

# Violent Video Games and the Rights of Children and Parents: A Critique of *Brown v. Entertainment Merchants Association*

by MARTIN GUGGENHEIM\*

I am afraid that our jurisprudence now says that [children have First Amendment rights] except when they do not . . . .<sup>1</sup>

## Introduction

One important kind of struggle within the First Amendment involves the effort to restrict particular art forms from being produced, distributed, or enjoyed because state officials consider their content unacceptable. For most of American history, states were free to censor entertainment that legislatures deemed inappropriate for civil society. Modern students of American culture might not appreciate just how closely censors monitored art because today's Supreme Court is an aggressive defender of freedom of expression. The Court insists that the marketplace be kept open both to further the political values of American democracy and to advance the intrinsic value of individual liberty to enjoy literature, film, and all other expressive media. Today, Americans enjoy the freedom to read books and magazines, and to be entertained at the movies and by television, notwithstanding that a majority of members of society might never wish to be exposed to this protected material.

As recently as the 1930s, however, federal courts declared that radio content was unprotected by the First Amendment because it

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\* Fiorello LaGuardia Professor of Clinical Law, New York University School of Law. I am grateful to the Florence D'Agostino and Max E. Greenberg Research Fund at New York University School of Law for financial support and to Norman Dorsen who helpfully read an earlier draft. A version of this article was presented at the Association of American Law Schools Annual Meeting in New York on January 3, 2014, at a panel sponsored by the section on Children and the Law.

1. *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring).

was merely entertainment.<sup>2</sup> Not until 1943 did the Supreme Court hold for the first time that radio is a protected medium, even if to a lesser degree than the more familiar print media.<sup>3</sup> It took until 1952 for the Court to declare that the content of motion pictures was protected by the First Amendment—ultimately indistinguishable for constitutional purposes from literature.<sup>4</sup> And it was as late as 1957 that the Supreme Court set into motion the demise of state censors' ban on "obscene" books.<sup>5</sup> This meant that by the 1960s, for the first time in American history, books and other forms of entertainment that had long been treated by the government as officially banned could be openly enjoyed throughout the country. In other words, American society officially permitted what could reasonably be characterized as "adult entertainment."

This remarkable transformation to the most robust free culture of expression in the world created some second-generation issues, most of which have been resolved by the Supreme Court. Thus, for example, individuals who may be said to suffer some harm from another's exercise of free speech have pressed their claims to have their separate interests accommodated. This includes individuals who do not want their mailboxes filled with unsolicited salacious materials,<sup>6</sup> who do not want to see t-shirts emblazoned with provocative language,<sup>7</sup> and who become the butt of unwelcomed jokes.<sup>8</sup>

The Supreme Court has largely resolved these competing claims by tolerating free speech and requiring those who prefer otherwise to learn to accept the rules of American society. In the Court's words:

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." Much that we encounter offends our esthetic, if not our political and

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2. See *Trinity Methodist Church v. Fed. Radio Comm'n*, 62 F.2d 850, 851, 853 (D.C. Cir. 1932).

3. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226–27 (1943).

4. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (overruling *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915)). See generally EDWARD DEGRAZIA & ROGER NEWMAN, *BANNED FILMS* (1982).

5. *Roth v. United States*, 354 U.S. 476 (1957).

6. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970).

7. *Cohen v. California*, 403 U.S. 15 (1971).

8. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to “avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”<sup>9</sup>

However, one of the particularly vexing second-generation questions involves children. How much of what is meant as fair game for adults to enjoy should also be available to children? This Article focuses on this important question as it examines the 2011 Supreme Court decision in *Brown v. Entertainment Merchants Association*,<sup>10</sup> which held that California’s effort to restrict children’s access to violent video games violated the First Amendment. Ultimately, this Article argues that the *Brown* law should have been more tolerant of government efforts to restrict children’s access to materials adults have the right to enjoy, especially when the restrictions were enacted to assist parents in raising their children.

This Article proceeds as follows: Part I sets out four different categories of cases involving some form of censorship by government officials focused on efforts to treat children differently from adults or to keep material from reaching children, as background for analyzing the *Brown* decision. Part II situates the rights of children and the corollary principles of parental rights into the broader picture of the issues raised in *Brown*. Part III describes and analyzes the *Brown* decision. Part IV offers a critique of the majority’s reasoning in *Brown*. This Article concludes in Part V with a proposal to regulate children’s access to violent materials that is designed to guard against government overreaching and to protect parental rights.

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9. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (citations omitted). *See also* *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (stating that “[i]n the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”).

10. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

## I. Regulating Speech Meant for Adults in an Open Society

Efforts to restrict books, film, and other forms of entertainment have taken several forms. The broadest, and best known, is the straightforward attempt to ban entirely the dissemination of particular material on the ground that the targeted materials were unfit for anyone. But, other efforts to restrict material arguably protected by the First Amendment have also been attempted in which an important focus of concern is the impact on children. One such effort is to ban certain material on the ground that banning it is the only way to ensure it will not get into the hands of children. This is a very different basis for the banning. Though both result in material being unavailable to anyone, what distinguishes them is their purpose. We will designate the first kind of case as “Category A” and the second kind “Category B.” Category B cases seek to prevent adult access to material, but only to ensure that they do not make their way to children.

There are two other kinds of censorship efforts in which children’s interests are prominently involved. In one, the effort seeks to restrict the time, place, or manner in which adults may have access to the materials in order to reduce the risk that children will also be able to gain access. We will call these “Category C” cases. Finally, “Category D” cases merely seek to restrict children’s access to materials with no attempt to interfere with an adult’s right to access the materials. What follows is a brief discussion of each category as a prelude to an examination of the 2011 *Brown* decision.

### A. Category A Cases

In 1952, in *Joseph Burstyn, Inc. v. Wilson*,<sup>11</sup> a film distributor challenged a New York statute which required the distributor to secure a license from the New York State Education Department before showing a film. After the distributor was originally given the license, audiences complained to the Board of Regents that the film was “sacrilegious”—a permissible ground to ban a film under the statute.<sup>12</sup> The Board reviewed the film a second time, concluded that it was sacrilegious, and rescinded the distributor’s license to exhibit the picture.

The Supreme Court rejected New York’s position that motion pictures should remain outside of the First Amendment “because

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11. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

12. N.Y. EDUC. LAW § 122 (1947).

their production, distribution, and exhibition is a large-scale business conducted for private profit.”<sup>13</sup> It explained that even though “books, newspapers, and magazines are published and sold for profit,” they have long received First Amendment protection.<sup>14</sup> Ultimately, the Court was unable to grasp why films should not receive the same protection. Even though films are usually produced for entertainment, “[t]he line between the informing and the entertaining,” the Court explained, “is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.”<sup>15</sup> Having concluded that the First Amendment protects films, the Court had little difficulty striking the statute as an unconstitutional abridgment of free speech and a free press. This case is important in the development of free speech in the United States because it established the rule that films are protected means of expression within the First Amendment, which put to rest a fifty-year experiment of censorship of motion pictures by the state or federal government.<sup>16</sup>

Beginning in the 1950s and concluding in the early 1970s, the Court struggled to develop a test for obscenity that achieves the purpose of restricting government censorship of sexually explicit materials that is properly categorized as “obscene,” but also protects sexually explicit material that has social value. In *Roth v. United States*,<sup>17</sup> the Court ruled that the First Amendment forbids only sexually explicit material that is “utterly without redeeming social importance.”<sup>18</sup> Although *Roth* upheld a conviction under a federal statute punishing the mailing of “obscene, lewd, lascivious or filthy . . .” materials, Justice William Brennan’s plurality opinion was widely read as intending to open the marketplace for material that had too easily been subject to suppression. “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—” Justice Brennan explained, “have the full protection of

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13. *Burstyn*, 343 U.S. at 501.

14. *Id.*

15. *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

16. *See Mutual Film Corp. v. Industrial Comm’n of Ohio*, 236 U.S. 230 (1915).

17. *Roth v. United States*, 354 U.S. 476 (1957).

18. *Id.* at 484.

the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests.”<sup>19</sup>

It was not until 1973 that the Court was able to fashion a test for defining obscenity that commanded a majority of Justices. That test, announced in *Miller v. California*,<sup>20</sup> rejected the requirement that a prosecutor must prove that the material is “utterly without redeeming social value” in order to sustain a conviction for obscenity.<sup>21</sup> In its place, a slightly easier test was fashioned:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>22</sup>

In 1982, in *New York v. Ferber*,<sup>23</sup> the Court addressed another law enacted to forbid entirely certain kinds of materials. *Ferber* upheld a New York statute that made it a crime to distribute or possess child pornography.<sup>24</sup> At the time the case was decided, it was unclear whether *Ferber* added a new category of speech that is outside of the First Amendment because the content was inherently underserving of protection or, as turned out to be the case, because the production of the material—itsself a separate crime—is inextricably connected to its distribution and possession. The *Ferber* Court explained that the production of child pornography is itself child “abuse,” “molestation,” or “exploitation.”<sup>25</sup> Reasoning that child pornography could not be produced without committing a

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19. *Id.* An important part of the *Roth* test was “[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest . . .” *Id.* at 489.

20. *Miller v. California*, 413 U.S. 15 (1973).

21. *Id.* at 24–25.

22. *Id.* at 24.

23. *New York v. Ferber*, 458 U.S. 747 (1982).

24. *Id.* at 765–66.

25. *See, e.g., id.* at 749 (“In recent years, the exploitive use of children in the production of pornography has become a serious national problem”); *id.* at 758 n.9 (“Sexual molestation by adults is often involved in the production of child sexual performances.”).

crime, the Court upheld the New York law as a reasonable means to prevent the crime of misusing “children who are made to engage in sexual conduct for commercial purposes.”<sup>26</sup>

Since the New York law furthered a compelling interest in combating the crime of child sexual abuse, and “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled,”<sup>27</sup> the Court held that New York was justified:

[I]n believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. . . . The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.<sup>28</sup>

*Ferber* induced Congress in 1996 to enact the federal Child Pornography Protection Act,<sup>29</sup> which was reviewed by the Supreme Court in 2002 in *Ashcroft v. Free Speech Coalition*.<sup>30</sup> The federal law made it a crime to possess or distribute “any visual depiction . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct,” even if it contained only youthful looking adult actors or virtual images of children generated by a computer.<sup>31</sup> This time, the Court had little difficulty striking the law as unconstitutional, explaining that the child-protection rationale from *Ferber* was missing in the federal law because the prohibited depictions did not necessarily involve children at all. *Ferber*, the Court explained, does not apply to materials produced without children.<sup>32</sup>

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26. *Id.* at 753 (citing *New York v. Ferber*, 454 U.S. 1052 (1981) (granting State’s petition for certiorari)).

27. *Id.* at 759.

28. *Id.* at 759–60. *See also id.* at 761 (“The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials . . .”).

29. 18 U.S.C. § 2256 (2014).

30. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

31. *Id.* at 241 (quoting 18 U.S.C. § 2256(8)(B)).

32. *See Ashcroft*, 535 U.S. at 249–51, 254.

Most recently, in 2010, in *United States v. Stevens*,<sup>33</sup> the Court addressed the constitutionality of a federal statute which established a criminal penalty “for anyone who knowingly ‘creates, sells, or possesses a depiction of animal cruelty’ if done ‘for commercial gain’ in interstate or foreign commerce.”<sup>34</sup> “Animal cruelty” was defined as involving “a living animal [that] is intentionally maimed, mutilated, tortured, wounded, or killed.”<sup>35</sup> The law contained an “exceptions clause,” exempting from prohibition “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”<sup>36</sup>

The federal government asked the Court to add depictions of animal cruelty that lacked artistic value to the short list of subjects that do not deserve First Amendment protection. The Court rejected the request, explaining that “[t]he 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.”<sup>37</sup> The Amendment, the Court explained, “reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”<sup>38</sup>

*Stevens* rejected “a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”<sup>39</sup> The case also provided the Court with a recent opportunity to summarize the very limited areas that do not receive First

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33. *United States v. Stevens*, 130 S. Ct. 1577 (2010).

34. *Id.* at 1582 (citing 18 U.S.C. § 48(a)).

35. *Id.* (citation omitted).

36. *Id.* at 1583 (citing 18 U.S.C. § 48(b)).

37. *Id.* at 1585.

38. *Id.* at 1585.

39. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).



Amendment protection;<sup>40</sup> obscenity,<sup>41</sup> defamation,<sup>42</sup> fraud,<sup>43</sup> incitement,<sup>44</sup> and speech integral to criminal conduct.<sup>45</sup>

### B. Category B Cases

In this category, state officials seek to ban everyone's access to material but only because the material is inappropriate for children. This first important case in this category is the 1948 case, *Winters v. New York*.<sup>46</sup> In *Winters*, the Court held that a New York law which forbid the publishing or distribution of any printed material "devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime,"<sup>47</sup> violated the First Amendment, despite the state's claim that the law was "aimed at the protection of minors from the distribution of publications devoted principally to criminal news and stories of bloodshed, lust or crime."<sup>48</sup>

Nine years later, the Court reviewed a bookseller's conviction of violating a Michigan statute that banned the production and distribution of any book to anyone, adult or minor, that "tend[ed] to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."<sup>49</sup> The Michigan legislature did not regard the books as posing a risk of corrupting adults, but the means it took to avoid corrupting minors was to ban the books from everyone. In *Butler v. Michigan*,<sup>50</sup> Justice Felix Frankfurter, writing for the Court, had little difficulty concluding the law was unconstitutional, explaining that the effect of the law "is to

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40. *Id.* at 1584 (citing *Roth v. United States*, 354 U.S. 476, 483 (1957), for obscenity; *Beauharnais v. Illinois*, 343 U.S. 250, 254–55 (1952), for defamation; *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), for fraud; *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam), for incitement; and *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), for speech integral to criminal conduct. The Court also noted that it had summarized these areas on many other occasions). *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000))).

41. *Roth*, 354 U.S. at 483.

42. *Beauharnais*, 343 U.S. at 254–55.

43. *Va. Bd. of Pharmacy*, 425 U.S. at 771.

44. *Brandenburg*, 395 U.S. at 447–49.

45. *Giboney*, 336 U.S. at 498.

46. *Winters v. New York*, 333 U.S. 507 (1948).

47. N.Y. PENAL LAW §1141(2) (1946).

48. *Winters*, 333 U.S. at 511.

49. MICH. PEN. CODE § 343 (1956).

50. *Butler v. Michigan*, 352 U.S. 380 (1957).

reduce the adult population of Michigan to reading only what is fit for children.”<sup>51</sup> In even more colorful language, he condemned the effort as an example of “burn[ing] the house to roast the pig.”<sup>52</sup>

The next effort to ban books on the ground they should not be allowed in the hands of children reached the Court in 1963 when the Court decided *Bantam Books, Inc. v. Sullivan*.<sup>53</sup> In that case, the Court reviewed the efforts of a state-created “Rhode Island Commission to Encourage Morality in Youth,” that took it upon itself to send letters to book distributors alerting them that certain books “had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years.”<sup>54</sup> These books included *Peyton Place* and *The Bramble Bush*.<sup>55</sup> Rather than risk trouble by allowing the books to end up in children’s hands, upon receiving the letter the bookseller had the books removed from distribution and then challenged the legality of the Commission’s efforts in court. In a short opinion, the Court condemned the Commission’s work explaining that “although the Commission’s supposed concern is limited to youthful readers, the ‘cooperation’ it seeks from distributors invariably entails the complete suppression of the listed publications; adult readers are equally deprived of the opportunity to purchase the publications in the State.”<sup>56</sup>

More recently, in *Sable Communications, Inc. v. FCC*,<sup>57</sup> the Federal Communications Commission (“FCC”) sought to protect minors from indecent telephone messages by banning all indecent messages. The concern was not with what adults themselves could do, only with the spillover impact on minors who, in the nature of things, might end up unintended recipients of adult conversations. Following *Butler*’s lead, the Court condemned the regulations as

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51. *Id.* at 383.

52. *Id.* The Court rejected the State’s claim that it was lawful to impose a blanket ban on public dissemination of literature that has “a potentially deleterious influence upon youth,” explaining that the law “arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.” *Id.* at 384.

53. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963).

54. *Bantam Books*, 372 U.S. at 61.

55. *Id.* at 62.

56. *Id.* at 71.

57. *Sable Commc’ns Inc. v. FCC*, 492 U.S. 115, 126–31 (1989).

having “the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear.”<sup>58</sup>

Congress’ efforts to limit speech on the Internet in order to protect children have also been found wanting by the Court. In 1996, Congress enacted a statute<sup>59</sup> that made it a crime to use indecent language in circumstances where children would likely hear it. In 1997, in *Reno v. ACLU*, stressing that this law infringed on adults’ right to access protected material, the Court struck down the law as unconstitutionally overbroad and vague.<sup>60</sup> In the Court’s words, the law:

[L]acks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the [statute] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.<sup>61</sup>

Legislatures have not only made efforts to suppress books, film and entertainment otherwise fit for adults in order to protect children—they have also attempted to limit commercial speech that can be harmful to children. They have fared little better in these efforts. In *Lorillard Tobacco Co. v. Reilly*,<sup>62</sup> for example, the Court struck down a law, enacted to protect children, that restricted the advertising of tobacco, explaining that “[i]t is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage.”<sup>63</sup>

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58. *Id.* at 131. *See also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (invalidating restrictions on contraceptive advertisements because “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox”).

59. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

60. *Reno v. ACLU*, 521 U.S. 844 (1997).

61. *Id.* at 874.

62. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001).

63. *Id.* at 579–80 (Thomas, J., concurring) (“It is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage. Presumably, the State could ban car advertisements in an

Justice Thomas perhaps best summarized the law in Category B cases in his concurring opinion in that case. In his words, “The theory that public debate should be limited in order to protect impressionable children has a long historical pedigree . . . . But the theory has met with a less enthusiastic reception in this Court than it did in the Athenian assembly.”<sup>64</sup>

### C. Category C Cases

In this category, government efforts focus on restricting the means through which adults may access material deemed inappropriate for children, without trying to forbid adult access. Many of the cases in this category involve entertainment that enters homes through modern media, including radio, television and cable.<sup>65</sup> The cable cases involved an effort to restrict sexually explicit programs from being sent to homes where children live because of the danger that children would be able to access them.

It should be unsurprising that there are many cases in this category. The upshot of Supreme Court decisions is that the United States enjoys the broadest marketplace of materials protected by the Constitution of any country in the world. Not only is the Court committed to protecting “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion unless excludable because they encroach upon the limited area of more important interests,”<sup>66</sup> but no longer is the censor permitted to focus only on the raciest of material. Instead, the publication must be viewed in the larger context. As a result, publishers and Hollywood producers were broadly liberated in the past generation to produce

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effort to enforce its restrictions on underage driving. It could regulate advertisements urging people to vote, because children are not permitted to vote. And, although the Solicitor General resisted this implication of her theory . . . the State could prohibit advertisements for adult businesses, which children are forbidden to patronize.”).

64. *Id.* at 580–81 (Thomas, J., concurring). *See also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73–74 (1983).

65. *See, e.g.*, *FCC v. Fox Television Stations, Inc.* 132 S. Ct. 2307 (2012); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. American Library Ass’n, Inc.*, 539 U.S. 194 (2003); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Denver Area Educ. Telecomm Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994). *See generally* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141 (1997).

66. *Roth v. United States*, 354 U.S. 476, 484 (1957).

material, framed within a larger scope of literary value, which has transformed American entertainment.

But as the Court opened the marketplace for art, there has been an important competing concern. Chief Justice Warren Burger expressed it well in the context of sexually explicit material: “the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”<sup>67</sup> Category C cases represent the efforts of legislatures to limit the dissemination of constitutionally protected materials to children by regulating when and where adults may have access to them. Because even these efforts interfere with adults’ capacity to access material protected by the First Amendment, they are, like Category B cases, subject to strict scrutiny.<sup>68</sup> As a result, the restrictions are often found wanting because they are overbroad: Better tailored laws designed to protect minors would meet the government’s goals without unduly interfering with the rights of adults.<sup>69</sup>

An early, and well-known, case in this category is *Erznoznik v. City of Jacksonville*,<sup>70</sup> in which the Court invalidated a city ordinance that prohibited drive-in movie theaters from exhibiting films containing nudity when the screen was visible from a public place.<sup>71</sup> Recognizing that the city sought to “protect[] minors from this type of visual influence,” the Court nonetheless explained that “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”<sup>72</sup> Applying

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67. *Miller v. California*, 415 U.S. 15, 18–19 (1973) (citing *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Rabe v. Washington*, 405 U.S. 313, 317 (1972) (Burger, C.J., concurring); *United States v. Reidel*, 402 U.S. 351, 360–62 (1971) (Marshall, J., concurring); *Ginsberg v. New York*, 390 U.S. 629, 637–43 (1968); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 690 (1968); *Redrup v. New York*, 386 U.S. 767, 769 (1967); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964); *Butler v. Michigan*, 352 U.S. 380, 382–83 (1957); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); *Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 464–65 (1952)); *Breard v. Alexandria*, 341 U.S. 622, 644–45 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949); *Prince v. Massachusetts*, 321 U.S. 158, 169–70 (1944).

68. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

69. *Id.* at 660 (finding law burdened adult speech by requiring credit card or other means of age verification); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 826 (2000) (finding law burdened adult speech by forcing cable operators to time-channel content).

70. *Erznozni v. City of Jacksonville*, 422 U.S. 205 (1975).

71. *Id.* at 211–12.

72. *Id.* at 212–13.

heightened scrutiny, the Court invalidated the ordinance because it was not narrowly tailored to shield minors from obscenity.<sup>73</sup> Ever since, the Court has reviewed efforts to regulate adult access to materials for the purpose of limiting children's access by applying strict scrutiny. If, in the Court's view, there were less restrictive means to shield children from "adult" material, the restrictions were declared unconstitutional.<sup>74</sup>

Of the various efforts to limit what adults may see and hear in order to aid parents in shielding their children from undesirable ideas, images or language, Congress' efforts to regulate broadcast media have been the most successful. Broadcast media is subject to greater oversight than other forms of expression because "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."<sup>75</sup>

Perhaps the best known example is the 1978 case, *FCC v. Pacifica Foundation*,<sup>76</sup> which provided the Court with the first opportunity to address the constitutionality of federal statutory and regulatory laws that prohibit the broadcasting of "any . . . indecent . . . language,"<sup>77</sup> which includes expletives referring to sexual or excretory activity or organs, between the hours of 6 a.m. and 10 p.m.<sup>78</sup> In *Pacifica*, the FCC fined a radio station for playing during daytime hours George Carlin's classic "seven dirty words" comedic monologue in which he talked about, often, and to great humor, seven words that are forbidden in proper American settings.<sup>79</sup> There was nothing prurient about his monologue; it was an examination of

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73. *Id.*

74. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 855 (1997) (parental control tools can provide a "reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children"); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 814 (2000) ("the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative").

75. *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981).

76. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

77. 18 U.S.C. § 1464 (1976).

78. The statutory prohibition applicable to commercial radio and television stations extends by its terms from 6 a.m. to midnight, but the District of Columbia Circuit Court of Appeals ruled in 1995 that it was unconstitutional to extend between the hours of 10:00 p.m. and midnight. *Action for Children's Television v. FCC*, 58 F.3d 654, 669 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

79. The words, by the way, are shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.

the meaning of the limits of “proper speech”—a brilliant discourse on the subject, at least for an adult audience.

Pacifica argued that it had the right to broadcast the routine because nothing in it appealed to the prurient interest. But the FCC regulations forbid the broadcasting of “indecent” material and the Court rejected Pacifica’s claim, observing that “the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.”<sup>80</sup> The Court found both that the language Carlin used was outside of accepted standards of morality and, most importantly, because of the “uniquely pervasive presence” of radio, combined with the fact that broadcast programming is “uniquely accessible to children,” it upheld the fine.<sup>81</sup> The Court explained that the “government’s interest in the ‘well-being of its youth’ . . . justified the regulation of otherwise protected expression”<sup>82</sup>—treating those households that did not want their homes invaded with language they deemed inappropriate, either for themselves or their children, to be equivalent to a captive audience.<sup>83</sup>

The prohibition against “any . . . indecent . . . language”<sup>84</sup> being broadcast into homes between the hours of 6 a.m. and 10 p.m.<sup>85</sup> has been recently challenged by arguing that it is “likely” that children “hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech.”<sup>86</sup> The argument has failed. As the Supreme Court explained as recently as 2009, it is rational for the FCC to conclude that isolated utterances of prohibited language can be harmful to children.<sup>87</sup> Justice Antonin Scalia, writing for the Court, acknowledged that there is no empirical evidence to demonstrate that children are harmed when they hear banned words. Nonetheless, he wrote:

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80. *Pacifica*, 438 U.S. at 740.

81. *Id.* at 748–49.

82. *Id.* at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

83. *Id.* 748–49.

84. 18 U.S.C. § 1464 (1976).

85. Public Telecommunications Act of 1992, § 16(a), 106 Stat. 954. The statutory prohibition applicable to commercial radio and television stations extends by its terms from 6 a.m. to midnight, but the District of Columbia Circuit Court of Appeals ruled in 1995 that it was unconstitutional to extend between the hours of 10:00 p.m. and midnight. *Action for Children’s Television v. FCC*, 58 F.3d 654, 669 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

86. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2nd Cir. 2007).

87. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.<sup>88</sup>

The upshot of the law today is that broadcast radio and television are limited in what they may present during 6 a.m. and 10 p.m.—the hours when children are most likely to be listening or watching. These rules serve the twin goals of accommodating parents who wish to restrict their children’s access to material that refrains from using “dirty words,” and the state’s independent interest in protecting children.<sup>89</sup>

Although the Court has permitted relatively broad restrictions on when certain content protected by the First Amendment may be broadcast into homes, it has been considerably less tolerant of federal efforts to regulate cable and other media in which viewers pay for the privilege of securing the signal to their televisions. In 2000, the Court decided *United States v. Playboy Entertainment Group, Inc.*,<sup>90</sup> which reviewed a law enacted by Congress that required cable television operators who provide channels “primarily dedicated to sexually-oriented programming.”<sup>91</sup> The law called for cable operators to either “fully scramble or otherwise fully block” those channels,<sup>92</sup> or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m.<sup>93</sup> The purpose of the law was to shield children from hearing or seeing images resulting from “signal bleed.”<sup>94</sup> Most cable operators chose to comply with the law by limiting the hours of the day certain

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88. *Id.* at 519.

89. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978) (citing *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968) (the government’s interest in the “well-being of its youth” and in supporting “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression).

90. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000).

91. Telecommunications Act of 1996 § 505, Pub.L. 104-104, 110 Stat. 136, 47 U.S.C. § 561 (1994 ed., Supp. III).

92. 47 U.S.C. § 561(a) (1994 ed., Supp. III).

93. 47 C.F.R. § 76.227 (1999).

94. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 808 (2000).



signals could be viewed, eliminating entirely the transmission of the targeted programming between 6 a.m. and 10 p.m. Although the law's purpose was legitimate, the Court found that its means were not.<sup>95</sup>

These few cases are representative of the effort to accommodate adults' right to have access to constitutionally protected material with the state's independent interest in limiting material unsuitable to children. The next category considers the problem from an entirely different place.

#### D. Category D Cases

In this category, legislation makes no effort to interfere with adult access to materials. Instead, all that is sought is to limit children's access. Of the four categories identified in this Article, this category contains by far the fewest number of cases decided by the Supreme Court. Altogether, there are only three cases in this category. Two of them were decided on the same day in 1968. The third, *Brown v. Entertainment Merchants Association*,<sup>96</sup> was decided in 2011 and will be discussed in Part IV.

By far the most important, and best known, case in this category is the 1968 Supreme Court decision in *Ginsberg v. New York*.<sup>97</sup> Because the precedential importance of *Ginsberg* is the central focus of this Article, it deserves to be examined carefully. *Ginsberg* addressed the constitutionality of a New York statute that made it illegal to sell sexually explicit books and magazines to minors.<sup>98</sup> In *Ginsberg*, a candystore owner on Long Island was arrested and convicted for selling what the Court referred to as a "girlie magazine"<sup>99</sup> to a child under seventeen years old. The statute under which he was convicted prohibited the sale to persons under seventeen, depictions of nudity, sexual conduct, and sadomasochistic abuse that "(i) pre-dominantly appea[l] to the prurient, shameful or morbid interest of minors, and (ii) [are] patently offensive to prevailing standards in the adult community as a whole with respect

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95. *Id.* at 815. ("[T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners . . . . [T]argeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests").

96. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

97. *Ginsberg v. New York*, 390 U.S. 629 (1968).

98. *Id.* at 631.

99. *Id.* at 632.

to what is suitable material for minors, and (iii) [are] utterly without redeeming social importance for minors.”<sup>100</sup>

Many might conclude that such a law is exceptionally vague and overbroad, making it treacherous for magazine sellers because they could never be certain, at least not until a jury told them so, whether a particular magazine is “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.” After all, there are not that many conversations about this in the first place. How would a storeowner know if a particular *Playboy Magazine* would be regarded as unsuitable for a sixteen year-old boy, for instance?

However vague the law may read, it is important to grasp that the New York legislature did nothing more in enacting it than add the words “of minors,” or “for minors,” to the precise test that the Court had itself fashioned for censoring materials containing what the film industry today would call “strong sexual content.” The New York statute was nothing more than the then-existing obscenity standard formulated in *Roth v. United States* in 1957,<sup>101</sup> modified in 1966 in *Memoirs v. Massachusetts*,<sup>102</sup> and applied to minors.<sup>103</sup>

The storeowner in *Ginsberg* challenged the law as unconstitutionally vague and overbroad. The Supreme Court held that the law was constitutional. The Court explained that the statute had been construed by New York’s highest court to be “‘virtually identical to the Supreme Court’s most recent statement of the elements of obscenity.’”<sup>104</sup> Given that the Court really was being asked to discard its own recently developed standard, unsurprisingly it rejected both claims. In the Court’s words, the test it developed, as slightly modified by the New York legislature, “gives ‘men in acting adequate notice of what is prohibited’ and does not offend the requirements of due process.”<sup>105</sup>

But the Court’s focus on vagueness and overbreadth filled a mere four paragraphs in its opinion. The Court’s main focus was New York’s introduction of a brand new concept in the field of obscenity:

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100. *Id.* at 633 (citation omitted).

101. *Roth v. United States*, 354 U.S. 476 (1957).

102. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion).

103. *Ginsberg v. New York*, 390 U.S. 629, 633 (1968).

104. *Id.* at 643 (citation omitted).

105. *Id.* (citation omitted) (citing *Roth*, 354 U.S. at 492; *Winters v. New York*, 333 U.S. 507, 520 (1948)).

“variable obscenity”—material that is not obscene for adults, but lawfully banned as to minors.<sup>106</sup>

The Court heartily endorsed New York’s concept, agreeing that there is a category of sexually explicit material that adults, but not children, ought to be entitled to enjoy.<sup>107</sup> It is extremely important to consider the historical context of this matter. Recall that prior to the 1950s, there was no need in American law to vary obscenity. Once the Supreme Court opened the marketplace to previously banned sexually explicit material, it is hardly surprising that this newly lawful material started to be referred to as “adult material.”

For this reason, *Ginsberg* is best understood in a historical context. The decision, and its reasoning, was the corollary of the mindset that found it a close choice to allow even adults to read *Lady Chatterley’s Lover*<sup>108</sup> or *Fanny Hill*,<sup>109</sup>—two books that went from being banned in the United States to protected material in the 1950s and 1960s because, taken as a whole, they were of literary value.<sup>110</sup> If it were a close call to permit a mature adult to read something edgy for its time, it would be an obvious choice not to permit children ready access to it.

This explains the mindset of the reluctant judge who was pushed to open up the marketplace. Even more interestingly perhaps, it made even more strategic sense to limit children’s access to this growing corpus of material for the progressive judge who hoped to expand the marketplace and minimize censorship. The progressive judge readily grasped that the more questionable the material, the more difficult it would be to secure the necessary votes to approve its availability in the marketplace. When lobbying the reluctant judge, it helps considerably to be able to stress that this is for adults only. Building on Justice Frankfurter’s insight, reluctant judges are most likely to reduce what is available to adults when they understand it will necessarily also be available to children.<sup>111</sup>

Thus, it should not be too surprising that Justice Brennan, who happened to be the author of both plurality opinions in *Roth* and

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106. *Id.* at 635.

107. *Id.* at 641–43.

108. D. H. LAWRENCE, *LADY CHATTERLEY’S LOVER* (1928).

109. JOHN CLELAND, *MEMOIRS OF A WOMAN OF PLEASURE (FANNY HILL)* (1748).

110. *See* *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (ruling that *Fanny Hill* is not obscene). *See also* *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960) (ruling that *Lady Chatterley’s Lover* was not obscene).

111. *See* *Butler v. Michigan*, 352 U.S. 380, 380–83 (1957).

*Memoirs*, also authored the Court's opinion in *Ginsberg*. Limiting the newly recognized right of adults to view risqué materials was an idea advanced by Justice Brennan himself four years earlier in an opinion announcing the Court's judgment in *Jacobellis v. Ohio*.<sup>112</sup> All of this paved the way for New York to defend the statute in *Ginsberg* as necessary to shield children from material that only recently entered the marketplace but was unsuitable for minors.

New York defended the concept of variable obscenity in three ways. The Court accepted all of them. First, New York successfully argued that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."<sup>113</sup> The Court explained that "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate . . ."<sup>114</sup> Second, the Court agreed with New York that "it was rational for the legislature to find that the minors' exposure to such material might be harmful."<sup>115</sup> Finally, the Court agreed, for two reasons, that it was proper for the legislature to restrict minors' access to these materials. First, because parents':

[A]uthority in their own household to direct the rearing of their children is basic in the structure of our society, [t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.<sup>116</sup>

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112. *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) ("We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. . . . State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.").

113. *Ginsberg v. New York*, 390 U.S. 631, 638 (1968) (citation omitted).

114. *Id.* at 639.

115. *Id.*

116. *Id.*

Second, the Court concluded that the State's "independent interest in the well-being of its youth"<sup>117</sup> allowed it to regulate harmful material that might reach children.

The only other case in this category decided by the Supreme Court before 2011 was announced the same day the Court decided *Ginsberg*.<sup>118</sup> In *Interstate Circuit, Inc. v. City of Dallas*,<sup>119</sup> the Court reviewed the constitutionality of a different effort to vary the content of what adults and children may view. In that case, the Court struck down as unconstitutionally vague a local ordinance that forbade films from being shown to children under sixteen that were found "not suitable for young persons" by a review board.<sup>120</sup> The board was charged with the duty to review all films and to label films unsuitable for minors when they described or portrayed "brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons."<sup>121</sup> The board was also required to label a film "unsuitable" if it:

Describ[ed] or portray[ed] nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or

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117. *Id.* at 640–41 ("[T]he State has an interest to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens.").

118. There have been a number of decisions in state or lower federal court addressing the legality of efforts to limit the distribution of books or film to minors. All were found unconstitutional. *See, e.g.*, *Katzev v. County of Los Angeles*, 52 Cal. 2d 360 (1959) (magazine sales to minors under age eighteen); *Police Commissioner v. Siegel Enterprises, Inc.*, 162 A.2d 727 (Md. 1960), *cert. denied*, 364 U.S. 909 (1960) (sale of certain publications to those under eighteen); *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959) (special license for films deemed objectionable for those under age twenty-one); *People v. Bookcase, Inc.*, 201 N.E.2d 14, 15–16 (N.Y. 1964) (book sales to minors under age eighteen); *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970); *Motion Picture Ass'n of America v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970).

119. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 681–82 (1968).

120. *Id.* at 691.

121. *Id.* at 681.

sexual promiscuity on the part of young persons or to appeal to their prurient interest.<sup>122</sup>

These tests deviated substantially from the then-accepted *Roth-Memoirs* test established by the Court. In *Ginsberg*, New York asked the Court to endorse a state law that was carefully drafted in light of the standard established by the Court itself. The City of Dallas came before the Court in a very different posture. It had to defend an ordinance drawn beyond the contours of the Court's own test. As a result, the Court declared the ordinance unenforceable as it found it to be unconstitutionally vague and overbroad. But the Court did not criticize the purpose of the ordinance, only its language. In rejecting the ordinance as unduly overbroad, the Court explained:

It is essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.<sup>123</sup>

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122. Chapter 46A of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas (1)(f) (reproduced as Appendix in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 691 (1968)). The ordinance also explained that

A film shall be considered “likely to incite or encourage” crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to “prurient interest” of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is “not suitable for young persons,” the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

*Id.* at 681–82.

123. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689 (1968) (citation omitted). Justice Marshall stressed the costs to adults that are incurred even when laws restrict material only to minors. First, he warned, if Dallas could enact such an ordinance, every city in the country could too, impacting the decision of filmmakers and exhibitors who might choose to produce and show

[N]othing but the innocuous . . . or only the totally inane. The vast wasteland that some have described in reference to another medium

## II. Children's Rights, Parental Rights, and the First Amendment

The preceding overview of First Amendment cases is essential to analyzing the 2011 Supreme Court decision in *Brown*, which this Article does in Part III. Before getting there, however, it is important to discuss the role parents play in shaping children's values under the Constitution and also, more broadly, the subject of children's rights, about which virtually nothing has yet been said.

The cases discussed in Part I place overwhelming emphasis on two interconnected concepts: the freedom of individuals to read and hear ideas about which they have an interest, and the corollary limiting principle of state officials' authority to restrict the dissemination of ideas. Though these are corollary principles, they need also to be examined independently. First, state officials lack the power to limit what adults read for two separate reasons. In order to ensure that the people remain positioned to form a new government at every election, we forbid government from limiting ideas in the marketplace. Free speech is our solution to avoid creeping toward dictatorship.<sup>124</sup>

Second, wholly apart from this concern, we value free speech intrinsically because it furthers the laudable goal of permitting individuals to live the life they choose for themselves, to pursue their own interests, and to get pleasure from that which pleases them. In recent years, the word that has best captured this set of ideas is "liberty"—a concept reinvigorated by Justice Anthony Kennedy, in particular, in several decisions over the past decade.<sup>125</sup>

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might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the filmmaker, distributor, and exhibitor, and certainly broader than those of youths under 16.

*Id.* at 684. The Court also stressed that it is no

[A]nswer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children."

*Id.* at 689.

124. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

125. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion). See also *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

Because both reasons are fully in play when adults' rights are at stake, we do not always appreciate that they are independent. But when we discuss children's rights, it is unavoidable that we do so. It would be difficult to overstate the degree to which adults' rights and children's rights differ under American law. It is far more than merely that "[t]he state's authority over children's activities is broader than over the like actions of adults."<sup>126</sup> Although both possess many of the same rights, children do not possess the same liberty rights that adults do. Indeed, American law is framed on the understanding that children *lack* the basic right to liberty. As the Supreme Court put it in 1984, juveniles, "unlike adults, are always in some form of custody."<sup>127</sup>

Moreover, "custody" is more than a physical concept; its deeper meaning is that children are always the responsibility of an adult. Moreover, the adult (usually a child's parent, guardian, or school teacher) who is responsible for the child has the authority to make life-changing decisions for her. The condition of children (some regard it as their plight),<sup>128</sup> in other words, could not be more different in terms of liberty, than the condition of being an adult.

Whereas adults get to choose where to live, what to do with their lives, the people with whom they associate, their religion, and all other qualities of their lives that constitute the full meaning of liberty, children lack all of these choices. They get to live the lives they choose (during their childhood) only if they are able to persuade their parents or guardians to let them.

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126. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

127. *Schall v. Martin*, 465 U.S. 253, 265 (1984) (citation omitted). *See also* *Reno v. Flores*, 507 U.S. 292, 302 (1993):

The "freedom from physical restraint" invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, "juveniles, unlike adults, are always in some form of custody," and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so.

*Id.* (internal citation omitted).

128. *See, e.g.*, JAMES G. DWYER, *RELIGIOUS SCHOOLS VS. CHILDREN'S RIGHTS* (1998); James G. Dwyer, *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371 (1994). Others, myself included, celebrate the rights of parents in their authority to make all significant decisions regarding their children's upbringing. *See* MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005).



Although the Due Process Clause of the Fourteenth Amendment serves to protect children against wrongful deprivations of liberty,<sup>129</sup> the Court has ruled that a child's liberty interest is considerably less than an adult's.<sup>130</sup> This means that, more than adults, children may be more easily detained before trial when accused of crimes, and they are also subject to searches at public school under conditions that would plainly be unconstitutional if conducted on adults.<sup>131</sup> Children, both at home and at public school, are lawfully subject to "a degree of supervision and control that could not be exercised over free adults."<sup>132</sup>

It is true that the Court wrote in 1967 that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"<sup>133</sup> and has repeated the idea many times.<sup>134</sup> Children, "in school as well as out of school," the Court added in 1969, "are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect."<sup>135</sup> Less than a decade later, the Court explained that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>136</sup>

But these platitudes do not come close to capturing the true picture of children's rights.

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129. See *Schall v. Martin*, 467 U.S. 253 (1984).

130. *Id.* at 265. Courts have also upheld nonemergency juvenile curfew laws on the reasoning that they advance the important state interest of protecting children from potential harm and protecting the community from misbehavior of youth. See, e.g., *Schleifer v. City of Charlottesville*, 159 F.3d 843, 848–49 (4th Cir. 1998). For a thorough review of the case law concerning juvenile curfews, see generally Harvard Law Review Association, *Juvenile Curfews and the Major Confusion Over Minor Rights*, 118 HARV. L. REV. 2400 (2005).

131. See *Vernonia School District v. Acton*, 515 U.S. 646, 649–51 (1995).

132. *Id.* at 655. See also *Ingraham v. Wright*, 430 U.S. 651, 656 (1977) (Court rejected junior high school students' challenge to practice of corporal punishment consisting of "paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick," commonly "limited to one to five 'licks' or blows with the paddle.").

133. *In re Gault*, 387 U.S. 1, 12 (1967).

134. See, e.g., *Schall v. Martin*, 467 U.S. 253, 288 (1984) (Marshall, J., dissenting); *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion); *Carey v. Population Servs. Intern.*, 431 U.S. 678, 692 (1977) (plurality opinion); *McKeiver v. Pennsylvania*, 403 U.S. 528, 532 (1971).

135. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

136. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

Children's rights are severely limited not only in terms of physical liberty and privacy. Whether they are allowed to go to school and to church are decisions assigned to their guardians to make on their behalf. Moreover, this is not some accidental consequence of history. In 2000, the Court wrote, "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>137</sup>

It is not an overstatement to suggest, as Justice Lewis Powell did in 1979, that parental control over their children's upbringing, including what values they are taught, what beliefs they are exposed to, which God to pray to, if any, is one of the basic structural arrangements of American society.<sup>138</sup> Justice Powell explained that the "Court has jealously guarded the "unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural . . . ."<sup>139</sup> Even more, parental authority over children is the bedrock of ultimate liberty in adulthood. "Properly understood," Justice Powell wrote, "the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter."<sup>140</sup>

Consider the foundational cases establishing the twin points being made here: First, state officials must be restrained in interfering with child rearing decisions, particularly those involving value inculcation; and second, that parents have the constitutional right to raise their children as they see fit. In *Meyer v. Nebraska*, the Supreme Court struck down a state law that restricted what children could be taught before the eighth grade.<sup>141</sup> In explaining that the state lacks the power to create a Spartan society in which children are reared by the state in a way that best serves the state's interests, the Court stressed that this authority rests with the parents themselves.<sup>142</sup> Again, in *Pierce v. Society of Sisters*, the Court held that Oregon could not constitutionally require that children attend public school (although it could insist that children be educated).<sup>143</sup> But the struggle was over

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137. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

138. *See Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion).

139. *Id.* at 634.

140. *Id.* at 638–39.

141. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

142. *Id.* at 403.

143. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

who gets to shape children, not whether children have any rights to make these important choices for themselves.

In 1944, in *Prince v. Massachusetts*, the Court resolved an argument between adults over who gets to decide important child rearing decisions.<sup>144</sup> It is instructive in *Prince* to focus on the substantive right at issue: religion. In that case a nine-year-old practicing member of her church was performing her duties as a minister by proselytizing on Boston's streets at 8 p.m. According to her beliefs, she had to perform this role or suffer condemnation at Armageddon.<sup>145</sup> But the Court treated the child as completely lacking the First Amendment freedom of religion.<sup>146</sup> It upheld a statute that punished her caregiver for allowing her to be out on the street. The case stands for the important principle that parental rights are limited and that the state may interfere with those rights to protect children from harm. But, in deciding which authority could decide for the child, the child herself was not an option.

The combination of *Meyer*, *Pierce*, and *Prince*, which established the parental rights doctrine as a vital aspect of American constitutional democracy,<sup>147</sup> answered the crucial question of who decides the details of a child's upbringing. Implicit in answering that question, however, was the notion that the decision rests with someone other than the child herself.

When the next parental rights case reached the Court in 1972, the implicit was made explicit. In *Wisconsin v. Yoder*,<sup>148</sup> the Court had to decide whether Wisconsin officials or the parents of fifteen-year-old Amish children had the authority to determine whether the children should continue going to school. State officials wanted the children to continue in their studies. The parents did not. Even though the Court appreciated that either decision would have a monumental impact on the children's future, the Court comfortably concluded that the decision was the parents' to make.<sup>149</sup> Only Justice

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144. See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

145. *Id.* at 163.

146. *Id.* at 170. Justice Murphy dissented. *Id.* at 172 ("Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare." (Murphy, J., dissenting).

147. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 17-49 (2007).

148. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

149. *Id.* at 234-35.

William Douglas cared what the children themselves wanted.<sup>150</sup> Chief Justice Burger's opinion for the Court addressed Justice Douglas' point, observing that recognizing the claim that children have the right to oppose their parents' educational decisions would constitute "an intrusion by a State into family decisions in the area of religious training" which "would give rise to grave questions of religious freedom."<sup>151</sup>

Several years later, in 1979, the Court found that another constitutional right afforded adults did not apply equally to children when it held that parents have the constitutional right to place their children in state mental hospitals as voluntary patients even when the children oppose being there. The Court dismissed the children's objections with the observation that "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."<sup>152</sup> Parents, the Court explained, have extraordinary power to make decisions regarding their children because "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."<sup>153</sup>

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150. *Id.* at 244–45. In his dissent, Justice Douglas wrote:

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

*Id.*

151. *Id.* at 231 (majority opinion).

152. *Parham v. J. R.*, 442 U.S. 584, 630 (1979). *See also* *Bellotti v. Baird*, 442 U.S. 622 (1979) (pregnant minors may be required to seek judicial approval to terminate a pregnancy if they choose not to secure their parents' permission for the procedure).

153. *Parham*, 442 U.S. at 602.

The most recent parental rights case involving a conflict between state and parental power was resolved in the same way as *Yoder*. In *Troxel v. Granville*,<sup>154</sup> the Court ruled that state courts may not force parents to permit third parties to visit their children even if the court determines that such visits are in the children's best interests. The ruling upheld a parent's constitutional right to limit the people with whom children may associate without requiring the parents to prove that their choice is best, or even very good, for their children. Moreover, parents may make this decision regardless of what the child wants.

This fundamental point—that parents, not the state, get to decide the upbringing of children—has two components. Depending on the particular question being decided by the Court, the Court's attention may be only on the one, ignoring the other, because the case did not provide an opportunity to address it. One component is what state officials may not do, and the other component is what parents' rights are.

The cases discussed thus far in Part II reveal the extent to which parents may make critical decisions for their children—and the extent to which children are denied the liberty to help make basic decisions about themselves. To complete the background review necessary to analyze the *Brown* decision in Part III, we will next look to various Supreme Court cases that have addressed First Amendment rights involving children.

In *West Virginia Board of Education v. Barnette*,<sup>155</sup> the question before the Court was whether school officials could compel students to salute the flag and say the pledge of allegiance each day as part of the curriculum.<sup>156</sup> The Court held that government lacks the power to compel any of its citizens to publicly demonstrate their agreement with ideas or views that the government deems correct.<sup>157</sup>

The Court held the mandatory flag salute provision unconstitutional because it compelled “a form of utterance,”<sup>158</sup> which “requires the individual to communicate by word and sign his

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154. *Troxel v. Granville*, 530 U.S. 57, 73 (2000).

155. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

156. *Id.* at 629–30.

157. *See id.* at 641 (“We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”).

158. *Id.* at 632.

acceptance of the political ideas it thus bespeaks.”<sup>159</sup> In addition, the Court observed that the combination of requiring a flag salute with utterance of the pledge of allegiance “requires affirmation of a belief and an attitude of mind.”<sup>160</sup> The opinion emphasized the potential ultimate cost to society, adults and children included, if state officials were permitted to force any citizens, but particularly children, to express a particular view. “There is no mysticism in the American concept of the State or of the nature or origin of its authority,” Justice Jackson wrote. “We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”<sup>161</sup>

As I have explained elsewhere, “neither the Court’s holding nor Justice Jackson’s reasoning depended on an understanding that children possessed rights which the Constitution protected. Instead, the case stands for the closely related, but materially different, point that state officials must be constrained in their use of power, particularly when applying it to children.”<sup>162</sup> As Justice Robert Jackson famously emphasized:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>163</sup>

The meaning of *Barnette* is plain: State officials may not force anyone, including children, to affirm a belief in an idea espoused by state officials. This was an extremely important case about the limits of state power, and the ruling focused on constraining state power because of the risks associated with unleashing it. The decision is not

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159. *Id.* at 633.

160. *Id.* (“To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”).

161. *Id.* at 641.

162. Martin Guggenheim, *Maximizing Strategies for Pressuring Adults to Do Right by Children*, 45 ARIZ. L. REV. 765, 769 (2003).

163. *Id.* at 642.

a statement about children's rights, except as a corollary principle. But even the corollary principle needs to be carefully explained lest we run the risk of missing the larger point.

After *Barnette*, we may accurately say that children have the right not to be forced by state officials to express a belief. But the phrase "by state officials" is the key to a full understanding of the rule. *Barnette* certainly does not stand for the principle that children have the right not to be forced to express a belief. Parents may force them (or attempt to force them). And agents for parents, for example teachers in private or church schools, may do so as well.

In *Tinker v. Des Moines Independent Community School District*,<sup>164</sup> public school officials were denied the authority to punish students for participating in an anti-war demonstration at school.<sup>165</sup> Proclaiming that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>166</sup> the Court held that students may not be punished merely for expressing their personal views on the school premises unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."<sup>167</sup>

Despite the broad language in *Tinker*, however, no Supreme Court case since then has held restrictions on student speech rights to be unconstitutional. In 1982, in *Board of Education v. Pico*,<sup>168</sup> the Court recognized the authority of school officials not to include in their libraries vulgar (nonobscene) material over a contrary claim by students that such materials should be made available to those students who want them.<sup>169</sup> In 1986, in *Bethel School District No. 403 v. Fraser*,<sup>170</sup> school officials successfully defended their authority to restrict the speech of school children and punish students for speech in order to teach student speakers proper manners.<sup>171</sup> Two years later,

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164. *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1969).

165. *Id.* at 508.

166. *Id.* at 506.

167. *Id.* at 509.

168. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

169. *Id.* at 871–72.

170. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

171. *Id.* at 681. The Court wrote,

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to

in *Hazelwood v. Kuhlmeier*,<sup>172</sup> school officials won the right to censor student speech by removing several pages of the newspaper without allowing any input into the decision by the editors.<sup>173</sup>

In 2007, in *Morse v. Frederick*,<sup>174</sup> the Court even allowed a high school principal to punish a student for refusing to take down a sign that the principal reasonably interpreted to have advocated drug use.<sup>175</sup> Recognizing that “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens,’”<sup>176</sup> the Court upheld the statute. In so doing, the Court explained that “[t]he State . . . has an independent interest in the well-being of its youth”<sup>177</sup> and that “[t]he well-being of its children is of course a subject within the State’s constitutional power to regulate.”<sup>178</sup>

With the combined background of cases in Parts I and II, we are now prepared to analyze and critique the 2011 decision in *Brown*.

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happiness and as indispensable to the practice of self-government in the community and the nation.”

*Id.*

172. *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

173. *See id.* at 273. The *Hazelwood* petitioners stated in their brief:

The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. The Court has acknowledged the importance of public schools in the preparation of individuals for participation as citizens, and as a means of inculcating fundamental values necessary to the maintenance of a democratic political system. [L]ocal school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values, and . . . there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.

Brief for Petitioners at 27, *Hazelwood*, 484 U.S. 260 (1988) (No. 86-836), 1987 WL 864172 (internal quotation marks and citations omitted).

174. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

175. *Id.* at 410.

176. *Id.* at 640–41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

177. *Id.* at 640.

178. *Id.* at 639. In his concurrence, Justice Stewart’s explanation for the rule that children have fewer First Amendment rights than adults, which has been widely repeated by the Court ever since, is that “at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.” *Id.* at 649–50 (Stewart, J., concurring).



### III. The *Brown* Decision

In *Brown*, the Supreme Court, for the first time ever, declared unconstitutional a state law that did not implicate adults' access to protected material but prevented children from purchasing, except through their parents, material found unfit for children by state officials. This is a groundbreaking decision. In describing and analyzing it, among the things we shall consider is whether the Court's reasoning is sound.

In *Brown*, a California law prohibited the sale or rental of "violent video games" to minors, and required their packaging to be labeled "18."<sup>179</sup> The covered games included those "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."<sup>180</sup> The statute was enacted after the Legislature convened extensive hearings and made findings that many of the games that minors were permitted to play had the potential to be very harmful to them. The Legislature found that "[e]xposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior," and that "even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games."<sup>181</sup>

Before the law went into effect, it was challenged in federal district court, where the law was declared unconstitutional and its enforcement was permanently enjoined.<sup>182</sup> After the Ninth Circuit affirmed the district court order, the Supreme Court granted California's petition for certiorari.<sup>183</sup> In the Supreme Court, all of the

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179. CAL. CIV. CODE §§ 1746–1746.5 (2009).

180. CAL. CIV. CODE § 1746(d)(1)(A) (2009). Violation of the law is punishable by a civil fine of up to \$1,000. *Id.* at § 1746.3.

181. 2005 Cal. Legis. Serv. Ch. 638 (Assemb. B. 1179, § 1).

182. Video Software Dealers Assn. v. Schwarzenegger, No. C-05-04188 RMW, 2007 WL 2261546 at \*2.

183. Schwarzenegger v. Entm't Merchs. Ass'n, 559 U.S. 1092 (2010).

parties agreed that video games enjoy protection under the First Amendment.<sup>184</sup> The Supreme Court agreed with the lower federal courts that the statute was unconstitutional.

Writing for the majority, Justice Scalia explained that the Supreme Court has “long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”<sup>185</sup> The Court added that video games, along with “books, plays, and movies,” “communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).” For the Court, “[t]hat suffices to confer First Amendment protection.”<sup>186</sup>

The majority opinion focused on the dangers associated with carving out a new art form or conferring power of censorship on state officials because they disapprove of the material’s content. As it emphasized, quoting *United States v. Playboy Entertainment Group, Inc.*,<sup>187</sup> “[u]nder our Constitution, ‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.’”<sup>188</sup> The Court further pointed out that “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary” when a new and different medium for communication appears.<sup>189</sup>

The Court explained that its holding in *United States v. Stevens*<sup>190</sup> “controls this case.” “[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.” Further, California’s claim that it may punish speech that it deems harmful is “startling and dangerous.”<sup>191</sup>

After finding the law unconstitutional because the speech the law sought to suppress was protected by the First Amendment, the Court rejected California’s claim that the law should be upheld because it

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184. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

185. *Id.* (adding “Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.” (citing *Winters v. New York*, 333 U.S. 507, 510 (1948))).

186. *Id.*

187. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000).

188. *Brown*, 131 S. Ct. at 2733 (quoting *Playboy*, 529 U.S. at 818).

189. *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

190. *United States v. Stevens*, 559 U.S. 460 (2010).

191. *Brown*, 131 S. Ct. at 2734.

“mimics the New York statute regulating obscenity-for-minors that” that the Court upheld in *Ginsberg v. New York*.<sup>192</sup> The majority opinion factually distinguished *Ginsberg*, explaining that the New York law prohibited “the sale to minors of sexual material that would be obscene from the perspective of a child.”<sup>193</sup> In its words, “[t]he California Act is something else entirely.”<sup>194</sup> Unlike *Ginsberg*, Justice Scalia wrote, the California law “does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children.”<sup>195</sup> “Instead,” he went on, “it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children. That is unprecedented and mistaken.”<sup>196</sup>

Not only is there no “longstanding tradition in this country of specially restricting children’s access to depictions of violence,”<sup>197</sup> Justice Scalia explained, children’s literature is rife with violence.<sup>198</sup> The majority opinion then briefly summarized some American history that included condemnation of new media for its impact on children (including dime novels in the 1800s blamed for juvenile delinquency,<sup>199</sup> motion pictures when they began,<sup>200</sup> radio dramas, comic books,<sup>201</sup> television and music lyrics<sup>202</sup>). The Court rejected California’s claim that “video games present special problems

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192. *Id.* at 2735.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 2736.

198. *Id.* (referencing, among other works, *Snow White*, *Cinderella*, and *Hansel and Gretel* as particular examples of literature for young children. He also references Homer’s *The Odyssey*, Dante’s *Inferno*, and Golding’s *Lord of the Flies* as material containing graphic violence and made widely available to high school students.)

199. *Id.* at 2737 (citing Brief for Cato Institute as Amicus Curiae 6–7).

200. *Id.*

The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close . . . . They say that the moving picture machine . . . tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison.

*Id.*

201. *Id.*

202. *Id.*

because they are ‘interactive,’<sup>203</sup> explaining that “all literature is interactive.”<sup>204</sup>

Championing children’s rights, the majority approved dictum from *Erznoznik* that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”<sup>205</sup> The majority also rejected the state’s exercise of a “free-floating power to restrict the ideas to which children may be exposed.”<sup>206</sup>

Turning to the statute’s validity, Justice Scalia wrote that “[b]ecause the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny.”<sup>207</sup> The test for strict scrutiny is twofold: “The State must specifically identify an ‘actual problem’ in need of solving,<sup>208</sup> and the curtailment of free speech must be actually necessary to the solution.”<sup>209</sup> In this context, it “is a demanding standard” which “California cannot meet.”<sup>210</sup>

The Court found that no study “prove[s] that violent video games cause minors to act aggressively.”<sup>211</sup> Rather, “[t]hey show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.”<sup>212</sup> The Court further noted that some of the negative effects researchers claim are produced by violent video games:

[A]re “about the same” as that produced by their exposure to violence on television. And [the state’s

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203. *Id.*

204. *Id.* at 2738 (quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)).

205. *Id.* at 2735–36 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975) (internal citation omitted)).

206. *Id.* at 2736.

207. *Id.* at 2738.

208. *Id.* (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822–23 (2000)).

209. *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)).

210. *Id.* (“It is rare that a regulation restricting speech because of its content will ever be permissible.”) (citing *Playboy*, 529 U.S. at 818).

211. *Id.* at 2739.

212. *Id.*

expert at trial] admits that the same effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated “E” (appropriate for all ages), or even when they “vie[w] a picture of a gun.”<sup>213</sup>

Mocking California, the majority observed that “California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns.”<sup>214</sup> But it then condemned California for being “wildly underinclusive,” “which in our view is alone enough to defeat it.”<sup>215</sup> “Underinclusiveness,” the Court wrote, “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers.”<sup>216</sup>

Additionally, the Court found the law underinclusive for a different reason: California would permit minors to play video games with their parents’ permission.<sup>217</sup> In the majority’s voice, “[t]he California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK.”<sup>218</sup>

The majority opinion also found that California failed even to show that parents need the help the law offers (the Court wrote that California “cannot show that the Act’s restrictions meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so.”)<sup>219</sup> According to the Court, this is because “[t]he video-game industry has in place a voluntary rating system designed to inform consumers about the content of games”;<sup>220</sup> the industry “encourages retailers to prominently display information

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213. *Id.* (emphasis and citations omitted).

214. *Id.* at 2740.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

about the [rating] system in their stores”;<sup>221</sup> and the industry expects retailers “to refrain from renting or selling adults-only games to minors; and to rent or sell “M” rated games to minors only with parental consent.”<sup>222</sup> Altogether, Justice Scalia concluded, the industry’s efforts do “much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home.”<sup>223</sup> In this light, whatever gains to parents additional legislation adds, “can hardly be a compelling state interest.”<sup>224</sup>

The Court’s final objection was that the law’s “purported aid to parental authority is vastly overinclusive,”<sup>225</sup> because “[n]ot all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games.”<sup>226</sup>

Summarizing the reasons the Court struck the law, the majority reiterated:

As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.<sup>227</sup>

Justice Samuel Alito, along with Chief Justice John Roberts, concurred in the result but concluded that the law was unconstitutional for very different reasons than the majority. Justice Alito expressly disagreed with the majority’s conclusion that the case

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221. *Id.*

222. *Id.*

223. *Id.* at 2741.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 2742.

was “controlled” by *Stevens*.<sup>228</sup> Explaining that *Stevens* addressed the constitutionality of a statute that banned material even for adults, the California statute in question did not interfere at all with adults’ opportunity to have access to the material. In the taxonomy of this Article, Justice Alito explained that a Category A case cannot control a Category D inquiry. But Justice Alito also explained that even laws designed only to limit children’s access to material otherwise protected by the First Amendment (Category D cases) cases are subject to the requirement that they be written with sufficient clarity that they not entrap vendors into violating the law.<sup>229</sup>

Justice Alito would have held that California’s attempt to adapt the *Miller* test for obscenity to the subject of violence does not work well enough to survive review on vagueness grounds.<sup>230</sup> The problem identified by Justice Alito is that the law applies to all video games meeting the threshold requirement of including “killing, maiming, dismembering, or sexually assaulting an image of a human being.”<sup>231</sup> Once this threshold test is met, games are within the law when “(i) [a] reasonable person, considering the game as a whole, would find [the game] appeals to a deviant or morbid interest of minors; (ii) [i]t is patently offensive to prevailing standards in the community as to what is suitable for minors; [and] (iii) [i]t causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”<sup>232</sup>

Justice Alito further explained that *Miller* restricts the law in question to “hardcore” acts, such as “masturbation, excretory functions, and lewd exhibition of the genitals.”<sup>233</sup> The problem with adapting the *Miller* test to violence is “our society has long regarded many depictions of killing and maiming as suitable features of popular entertainment, including entertainment that is widely available to minors.”<sup>234</sup> The California law’s threshold requirement would more closely resemble the limitation in *Miller* if it targeted a narrower class of graphic depictions.

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228. *Id.* at 2747 (Alito, J., concurring).

229. *Id.* at 2743 (“These principles apply to laws that regulate expression for the purpose of protecting children.”) *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689 (1968).

230. *Id.* at 2743–47 (Alito, J., concurring).

231. *Id.* at 2744 (Alito, J., concurring) (citation omitted).

232. *Id.* (citation omitted).

233. *Id.* (citation omitted).

234. *Id.* at 2745.

This means that the weight of California law's providing fair notice to vendors of what falls within its ambit rests entirely on the "community standards" test. In applying this test, a court looks at the "prevailing standards in the community as to what is suitable for minors,"<sup>235</sup> or whether "[a] reasonable person, considering [a] game as a whole," would find that it "appeals to a deviant or morbid interest of minors."<sup>236</sup> According to Justice Alito, this test does not do the job.<sup>237</sup> Vendors of any material, whether it is fully protected by the First Amendment, partially protected, or entirely unprotected, have an independent right to know what behavior may result in their prosecution.<sup>238</sup> For Justice Alito, the challenged law fails to provide guidance and, for that reason alone, the statute is unconstitutional.

Only Justices Clarence Thomas and Stephen Breyer voted to uphold the Act. Justice Thomas' dissenting opinion argued that children had no right to view material over their parental objection.<sup>239</sup> He concluded that the Founders did not intend for the "freedom of speech" to encompass a right to speak to children by bypassing their parents, or a right of children to access speech.<sup>240</sup>

Justice Breyer disagreed both with the majority and with Justice Alito's concurrence. According to Justice Breyer, the majority was wrong to limit *Ginsberg's* reach only to obscenity-related material.<sup>241</sup> Justice Breyer read *Ginsberg* as being about protecting children from harmful content that adults have the right to view. For him, *Ginsberg* did not create a new category of impermissible speech. He nonetheless agreed with the majority that, because the Act regulated the distribution of material based on content, strict scrutiny was the proper standard by which to evaluate the law.<sup>242</sup> He concluded, however, contrary to all other Justices, that "protecting children from harm" was a sufficiently compelling government interest<sup>243</sup>—reminding the reader that the Court has previously held that the

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235. CAL. CIV. CODE § 1746(d)(1)(A)(ii) (2009).

236. CAL. CIV. CODE § 1746(d)(1)(A)(i) (2009).

237. *Brown*, 131 S. Ct. at 2745 (Alito, J., concurring).

238. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968).

239. *See Brown*, 131 S. Ct. at 2751–61 (Thomas, J., dissenting).

240. *Id.* at 2752.

241. *Id.* at 2765–66 (Breyer, J., dissenting).

242. *See id.* at 2765–66 (Breyer, J., dissenting).

243. *Id.* at 2768. Justice Breyer also concluded that the Act provides fair notice to game manufacturers of the content that would be forbidden for minors. *Id.* at 2763.



“power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”<sup>244</sup>

He also stressed that “the First Amendment does not disable government from helping parents make . . . a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children.”<sup>245</sup>

He concluded that the California law advanced two compelling state interests: “both (1) the ‘basic’ parental claim ‘to authority in their own household to direct the rearing of their children,’ which makes it proper to enact ‘laws designed to aid discharge of [parental] responsibility,’ and (2) the State’s ‘independent interest in the well-being of its youth.’”<sup>246</sup> Nor did he agree that the law was fatal simply because California chose “to advance its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish.”<sup>247</sup>

Justice Breyer had particular difficulty reconciling the state of the law after the majority’s opinion in *Brown*, assuming that *Ginsberg* remains good law. As he expressed it, there is currently “a serious anomaly in First Amendment law.”<sup>248</sup> “*Ginsberg*,” he explained, “makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games.”<sup>249</sup> He then asked:

But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game

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244. *Id.* at 2762 (Breyer, J., dissenting) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

245. *Id.* at 2771.

246. *Id.* at 2767 (quoting *Ginsberg*, 390 U.S., at 639–640).

247. *Id.*

248. *Id.* at 2771.

249. *Id.*

only when the woman—bound, gagged, tortured, and killed—is also topless?<sup>250</sup>

#### IV. Critique

The careful reader has hopefully already seen the serious flaws in Justice Scalia's opinion for the Court. Most obviously, he relied exclusively on Categories A, B, and C cases to reach the conclusion that the California law is unconstitutional. Although it may be appropriate to refer to Categories A and B (and even C) cases when analyzing the constitutionality of a Category D case, it surely cannot be correct that the Category A *Stevens* decision *controls* the result in *Brown*.<sup>251</sup>

How could the Court go so far off track? One answer is circular. The majority relied on all of the cases already cited to support the proposition that a *ban* on violent videos games could not survive the result in *Stevens*. On that particular point, the majority is undoubtedly correct. The problem, however, is that the California law is not any kind of ban. It is a classic Category D case in which the law does nothing more than limit the conditions under which minors may access violent video games. Indeed, in two important senses, it is not a ban. The law does not interfere in the slightest with an adult's freedom to access and play video games. Nor is it even a ban on children's use of them. The law expressly permits children to use the games. All the law does is limit the conditions under which children may gain access to them in the first place.<sup>252</sup>

Perhaps the most ludicrous aspect of the majority's opinion was criticizing California for enacting a law that was "underinclusive"

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250. *Id.*

251. *Id.* at 2747 (Alito, J., concurring) ("The Court is wrong in saying that the holding in *United States v. Stevens* controls this case. First, the statute in *Stevens* differed sharply from the statute at issue here. *Stevens* struck down a law that broadly prohibited *any person* from creating, selling, or possessing depictions of animal cruelty for commercial gain. The California law involved here, by contrast, is limited to the sale or rental of violent video games *to minors*. The California law imposes no restriction on the creation of violent video games, or on the possession of such games by anyone, whether above or below the age of 18. The California law does not regulate the sale or rental of violent games by adults. And the California law does not prevent parents and certain other close relatives from buying or renting violent games for their children or other young relatives if they see fit.") (internal citation omitted).

252. Justice Scalia is adept at characterizing the very same error he made in *Brown*, at least when he perceives the error in others. *See, e.g., Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2335 (2013) (Scalia, J., dissenting).

because it permitted minors to play video games with their parent's permission.<sup>253</sup> The "ban," in other words, was unconstitutional because it was not a ban. But only Justice Scalia labeled it a ban in the first place. One would hope that if the majority could see that the law permitted parents to make the games available to their children, it could also recognize that the law was not a ban.

None of this means, by itself, that the California law should have been upheld. I agree with Justices Alito and Roberts that the California law was fatally overbroad and should have been declared unconstitutional. What is important here, however, is to clarify that, thus far, the majority has not made a satisfactory case for the law's unconstitutionality and its description of the law as a ban allowed it to rely on tangential cases that cannot carry the day.<sup>254</sup>

The case, above all others, that belongs prominently in the conversation is *Ginsberg*.<sup>255</sup> But *Ginsberg* would be very poor precedent for the majority to begin with for the simple reason that *Ginsberg* applied a rational basis test in reviewing the legality of New York's requirement that minors may not purchase certain sexually explicit, non-obscene material except with their parents' permission. Recall Justice Brennan's exceedingly generous test in reviewing the legality of that law: to sustain the law "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."<sup>256</sup> But the majority's goal was to apply strict scrutiny to the California law, a test that could not be further from *Ginsberg*'s.

As this Article has shown, an important set of second generation First Amendment questions that needed to be resolved was whether there could be any limits imposed on the distribution of materials suitable for adults because of the concern that they might end up in the hands of children. The inquiry is invariably the same. How do we balance the state's legitimate interest in assisting parents in raising

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253. *Brown*, 131 S. Ct. at 2740.

254. All of the cases cited by Justice Scalia supporting his conclusion that prior precedents "control" the result that the law is unconstitutional were non-Category D cases: *United States v. Playboy Entm't Grp., Inc.* (Category C); *Joseph Burstyn, Inc. v. Wilson* (Category A); *Ashcroft v. American Civil Liberties Union* (Category B); *United States v. Stevens* (Category A); *R.A.V. v. St. Paul* (Category A); *Roth v. United States* (Category B); *Brandenburg v. Ohio* (Category A); *Chaplinsky v. New Hampshire* (Category A); *Miller v. California* (Category A); *Cohen v. California* (Category A); and *Winters v. New York* (Category B). *Brown*, 131 S. Ct. at 2733.

255. See *Brown*, 131 S. Ct. at 2747 (Alito, J., concurring) (calling *Ginsberg* "our most closely related precedent").

256. *Ginsberg v. New York*, 390 U.S. 629, 641 (1968).

their children by shielding them from a cascade of materials to which many parents do not wish their children to have ready access with the independent right of adults to gain ready access to the same things? Many of the key cases decided over the past sixty years are nothing but an attempt to address this problem. For the most part, these cases are framed within the same broad outline: Adults have an unfettered right to access to these materials; children do not. Until *Brown*.

In the lower federal courts, the California Attorney General stressed the State's independent interest in the well-being of children. California defended the law as furthering the State's "compelling interest in preventing harm to minors caused by the unique interactive media of video games."<sup>257</sup> It justified the law as advancing the State's interest in developing "healthy, well-rounded growth of young people into full maturity as citizens,"<sup>258</sup> arguing that the State may lawfully protect children "from exposure to material that would 'impair[] [their] ethical and moral development.'"<sup>259</sup>

The California Attorney General also stressed that the Legislature found that watching violent video games can cause harm to minors because it (a) "causes increases in aggressive thoughts, affect, and behaviour; increases in physiological arousal; and decreases in helpful behaviour";<sup>260</sup> (b) increases the risk children would be more likely to be involved in physical fights, and perform more poorly in school;<sup>261</sup> and (c) leads to desensitization to violence in minors and impacts their brain activity.<sup>262</sup> The Attorney General's brief explained that the California Psychiatric Association encouraged the Legislature to enact the law in order to "lessen[] not only aggression, but symptoms of anxiety, depression, agitation and social isolation for many young people already predisposed to

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257. Appellants' Opening Brief, *Video Software Dealers Ass'n v. Schwarzenegger*, 07-16620, No. C-05-4188-RMW, at 24 (9th Cir. 2008).

258. *Id.* at 26 (citing *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

259. *Id.* (citing *Ginsberg*, 390 U.S. at 641).

260. *Id.* at 30 (citing Craig Anderson et al., American Psychological Society, *The Influence of Media Violence on Youth*, 4 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST, No. 3, at 91-93 (Dec. 2003)).

261. *Id.* at 30 (citing Gentile, *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 J. OF ADOLESCENCE 5 (2004)).

262. *Id.* at 31.

behavioral problems or with Severely Emotionally Disturbed diagnoses, or with Severe Persistent Mental Illness.”<sup>263</sup>

Stressing this purpose may not have been sound strategy for the Attorney General.<sup>264</sup> The California Legislature, however, made it very difficult to ignore this purpose. As justification for enacted, the law, the California Legislature declared that:

(a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior. (b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.<sup>265</sup>

All of this set up very nicely for the majority to identify the principal flaw in the statute’s goal of preventing children from gaining access to disfavored material. Even though the law did not make it *illegal* for children to play violent games, once the Court concluded that the Legislature enacted the law to make it unlikely that children would play the games, it was expectable that the majority would be concerned that the state’s principal goal was to deter children from playing violent games and that anything further it said in support of the law was merely pretext.

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263. *Id.* at 33.

264. Indeed, the Attorney General changed the argument in the Supreme Court after losing in the Ninth Circuit. This time around, the brief stressed,

The Act promotes parental authority to restrict unsupervised minors’ ability to consume a narrow category of material in order to protect minors’ physical and psychological welfare, as well as their ethical and moral development. California has a vital interest in supporting parental supervision over the amount of offensively violent material minors consume. The Act ensures that parents—who have primary responsibility for the well-being of minors—have an opportunity to involve themselves in deciding what level of video game violence is suitable for a particular minor. In doing so, the Act does not impinge upon the rights of adults, as it was deliberately structured to accommodate parental authority over minors while leaving access by adults completely unfettered.

Petitioners’ Brief, *Brown v. Entm’t Merchs. Ass’n*, No. 08-1448, at \*6 (2010).

265. 2005 Cal. Legis. Serv. Ch. 638 (Assemb. B. 1179, § 1).

### A. Things the Court Got Right

Viewing the law through this lens, the majority opinion was correct in a number of key respects. First, it was correct in rejecting California's effort to place video games outside of ordinary First Amendment regulation as a new genre materially different from anything that came before. If one wants to avoid being ridiculed by a future generation, the safest course, by far, is to withhold judgment about the dangers of a new medium or method of communication for at least a generation. History, including very recent American history, is filled with examples of efforts to censor material on grounds of its fitness for good people or children that, often within less than a generation, have come to be viewed as laughable. This history of efforts to censor that which soon enough became accepted as mainstream, even tame, should serve as an important restraint on anyone considering banning what appears at the moment to be edgy material.<sup>266</sup>

As the Comic Book Legal Defense Fund's amicus brief in *Brown* reported:

Past crusades leave behind a cultural sense of curious bemusement, as if it is difficult to imagine what all the fuss was about. But that does not prevent social reformers and state legislatures from latching on to the next *cause célèbre* that unquestionably will lead to the ruination of America's children unless decisive action is taken. Unfortunately, such cycles of outrage leave behind a legacy of censorship.<sup>267</sup>

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Such concerns foreshadowed later campaigns against music, but by then, the critics had forgotten how foolish those efforts looked from a historical

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266. See *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 69–72 (1961) (Warren, C.J., dissenting) (describing how in 1950, Atlanta banned *Lost Boundaries*, a film about a black physician and his family who “passed” for white, on grounds that exhibition of the film would “adversely affect the peace, morals and good order” of the community; in 1959, Ohio censored deleted scenes of orphans resorting to violence in the film *It Happened in Europe*; in 1959, the Chicago licensing board banned newsreel films of Chicago policemen shooting at labor pickets and refused a license to exhibit the film *Anatomy of a Murder*; and, in 1937–38, the New York film licensing board censored over five percent of the movies it reviewed).

267. Brief for Comic Book Legal Defense Fund as Amici Curiae Supporting Respondents, *Brown v. Entm't Merchs. Ass'n*, No. 08-1448, at \*4 (2010).

perspective. Responding to demands like this, NBC in 1940 banned from the radio more than 140 songs because they allegedly encouraged “a disrespect for virginity, mocked marriage, and encouraged sexual promiscuity.” Duke Ellington’s *The Mooche* was blamed for inciting rape, and only the instrumental version of Cole Porter’s *Love for Sale* could be aired.<sup>268</sup>

In the federal litigation in *Brown*, California had a very difficult time supporting the Legislature’s conclusion that playing violent video games is bad for children or that it contributes to criminal or violent misbehavior by children who play them. The Court was surely right to be wary of state power to limit what children may read to what state officials believe is suitable for them. This is particularly true when California patterned its law on the *Ginsberg* statute. The *Ginsberg* test was never really any kind of test at all. Allowing states to censor material from children whenever one concludes it is “not irrational to believe the materials may be harmful to children”<sup>269</sup> provides virtually no check on state power. The true meaning of the *Ginsberg* test is that anything may be censored except when it is irrational to believe it is harmful to children.

Between 1968, when *Ginsberg* was decided, and 2011, when *Brown* was announced, the black letter law was that states may limit harmful material to children, at least when the material involved sex or “vulgar” language, whenever a court found it was not irrational to believe the material was inappropriate for children. Although the *Brown* Court explained that *Ginsberg* was always only about sex, neither *Ginsberg* nor any other case ever said so. Instead, the *Ginsberg* Court spoke in much broader terms, recognizing the state’s interest in “preventing distribution to children of objectionable material” and of “books recognized to be suitable for adults.”<sup>270</sup> On the same day *Ginsberg* was decided, the Court described *Ginsberg* as allowing states to “regulate the dissemination to juveniles of . . . material objectionable as to them . . . .”<sup>271</sup> Again in 1978, the *Pacifica* Court likewise listed as material properly kept from children, not merely material containing sexual language, but language that was

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268. *Id.* at \*10 (citation omitted).

269. *Ginsberg v. New York*, 390 U.S. 629, 641 (1968).

270. *Id.* at 636 (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966)).

271. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 690 (1968).

“vulgar,” “indecent,” “offensive,” “shocking,” “unseemly,” and “not conforming to generally accepted standards of morality.”<sup>272</sup>

Looking back on the turbulent 1960s long after the First Amendment wars were won, *Ginsberg* may seem difficult to justify. But it was an extremely important decision, necessary in its time to secure and advance adult rights, as its author, Justice Brennan, undoubtedly understood well. Indeed, it is fascinating to observe Justice Brennan’s *Ginsberg* test being ridiculed today as toothless.<sup>273</sup> Brennan’s method, borne out by experience, was that only by creating a double standard for children and adults would it be possible to have maximum freedom for the adults-only group. I suspect many readers today would be very surprised to look back at the photos that were banned by the *Ginsberg* Court in 1968. *Playboy* and *Penthouse* were the two mainstream “men’s magazines” in those years, both of which were included in the materials covered by the *Ginsberg* statute.<sup>274</sup> Though the centerfolds were nude, their genitals were never on display. It did not take very long for the racy *Playboy*, which shocked the country with its centerfold when the magazine first appeared in 1953, to seem staid once Larry Flynt joined the field and published his much more explicit *Hustler Magazine*.<sup>275</sup>

A standard that blinked at a legislature’s choice to forbid children access to racy material was a very fair trade off to achieve a broadening of material for adults. Indeed, if children are seen as future adults, delaying their right to gain access to material that would not otherwise be permitted in the marketplace expands the freedom of both adults today and adults tomorrow (today’s children).<sup>276</sup> It may go too far to suggest that Justice Brennan could see how successful his compromise would turn out. But no one will ever know for certain whether the remarkable expansion of what came to be treated as non-pornographic material which began in the late 1960s and accelerated in the 1970s would have been possible had the more liberal Justices

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272. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1977). Justice Powell’s concurrence explained that “speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest.” *Id.* at 758.

273. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001) (“*Ginsberg* did not insist on social scientific evidence that quasi-obscene images are harmful to children. The Court, as we have noted, thought this a matter of common sense. It was in 1968; it may not be today; but that is not our case.”).

274. *Ginsberg*, 390 U.S. at 631–33.

275. *Hustler Magazine* was first published in 1974. *Larry Flynt*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Larry\\_Flynt](http://en.wikipedia.org/wiki/Larry_Flynt) (last visited May 5, 2014).

276. See Martin Guggenheim, *What’s Wrong with Children’s Rights* 141 (2007).



Douglas and Fortas, both of whom dissented in *Ginsberg*, prevailed in that case and insisted that children had the same right as adults to enjoy nude pictures.

Nevertheless, permitting the state a direct role in protecting children from violent imagery invites censors into an impossible inquiry: Which imagery is too much for reasonable adults to want children to see? Justice Scalia was surely right when he explained that there is no “longstanding tradition in this country of specially restricting children’s access to depictions of violence.”<sup>277</sup> There are simply too many examples of violence in children’s literature, both high- and low-brow, to permit a meaningful inquiry into where the line ought to be drawn. My wife and I loved to read Little Red Riding Hood to our young children as they were growing up through the children’s literature classics. But I have come to know parents who would not expose their children to the violent themes of the story, and sincerely believe no parent should. When courts are instructed to decide this question on the basis of “community standards,” it quickly becomes manifest that there is no such thing. When we add that these “standards” are supposed to gauge what *adults* think are appropriate for minors, we invite an exponential factor of ambiguity. Before too long, it becomes clear we are not talking about any kind of standard at all.

For this reason, when Justice Scalia distinguished sex in *Ginsberg* from violence in *Brown*, he was surely right. As he explained, depictions of sexually salacious material in children’s literature, if not unknown, are extremely unusual.<sup>278</sup> The same cannot be said for violence. Violence is a central feature of expression intended for minors.<sup>279</sup>

In light of all this, the Court was correct to insist that state officials prove that children, or members of society, will be harmed by children playing violent video games before they may limit children’s opportunity to play the games for that reason alone. The *Ginsberg* test, applied to support the state’s independent interest in children’s well-being, was properly rejected as applied to violent video games. Since the state could not demonstrate that playing violent video

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277. *Brown*, 131 S. Ct. at 2736. See, e.g., Marjorie Heins, *Blaming the Media: Would Regulation of Expression Prevent Another Columbine?*, 14 MEDIA STUD. J. 14, 15 (2000).

278. See *Am. Amusement Mach. Ass’n*, 244 F.3d at 578 (depictions of sex, as opposed to depictions of violence, are “an adult invasion of children’s culture”). See also NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 72–80 (1982).

279. *Brown*, 131 S. Ct. at 2736–37.

games was harmful to minors, the Court was also correct in refusing to uphold the law for that reason.

### **B. The Validity of Legislation Enacted to Assist Parents Raising Their Children**

There still remains the state's second claim: The statute should be upheld as assisting parents in raising their children. But as we have seen, when the state enacts a law in the name of aiding parents, how do we ever know when its true motive is to deny children the opportunity to view protected material? Virtually all restrictions imposed by a legislature could be defended on this basis. Given California's legislative history—making manifest legislators' hope that the law's effect would reduce the number of children who would play violent video games (despite what their parents might want)—the *Brown* Court cannot be faulted for choosing to reject the second claim, too.

But it surely can be faulted for its reasoning. Putting pretextual concerns aside for the moment, when the law is defended on the exclusive rationale that it is an appropriate effort to assist parents raise their children, it is unnecessary to support the contention (because the law does not depend on its truth) that the material is harmful to children (something that may be impossible to accomplish).<sup>280</sup> Rather, the law is simply deferring to parental judgment—either that it is not irrational for them to think the material is harmful to their children or, even more straightforwardly, the parents simply do not wish their children to have access to the material, regardless of whether or not it is harmful.

Parents have the constitutional right to deny their children access to materials for no better reason than they believe the material may be harmful to them.<sup>281</sup> Although parents have this extraordinary range of power, that does not mean states should be required to enact laws to help parents on all fronts. But we begin in the wrong place if we follow Justice Scalia's lead from *Brown* and strike any law as overinclusive simply because it will result in some parents being impacted by the law who would rather there were no law in the first

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280. See Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1553 (1995) (“The heart of the problem is that available research does not supply a basis upon which one could determine with adequate certainty whether a particular ‘violent’ program will cause harmful behavior.”).

281. This is akin to the well-known parental authority based on nothing more than, “because I said so.”

place. Given this, there is considerably more to say about violent video games.

It is one thing to be wary of state officials deciding for themselves what is suitable for children. But that does not mean government goes too far when it strives to accommodate the needs of parents who have strong feelings about what their children get to view. A pluralistic society that cares about fairness and equity for all of its members surely acts reasonably when it take reasonable steps to address discrepant values that pluralism means to honor.

The majority's insensitivity to the legitimacy of a state interest in supporting parents who prefer their children not play these games, is a particularly regrettable feature of its opinion. The majority in *Brown* revealed an astonishing indifference to the needs and concerns of parents trying to navigate a cacophonous marketplace. Justice Scalia expressed the view that conservative parents are obliged to figure out for themselves how to limit their children's access to protected material that the parents do not wish their children to use. Such lack of sympathy seems to ignore the meaning of living in a free society. Parents have the substantive right to limit their children's access even to materials protected by the First Amendment. Indeed, parents have the constitutional right *to forbid* their children's access to constitutionally protected materials.

One of the legitimate goals of a pluralistic society should be to strive to accommodate all parents' needs, if that is possible without an undue restriction on any parent's freedom. As the *Ginsberg* Court stated in 1968, laws further a legitimate purpose when they "support the right of parents to deal with the morals of their children as they see fit."<sup>282</sup> The freedom to direct a child's upbringing means, of course, that government may not prohibit parents from teaching their children ideas government regards as repugnant. But because that freedom also means parents may lawfully forbid their children exposure to ideas that government must tolerate, government performs a legitimate function when it strives to assist parents who care deeply about minimizing their children's exposure to materials that adults have the right to view.

One of the most puzzling claims Justice Scalia made in *Brown* is that the California law impermissibly interfered with liberal parents' rights because it burdened their freedom to not care about which

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282. *Ginsberg*, 390 U.S. at 639 n.7 (quoting Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n.68 (1963)).

games their children purchased.<sup>283</sup> Justice Scalia objected that the California law unconstitutionally interfered with the rights of children whose parents “think violent video games are a harmless pastime.”<sup>284</sup> But this ignores that whatever rules we employ, including no rules at all, we cannot avoid burdening some parents.

It should be obvious that *between* two sets of parents—one that does not mind at all what their children read or view and the other that does—only the latter is in need of assistance from government to accommodate their interests. The *laissez-faire* parent needs no government assistance to help raise her child. The parent who regards the marketplace as nasty and brutish does. Justice Scalia objected that the California statute interferes with the *laissez-faire* parent’s rights.<sup>285</sup> Many will scratch their heads in grasping exactly how this is an “interference” of any kind. To be sure, it means parents must take some steps to allow their children access to certain games.

In a cooperative democracy that celebrates pluralism and a maximally open marketplace of ideas, someone invariably is going to be put upon. Parents who wish to raise their child in an environment where words like “shit” and “tits” are not commonly spoken on television need the government’s help to keep these words out of their living rooms. This accommodation to their values comes at a real cost. Not only are parents of households who do not mind such language imposed upon, *all* households are, including those with no children living in them. In other words, despite the rhetoric in *Brown* to the contrary, *Pacifica* stands for the very proposition the *Brown* Court claims it has never permitted: the suppression of speech that is unrelated to sex. *Pacifica*’s restrictions apply to what government officials regard as vulgar.<sup>286</sup> Moreover, they result in suppressed speech even for adults for no better reason than to accommodate the needs of some parents. Americans have lived with *Pacifica* for a generation and most Americans are likely to agree that the ruling is a sound compromise. The results exact a cost on many, to be sure. But it also is the only way to meet the needs of some parents.

The California Legislature went considerably beyond what the New York Legislature did in *Ginsberg*. In *Ginsberg*, the Court said it was sufficient for New York legislators to believe the material was

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283. *Brown*, 131 S. Ct. at 2741.

284. *Id.* at 2742.

285. *Id.* at 2741.

286. *See* FCC v. *Pacifica Found.*, 438 U.S. 726 (1977).

harmful to minors. In California, the legislative inquiry before enacting the law is best understood as an independent inquiry by legislators into whether it is rational to believe violent videos may be harmful to minors. Even further, the legislature may be seen to have inquired into whether it wanted to support parents who preferred their children not to have access to the materials. Ultimately, we may say the California legislators concluded it was not irrational for many parents to prefer their children not have ready access to these materials and they enacted a law to assist those parents. In doing so, the legislators were mindful of the proper limits of their authority and avoided imposing a ban on children's access to the materials. This is best seen as an attempt to accommodate the interests of all parents and, importantly, to avoid imposing its own view on what is proper for children.

This leaves one last extraordinary claim raised by Justice Scalia that deserves some attention. Not only did Justice Scalia criticize the California law for burdening *laissez-faire* parents, even more remarkably, he also suggested that the California law violated children's rights because California would have limited the games children could play to those their parents sanctioned.<sup>287</sup> He expressed doubt "that the state has the power to prevent children from hearing or saying anything without their parents' prior consent,"<sup>288</sup> giving as an example to prove the that state lacks this power, "that it could be made criminal to admit persons under 18 to a political rally without their parents' prior written consent—even a political rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors."<sup>289</sup> Going further, he said that laws, for example, that make it a crime "to admit a person under 18 to church, or to give a person under 18 a religious tract, without his parents' prior consent" "are obviously an infringement upon the religious freedom of young people."<sup>290</sup>

It is unclear which is more remarkable: The claim that children have the constitutional right to choose their church over their parent's objection, or that the person making the claim is Justice Scalia, whose track record for advancing children's rights before *Brown* would rank

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287. *Brown*, 131 S. Ct. at 2736.

288. *Id.* at n.3.

289. *Id.*

290. *Id.*

him behind only Justice Thomas as the least child-friendly Justice on the Court.<sup>291</sup> This is the same Justice who wrote in 1995 that:

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.<sup>292</sup>

This time around, he suggests that children enjoy unfettered freedom to speak their minds and join the church of their choice.

If this dictum, expressed in a footnote, were true, it would turn on its head the foundational principles of parental rights under the Constitution. Parents have the right to choose for their children virtually everything including their school church, community, friends, clothes, amount of time they may spend out of the home, as only a few immediate examples. They also have the right in every state to enforce their lawful commands over their children and to seek the state's aid over their recalcitrant children by charging them in juvenile court with disobeying the lawful command of the parent.<sup>293</sup>

But even if we were to take this footnote seriously, there is an important distinction between granting children the freedom, even over their parents' objection, to speak out on political matters and granting them the freedom to disobey their parents by rejecting the school or church their parents have chosen for them. We go very far

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291. It is easy to make the case that Justice Thomas ranks as the least children's-rights-friendly sitting Justice. His concurrence in *Morse v. Frederick*, 551 U.S. 393, 418 (2007), argued that children have no First Amendment rights at school because their parents have assigned them to the school teachers who are acting as the parents' agents. In addition, as we have seen, Justice Thomas dissented in *Brown*, arguing that children have no First Amendment rights to view material over their parental objection because the Founders did not intend for the "freedom of speech" to encompass a right to speak to children by bypassing their parents, or a right of children to access speech. *See Brown*, 131 S. Ct. at 2760 (Thomas, J., dissenting). But, along with Justice Thomas, Justice Scalia has voted against children in virtually every case decided by the Court during his tenure. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Graham v. Florida*, 560 U.S. 48 (2010); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009); *Roper v. Simmons*, 543 U.S. 551 (2005); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988); *Michael H. v. Gerald D.*, 491 U.S. 110 (1988).

292. *Vernonia*, 515 U.S. at 654.

293. *See, e.g.*, N.Y. FAM. CT. ACT § 712(a) (2010).

in American law to protect the right of all Americans, including children, to speak out on public events. Children may attend rallies and participate in parades even when these gatherings are for the purpose of supporting contested ideas.<sup>294</sup> This is, however, an example of children having rights because it is good for adults: Little is lost by conferring these rights on children, and much is gained. In this sense, granting children the right to speak out on public affairs should also be considered the right of adults to hear what all members of the community, including children, have to say.<sup>295</sup>

There is also a second instrumental value in permitting children this right. We are also interested in training them to become future voters and participants in the marketplace of ideas.<sup>296</sup> To further that instrumental value, it makes sense to want children to practice exercising their speech capacities and to absorb the feedback from

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294. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 882 (1963) (“The only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world.”). Allowing foster children, for example, to speak publicly about their experiences is a vital source of material information to policy and lawmakers. As Justice Stevens explained in his dissenting opinion in *Morse*, the views of minors on such public matters deserve to be heard:

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. In the national debate about a serious issue, it is the expression of the minority’s viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

*Morse v. Frederick*, 551 U.S. 393, 448 (Stevens, J., dissenting) (citations omitted).

295. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth is fundamental to our free society.”) (internal citations omitted); *Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”). See also Cass Sunstein, *Free Speech Now*, 59 *U. CHI. L. REV.* 255, 263 (1992) (“the First Amendment is fundamentally aimed at protecting democratic self-government”); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 45–46 (1948) (“[E]very plan of action must have a hearing, every relevant idea of fact or value must have full consideration”).

296. See John Garvey, *Children and the First Amendment*, 57 *TEX. L. REV.* 321, 344–48 (1979).

peers who disagree with their views.<sup>297</sup> This form of practicing speech has both instrumental and immediate benefits to children and adults. For this reason, when children are exercising their speech rights in the form of expressing their views, we should count this as a true child's right—not simply the consequence of rights adults insist upon for themselves.

Thus, I agree with Emily Buss that “[s]peech offers children a chance to pursue their self-fulfillment in a manner that minimizes the risks associated with that pursuit and, in the process, facilitates the development of the very capacities and stability of identity on which full autonomy in adulthood depends.”<sup>298</sup> To agree that the state may not punish children for expressing their ideas<sup>299</sup> tells us nothing about the extent to which those charged with bringing up children are authorized to shape their values and world outlook, even to the extent of forbidding them from having access to ideas repugnant to the guardians.

Contrary to Justice Scalia's footnote, it does not violate a child's right to be denied access to particular ideas. The difference between being a child and an adult is not a mere detail. The liberty guaranteed by the First Amendment—the freedom to choose for oneself what to publish, read, or view in order to promote a free trade in ideas—presupposes the capacity of the individual to make a reasoned choice.<sup>300</sup>

Under American law, parents have considerable authority to expose their children to ideas important to the parents, and to limit their child's exposure to ideas that the parents regard as antithetical or even slightly inconsistent to their values. Thus, side by side are two seemingly incompatible concepts: the right of free speech and a child's burden to be limited by the choices of one's parent.

It is false to think that just because we forbid state officials from forcing children to express a belief in something,<sup>301</sup> from teaching

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297. See John Stuart Mill, *ON LIBERTY AND OTHER ESSAYS* 42 (1991) (children benefit from being able to articulate arguments in order to “feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of”).

298. Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 381 (2004).

299. Cf. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503; *Morse v. Frederick*, 551 U.S. 393 (2007).

300. *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring).

301. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).



science in school because it is disfavored by the school board,<sup>302</sup> or from drafting overbroad laws designed to limit the availability of indecent sexual material to minors,<sup>303</sup> that there is something wrong with carefully drafted laws designed to assist parents to protect their children from controversial materials. No one should confuse the true meaning of the principle that “opinions and judgments, including esthetic and moral judgments about art and literature, . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of the majority.”<sup>304</sup> The “individual” in that case is “an adult.” Children are not among the individuals who, in the same unrestrained way as adults, get to decide for themselves what art and literature is suitable for them.<sup>305</sup> Only if they happen to have parents who give them such authority do they possess it.

The full scope of the degree to which state officials may properly ensure that children are exposed to ideas that their parents would prefer they not consider is beyond the focus of this Article. For better or worse, current law strongly protects parental freedom to teach their children what they want them to learn, and what they want them not to know about. Our constitutional democracy forbids forcing parents to send their children to public schools.<sup>306</sup>

Although the Court has gone very far to oversee efforts by public school officials to restrict the base of knowledge provided to students attending public schools, it would be misleading to conclude from the Court’s rulings in those cases that children have some kind of right to be exposed to particular ideas.<sup>307</sup> Those cases invariably were concerned with restricting actions of state officials. Parents have the constitutional right to eschew entirely the public school regime. Indeed, it is very likely that the Court has been especially comfortable

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302. *Epperson v. Arkansas*, 393 U.S. 97 (1968). We should remember that such lusty language as Justice Brennan’s in *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection’”) protected the rights of adults who were college students.

303. *Sable Comm’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126–31 (1989). *See also* *U.S. v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 819–27 (2000); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975) (government may limit speech to minors “only in relatively narrow and well-defined circumstances”).

304. *Playboy*, 529 U.S. at 818.

305. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

306. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1923).

307. *See, e.g., Epperson*, 393 U.S. 97; *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality opinion).

forcing state officials to teach topics considered by some communities to be highly contested subjects, such as evolution,<sup>308</sup> *because* parents are not obliged to use the public school regime.

Remarkably little is regulated in the private school arena. Even more, as home schooling has grown to be the biggest movement in education in the United States over the past generation, a significant number of American children today are being educated in circumstances in which there is virtually no oversight.<sup>309</sup> The Court has had almost nothing to say about any of this. As we have seen, in the only major case ever decided by the Supreme Court on the subject, the Court was content to leave the subject of children's education entirely in their parents' hands, subject only to the extremely limited conditions that they offer "some degree of education . . . necessary to prepare citizens to participate effectively and intelligently in our open political system . . . [and prepare] individuals to be self-reliant and self-sufficient participants in society."<sup>310</sup>

We can reasonably disagree about just how far parents ought to have the power to limit their children's education. May a parent punish a child for reading the holy text of a religion considered heretical by the parent? Remarkably, the answer even to that question is far from clear.<sup>311</sup> But however one chooses to answer it, surely the wrong place to begin drawing lines is at violent video games. This is to say that, at least until the limits of parental authority to rear their late adolescent minor children is made considerably clearer under American law than it is today, we should not expect to determine those limits through the inquiry on violent video games.

In light of all this, parents might reasonably claim the right to assistance from state officials when navigating a noisy and treacherous marketplace. *Ginsberg* itself emphasized that "the

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308. See *Epperson*, 393 U.S. at 97.

309. See, e.g., *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 443–46 (Tex. 1994).

310. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

311. See, e.g., WILLIAM A. GALSTON, *LIBERAL PLURALISM* 104–105 (2002) ("Parents are entitled to introduce their children to what they regard as vital sources of meaning and value, and to hope that their children will come to share this orientation" but children nonetheless possess "freestanding religious claims" that include "enforceable rights of exit from the boundaries of communities defined by their parents."). See also Stephen G. Gilles, *On educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 947 (1966) ("in a liberal society, all authority is limited, and all coercion requires reasoned justification").

parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."<sup>312</sup> But even if parents do not have such a right, it seems incontestable that the state advances a legitimate interest when it takes reasonable steps to provide such assistance.

What then are the dangers of states enacting laws for the sole reason of accommodating the needs of parents who do not want their children to view materials that a free society may not suppress? That should have been the crucial focus in *Brown*, even if, based on the arguments California made both in enacting the challenged law and in defending it in federal court, the result was ultimately correct.

In Part V, I aim to show that states should be permitted to enact laws that restrict children's access to material that a substantial percentage of parents prefer to have restricted. There are two dangers when a state enacts such a law. If they can be addressed satisfactorily, as I hope to do, then laws that require parental permission for children to gain access to certain materials otherwise fully protected by the First Amendment should themselves be deemed constitutional.

### **V. Proposal to Regulate Children's Access to Materials**

This Article proposes a statute, set forth in the Appendix, which forbids distributing material to minors that the industry that produces the material has labeled unsuitable for them. This addresses the concern that states will attempt to limit material to children merely because state officials dislike the material. It also ensures that the prohibited material is easily known to sellers and distributors.

Laws should not be based on the *Ginsberg* statute because "community standards" is too vague. The draftsman's goal should be to address the twin concerns that the category may grow too large or fail to be readily known to distributors subject to the restrictions. The simple solution to meeting this set of conditions is for legislatures to take their cue from the industries producing material which they themselves have seen fit to categorize and label. Government officials run the risk of becoming censors when they get into the business of labeling material unsuitable for minors. That should not prevent them from taking advantage of labeling that the industries themselves are doing.

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312. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

Both the motion picture and video industries have created a reviewing and labeling system that is well-known. It should be permissible to prohibit minors from having access to materials the industry itself labels as unsuitable to minors without parental permission.<sup>313</sup> This limiting condition gives the industry complete say over which games or films the law may restrict to minors. All the industry needs do is label the material as “suitable to minors without parental permission” and it may not end up in the restricted grouping. This removes from the state the power to identify unsuitable materials—a power that many are loathe to give state officials. It also eliminates the need to draft language that necessarily will contain overbroad and vague terms, avoiding the problem of being unfair to distributors or vendors who would be forced to guess whether the particular product is within the restricted group.

As set forth in the Appendix, such a statute, as applied to video games and, while we are at it, films, to use two prominent examples, would simply prohibit the sale or rental of video games to someone under seventeen years of age that have been labeled “M” (inappropriate for persons under seventeen) and prohibit the sale or rental of video games to someone under eighteen years of age that have been labeled AO (unsuitable for persons under 18); it would also prohibit selling or permitting entry to a theatre to watch a motion picture to someone under seventeen years of age unless they are accompanied by a parent or guardian that has been classified as “R” (unsuitable to persons less than seventeen years of age unless they are accompanied by a parent or guardian) and prohibit selling or permitting entry to a theatre to someone less than eighteen years of age to watch a motion picture that has been classified as “NC-17” (unsuitable for persons less than eighteen years of age).<sup>314</sup>

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313. *But see* Engdahl v. City of Kenosha, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970); Motion Picture Ass’n of Am. v. Specter, 315 F. Supp. 824, 825 (E.D. Pa. 1970) (Pennsylvania law that restricted minors’ access to films that were “not suitable for family or children’s viewing” declared unconstitutionally vague. Although the law “purport[ed] to adopt as its standards the ratings or standards of the Code and Rating Administration of the Motion Picture Association of America . . . . The ratings employed by the Association do not correspond to the statutory standards of ‘unsuitable’ or ‘not suitable for family or children’s viewing.’”).

314. I do not propose limiting sales of video games on the Internet (such a restriction would change my proposal from a Category D law to a Category C law). Restricting sales to persons under eighteen cannot be applied to online sales without running the unacceptable risk that it will unduly burden the First Amendment rights of adults. The risk is not only that a prudent seller cannot be sure of the age of the purchaser but also cannot be sure of the location of someone downloading a game or playing it online. As the ACLU Amicus Brief in *Brown* explains, “those offering downloading or online game

This proposed law does not collide with any claim of a child's right to receive information over the objection of state officials<sup>315</sup> and is fully consistent with First Amendment principles, in "keeping with our basic American concepts of a free press operating in a free land for a free people."<sup>316</sup> If this proposal seems extreme to some, that itself deserves some attention. For all the heated rhetoric in *Brown* about children's rights and the need for an unregulated marketplace relating to First Amendment protected material, American society has long endured a system of discrimination against minors when it comes to allowing access to such material.

Indeed, at the very point when Hollywood liberated filmmakers to produce sexually explicit films, the film industry created the well-known film rating system for films released by the Motion Picture Association of America ("MPAA"). In 1968, the MPAA devised the idea of a voluntary rating system for three purposes. One was to make it less likely that government would intrude by reviewing and censoring films. The second was to inform the public (but particularly parents) about movie content so that they could make effective decisions concerning their children's exposure to controversial material.<sup>317</sup> The third, as described below, was to prevent children from seeing in theatres films rated as unsuitable for them.

Filmmakers who belong to MPAA agree to submit their work to the Classification and Ratings Administration ("CARA")—an independent organization. Ratings are based both on content and themes of a film with particular consideration to sexual content and

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play must refuse service not only to all Californians, regardless of age, but everyone throughout the world." Brief for ACLU as Amici Curiae Supporting Respondents, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697182 at \*6 (citing *Butler v. Michigan*, 352 U.S. 380 (1957); *Reno v. ACLU*, 521 U.S. 844, 875 (1997)). Some will object that by limiting the proposal to in-store sales, the proposal will be ineffective in providing parents with a meaningful opportunity to restrict their children's access to adult materials. They are probably right. My proposal should be seen as symbolic support for parents. Realistically, there is no way to prevent children from gaining access to violent video games. Todd Gitlin considers symbolic legislation of this sort as a "confession of despair." See MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 257 (2007) (quoting Todd Gitlin, *Imagebusters: The Hollow Crusade Against TV Violence*, AMERICAN PROSPECT 46–47 (1994)). I do not agree.

315. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867–68 (1982) (plurality opinion). See also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

316. S. Rep. No. 84-62, at 23 (1955).

317. See Motion Picture Ass'n of Am., *Classification and Rating Rules* § 3(A) (2010), available at [http://www.filmratings.com/filmRatings\\_Cara/downloads/pdf/ratings/cara\\_rating\\_rules.pdf](http://www.filmratings.com/filmRatings_Cara/downloads/pdf/ratings/cara_rating_rules.pdf) (last visited Mar. 14, 2014).

nudity, violence, drug use, and adult language.<sup>318</sup> An important part of the ratings arrangement is the commitment made by the National Association of Theatre Owners, Inc. to enforce the ratings by refusing to admit children to “R”-rated motion pictures unless accompanied by a parent or guardian (and refusing to admit children to “NC-17”-rated motion pictures at all).<sup>319</sup> Retailers that sell or rent movies have also agreed to participate in enforcement. Although films may be released without a rating, MPAA members routinely submit all of their films and only release them in theaters as rated.<sup>320</sup> According to the MPAA, the Federal Trade Commission tracks theater compliance with rules regulating unaccompanied minors access to R-rated films. According to the industry, “[i]n 2009, the FTC found that theaters denied admission to R-rated movies to 72% of underage buyers.”<sup>321</sup>

In other words, we already live in the world of deep regulation of First Amendment-protected content. The film industry requires young-looking people to prove their age before being admitted to a restricted-rated film and refuses admittance to young people who are unable to prove they are old enough to be admitted according to industry rules. When young people are denied access to the theatre, they are treated as trespassers who may be removed from the premises by the police. Were a minor to persist in his or her claim to be allowed to see the film, the private theatre operator would be

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318. *Id.*

319. Minors’ access to NC-17 and R-rated films is restricted at these theaters. G, PG, and PG-13 are considered parental guidance ratings and theaters thus do not enforce any age requirement. *Id.*

320. Brief for The Cato Institute as Amici Curiae Supporting Respondents, *Brown v. Entm’t Merchs. Ass’n* 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697184 at \*21 (citing Classification and Rating Administration, *About Us*, <http://www.filmratings.com/who.html> (last visited Apr. 28, 2014)). Unrated films are generally given only limited release because about eighty-five percent of theaters participate in the MPAA system. Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 CARDOZO ARTS & ENT. L.J. 135, 138 (1997). While 178 films were released without ratings in 2009, representing 34.2% of total film releases, they accounted for only 0.3% of gross film receipts because they were shown on fewer screens and had lower attendance. Box Office Mojo, *Yearly Box Office*, available at <http://www.boxofficemojo.com/yearly/?view2=mpaa&chart=byyear&yr=2009&view=releasedate&p=.htm> (last visited Mar. 14, 2014).

321. Brief for The Cato Institute as Amici Curiae Supporting Respondents, *Brown v. Entm’t Merchs. Ass’n* 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697184 at \*22 (citing FED. TRADE COMM’N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FIFTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES: A REPORT TO CONGRESS* 8 (Apr. 2007), available at <http://www.ftc.gov/sites/default/files/documents/reports/marketing-violent-entertainment-children-fifth-follow-review-industry-practices-motion-picture-music/070412marketingviolentechildren.pdf>).

allowed to have the minor arrested and charged with criminal trespass.

All of this is somehow treated today as an entirely private affair without state involvement, even though the entire arrangement depends on being allowed to enforce the rules through police involvement. Discrimination against children on the basis of age is broadly permissible and needs only be found rational to survive an equal protection challenge.<sup>322</sup>

What precisely is the difference between the current regime and one regulated by statute? The current private system (which could not operate with the force-of-law's support) allows for indirect censorship of children's access to First Amendment-protected material while allowing the Supreme Court to speak in a voice that implies such things are forbidden in the United States. Though we routinely use the state's police force to enforce censorship, we comfort ourselves by insisting that the censors are from private industry, rather than the government. This should not blind us from the reality that we tolerate discrimination against children with regard to constitutionally protected material.<sup>323</sup> Moreover, the reason state officials have not had to enact legislation to enforce the film industry's own regulations is because the film industry does well enough on its own.

And that, after all, is the most serious problem with the Court's decision in *Brown*. Both Justices Alito and Breyer separately complained in *Brown* that, by declaring that video games protected speech which government may not regulate, the Court had removed an implied threat over the industry<sup>324</sup> that has proven to be an important impetus for self-regulation ever since Jack Valenti left the white House in 1966 to become the first President of the Motion Picture Association of America.<sup>325</sup> The video industry took its cue from the film industry and currently regulates itself, although apparently not as successfully. The Entertainment Software Rating Board ("ESRB") is an independent entity established in the 1990s by

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322. See generally *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

323. My civil liberties friends will undoubtedly be disappointed with this proposal and see much wrong with it. But I would remind them that no one at the ACLU ever brought a challenge to the universal practice throughout the United States of forbidding children from viewing films in theaters except in accordance with the industry's rules.

324. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2747–48 (Alito, J., concurring); *id.* at 2770–71 (Breyer, J., dissenting).

325. Entertainment Software Rating Board, *About the ESRB*, available at [http://www.esrb.org/about/news/downloads/ESRB\\_Fact\\_Sheet.pdf](http://www.esrb.org/about/news/downloads/ESRB_Fact_Sheet.pdf).

the Entertainment Software Association.<sup>326</sup> The raters, who have no ties to the industry,<sup>327</sup> includes as categories: Teen (suitable for ages thirteen and older and may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and infrequent strong language), Mature (suitable for ages seventeen and over and which may contain intense violence, blood and gore, sexual content, and strong language, and Adults Only (suitable only ages eighteen and older and may include prolonged scenes of intense violence and graphic sexual content and nudity).<sup>328</sup>

Justice Alito complained that “[t]he Court does not mention the fact that the industry adopted this system in response to the threat of federal regulation, a threat that the Court’s opinion may now be seen as largely eliminating.”<sup>329</sup> He also objected that the Court ignored both that the current compliance with the industry’s own rules “left much to be desired” and “that future enforcement may decline if the video-game industry perceives that any threat of government regulation has vanished.”<sup>330</sup>

At least as applied to video game sales, the law proposed in this Article might actually result in more retailers willing to carry “adult only” merchandise once the retailers could be confident that parents who do not wish their children to purchase them are meaningfully prevented from doing so. Today, a number of major distributors,

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326. Entertainment Software Rating Board, *Facts about ESRB*, <http://www.esrb.org/ratings/faq.jsp#14> (last visited Apr. 4, 2014).

327. *Id.*

328. Entertainment Software Rating Board, *ESRB Ratings Guide*, [http://www.esrb.org/ratings/ratings\\_guide.jsp#rating\\_categories](http://www.esrb.org/ratings/ratings_guide.jsp#rating_categories) (last visited Mar. 14, 2014). Altogether the Ratings Guide uses six categories: **EC** (Early Childhood, suitable for ages three and over and contains no material that parents would find inappropriate); **E** (Everyone, suitable six and older and may contain minimal cartoon, fantasy, or mild violence and may infrequently use mild language); **E10+** (Everyone 10+, suitable for ages ten and over and may contain more cartoon, fantasy, or mild violence and mild language or minimal suggestive themes); **T** (Teen, suitable for ages thirteen and older and may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and infrequent strong language); **M** (Mature, suitable for ages seventeen and over and which may contain intense violence, blood and gore, sexual content, and strong language); and **AO** (Adults Only, suitable only ages eighteen and older and may include prolonged scenes of intense violence and graphic sexual content and nudity).

329. *Brown*, 131 S. Ct. at 2747–48 (2011) (Alito, J., concurring) (internal citation omitted).

330. *Id.* at 2748. *See also id.* at n.6.



including Target and Walmart, simply do not carry “adult only” merchandise.<sup>331</sup>

### Conclusion

The result in *Brown* is not the problem. Its reasoning, however, strayed far from the mark. Parents who find it ever more challenging to raise their children in accordance with their own values deserve a government able to help them in their efforts. Even more, they deserve a Supreme Court sensitive to their plight. States should be encouraged to draft carefully worded legislation designed to reduce the risk of being declared vague or overbroad that makes it difficult for children to gain access to material that neither the industry itself nor their parents considers suitable for them.

The California statute properly foundered on the shoals of vagueness. It contained the vices of a vague law that must be declared unconstitutional because it required decisionmakers to decide, after the fact, decide whether a marketer violated the law. This poorly serves public policy and risks an overbroad impact of the statute when risk-averse distributors refuse to sell material that the statute did not intend to cover. Nonetheless, the Court’s categorical rejection of the state exercising its power to regulate the availability of material to minors protected by the First Amendment outside of the field of sexually explicit material went too far.

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331. See, e.g., Target, *Target mature-rated games policy*, TARGET.COM, [http://m.target.com/HelpContent?help=/sites/html/TargetOnline/help/product\\_information/target\\_mature\\_rated\\_games\\_policy/target\\_mature\\_rated\\_games\\_policy.html](http://m.target.com/HelpContent?help=/sites/html/TargetOnline/help/product_information/target_mature_rated_games_policy/target_mature_rated_games_policy.html) (last visited Apr. 28, 2014) (Target only carries games with ESRB ratings, and does not carry “adults only” merchandise); Walmart, *Mature Merchandise: Music, Video Games, and Movies*, <http://walmartstores.com/pressroom/news/8234.aspx> (last visited Apr. 28, 2014) (“All of [the games] that we carry are rated by the [ESRB] and we carry no adult-rated video or computer software games.”).

## Appendix

### Model Statute

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

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

(b) “Motion picture” means any motion picture, regardless of length or content, which is exhibited in a motion picture theater to paying customers.

A person may not sell or rent a video game that has been labeled M by the Entertainment Software Rating Board or other entity designated by the Entertainment Software Association to someone less than 17 years of age unless they are accompanied by a parent or guardian;

A person may not sell or rent a video game that has been labeled AO by the Entertainment Software Rating Board to someone less than 18 years of age;

A person may not sell or permit entry to a theatre to watch a motion picture that has been classified as “R” by the Classification and Ratings Administration of the Motion Picture Association of America to someone less than 17 years of age unless they are accompanied by a parent or guardian;

A person may not sell or permit entry to a theatre to watch a motion picture that has been classified as “NC-17” by the Classification and Ratings Administration of the Motion Picture Association of America to someone less than 18 years of age.

(b) Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence including but not limited to a driver’s license or government-issued identification card that a purchaser or renter of a violent video game was not a minor shall be an affirmative defense to any action brought.

Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars (\$1,000), or a lesser amount as determined by the court.

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