invalidated the statute because it found that the statute could apply to other depictions that clearly were protected, such as depictions of hunting.

But as Alito pointed out, a fair reading of the statute would preclude its application to depictions of hunting - either because hunting is legal in all 50 states, and the statute requires "unlawful" animal cruelty; or because Congress, which is a great supporter of hunting, could not have intended such result, so that courts would be perfectly justified in carving an exemption for depictions of hunting.

Either way, Alito said, depictions of hunting and other protected images are properly exempt, while the ban on "crush videos" or deadly dog fights should be allowed to stand.

Indeed, courts often give statutes "saving constructions" - constructions that limit their reach and thus save them from constitutional invalidation. But the majority refused to resort to this simple and common device: saving constructions, they said, are allowed only where a statute is "readily susceptible" to such an interpretation, and this statute was not.

Alito suggested another way to get over the majority's difficulty: depictions of hunting, Alito wrote, in any event qualify for the exemption for depictions having "serious ... scientific, educational (or) historical" value. But the majority refused to adopt this strategy as well: Relying on such exemptions, they said, may be inappropriate for depictions of hunting, and is in any case insufficiently protective of free speech.

It should be noted that identical exemptions were wholeheartedly embraced by the Supreme Court in the context of bans on sexually explicit materials.

According to the court, outlawing sexually obscene depictions does not violate the First Amendment because obscene materials having "serious artistic, political or scientific value" are exempt. So such exemptions permit the government to outlaw depictions of consenting adults having sex, but not depictions of kittens being tortured to death.

The Register-Guard's editorial reminds us that "unpopular and even dangerous and despicable speech can merit protection in a free society." That is true. But the depictions banned by the federal statute were not banned for being unpopular or dangerous or despicable.

They were banned because their creation inevitably involves the infliction of unimaginable pain and suffering on defenseless, sentient creatures. They inevitably involved despicable and unlawful action, not merely despicable speech.

The Supreme Court invalidated this decent and much-needed statute by relying on far-fetched hypotheticals, while refusing to employ judicial devices it readily employs in other contexts.

The 3rd Circuit Court of Appeals, the decision of which the Supreme Court affirmed, declared that protecting animals from gratuitous cruelty is not a sufficiently important governmental objective. The Supreme Court did not explicitly adopt this outrageous claim, but it certainly adopted it implicitly.

The decision is a moral disgrace.

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