

Shielding Children From Nudity, But Not Violence ... Do Minors' First Amendment Rights Make Sense?

Vincent S. Onorato*

INTRODUCTION

Historically, children have been exposed to violence by authors and directors who have depicted violence as a central theme,¹ whether it has been words within literature² or visual images within movies.³ As technology has continued to evolve in the modern era, video games have surfaced as a new form of media.⁴ These video games, similar to literature and movies, have also seemed to place violence at the forefront, exposing children to even more violence.⁵

* J.D. Candidate (2013), Washington University School of Law; B.S. (2010), Miami University. I would like to thank my family for their support both while writing this Note and throughout law school; I could not have gotten through either without them. In addition, I would like to thank the staff of the *Washington University Journal of Law & Policy* for all their help during the publication process of this Note.

1. *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (discussing how “violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture,” which “engages the interest of children from an early age”).

2. *See, e.g., id.* (“[T]he *Odyssey*, with its graphic descriptions of Odysseus’s grinding out the eye of Polyphemus with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants; or *The Divine Comedy* with its graphic descriptions of the tortures of the damned; or *War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds.”).

3. *See, e.g., id.* (“Or . . . the famous horror movies made from the classic novels of Mary Wollstonecraft Shelley (*Frankenstein*) and Bram Stoker (*Dracula*).”).

4. *See* Scott A. Pyle, *Is Violence Really Just Fun and Games?: A Proposal For A Violent Video Game Ordinance That Passes Constitutional Muster*, 37 VAL. U. L. REV. 429, 430 (2002) (“Video games have clearly become a permanent and prevalent fixture in the life of a staggering number of children in the United States. Studies have indicated that an estimated seventy-nine percent of American children play computer or video games an average of eight hours per week.”).

5. *See* Emily R. Caron, *Blood, Guts, & the First Amendment: Regulating Violence in the*

Yet, unlike literature and movies, the highly interactive nature of video games allows players to control the gruesome violence that occurs.⁶ This has led some states to question whether regulations need to be in place to censor children from exposure to this extreme violence.⁷

California is the most recent state to enact a statute aimed at protecting children from violent video games. Specifically, on October 7, 2005, then-California Governor Arnold Schwarzenegger signed into law Assembly Bill 1179 (“A.B. 1179”),⁸ codified at Civil Code §§ 1746–1746.5.⁹ In short, the law had the effect of labeling violent video games “adult only” and prohibited retailers from renting or selling them to anyone under age eighteen.¹⁰ In response to the proposed bill, the video game and software industries filed suit against the Governor, on the grounds that the Act violated the First

Entertainment Media, 11 KAN. J.L. & PUB. POL’Y 89, 91 (2001) (explaining that “American children are being exposed to violent entertainment at an alarming rate”).

6. See Rashid Sayed, *15 Most Violent Video Games That Made You Puke*, GAMINGBOLT (May 2, 2010), <http://gamingbolt.com/15-most-violent-video-games-that-made-you-puke>. Five of the fifteen games listed: (1) *Soldier of Fortune 2*: “You can simple [sic] tear off [sic], chop off, and do any damn thing with your victims;” *id.* (2) *Fallout 3*: “You can decide which part of the body of your enemy you want to blow up;” *id.* (3) *Shadow of Rome*: “[Y]our aim is to master the art of a Gladiator” which allows you to use “human arm and legs as weapons;” *id.* (4) *God of War 3*: “[Mr. Kratos] chops off Hermes limbs just to get his pair of magical shoes;” *id.* (5) *Heavy Rain*: “Allows you to see “[h]ow far you will go to save someone you love? Will you chop [off] your own finger?” *Id.*

7. See James Dunkelberger, *The New Resident Evil? State Regulation of Violent Video Games and The First Amendment*, 2011 BYU L. REV. 1659, 1693 n.4 (2011) (“Numerous states and political subdivisions [such as California, Illinois, Louisiana, Michigan, Minnesota, Oklahoma, Washington, the city of Indianapolis, and St. Louis County, Missouri] have passed legislation seeking to restrict minors’ access to violent video games.”).

8. See *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009). “A.B. 1179 states that the State of California has two compelling interests that support the Act: (1) preventing violent, aggressive, and antisocial behavior; and (2) preventing psychological or neurological harm to minors who play violent video games.” *Id.* at 954.

9. CAL. CIV. CODE §§ 1746–1746.5 prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled. The Act covers games “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.”

10. *Id.* The law also imposed a fine on violators of up to \$1,000 per offense. § 1746.3.

Amendment.¹¹ The suit led to the recent U.S. Supreme Court decision, *Brown v. Entertainment Merchants Association*.¹²

In *Brown*, the Supreme Court considered “whether a California law imposing restrictions on violent video games comports with the First Amendment.”¹³ In answering this question, Justice Scalia, writing for the majority, held that the California statute was unconstitutional.¹⁴ In doing so, he refused to expand the *Ginsberg v. New York* standard¹⁵ to include violence. Instead, the Court looked to *United States v. Stevens*¹⁶ as the controlling precedent, thereby employing strict scrutiny¹⁷ to strike down the California statute as violating the First Amendment.¹⁸ The Court reaffirmed various lower court decisions that had decided similar First Amendment issues involving video games.¹⁹ Therefore, the decision to grant certiorari

11. *Video Software Dealers Ass’n*, 556 F.3d at 955. The video game and software industries also argued that the Act violated 42 U.S.C. § 1983 and the Fourteenth Amendment, however the scope of this Note is limited to First Amendment issues, in particular with respect minors.

12. 131 S. Ct. 2729 (2011).

13. *Id.* at 2732.

14. *See id.* at 2738.

15. 390 U.S. 629, 636 (1968). The Supreme Court created the *Ginsberg* (obscenity-for-minors) standard, which barred the dissemination to children of obscene material that was constitutionally protected for distribution to adults. For a more complete discussion of the *Ginsberg* standard, see *infra* notes 46–51.

16. 130 S. Ct. 1577, 1586 (2010) (explaining that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated). For a more complete discussion on *Stevens* *infra* see notes 57–62.

17. William Cross, *Hot Coffee and Freeze-Dried First Amendment Analysis: The Dubious Constitutionality of Using Private Ratings for Public Regulation of Video Games*, 4 FIRST AMEND. L. REV. 299, 321 n.87 (2005) (explaining that “[s]trict scrutiny is the highest standard of review for a law. Under strict scrutiny a regulation is presumed to be invalid and the state bears the burden of demonstrating that the law is necessary to further a compelling state interest.”).

Under strict scrutiny, legislation imposing a restriction on the content of protected speech will be upheld against constitutional challenge only if “necessary” or “narrowly tailored” to promote a “compelling” governmental interest. *See* *R.A.V. v. City of St. Paul*, Minn. 505 U.S. 377, 395–96 (1992). For a more complete discussion of strict scrutiny, see *infra* notes 77–92.

18. *See Brown*, 131 S. Ct. at 2742. The majority stated that California failed to produce any objective scientific evidence that exposure to video game violence harms children. *Id.* at 2739. The state therefore failed to prove it had a compelling governmental interest in protecting minors from such exposure. *Id.* Moreover, the majority asserted that even if California were able to demonstrate the existence of that causal link between violent speech and harm to minors, the statute nonetheless would be unconstitutional because it is not narrowly tailored (the statute is both underinclusive and overinclusive) to achieve its goal. *Id.* at 2739–41.

19. David Post, *Sex, Lies, and Videogames: Brown v. Entertainment Merchants*

and the ruling were both strange in that they added nothing additional to lower courts' holdings, all of which had unanimously struck down similar statutes for failure to pass strict scrutiny.²⁰

By applying the holding in *Stevens*,²¹ and the reasoning²² for refusing to apply the *Ginsberg* standard, *Brown* has further complicated the problematic First Amendment standard²³ for minors. As Justice Breyer's dissent makes clear, the current law permits the shielding of minors from mere nudity, but does not allow minors to be shielded from extreme violence—a serious “anomaly.”²⁴ The

Association, CATO SUP. CT. REV. 27, 38 (2011). Explaining why granting certiorari and holding in the way the U.S. Supreme Court did was unusual:

When the Supreme Court granted California's cert petition in April 2010, Court-watchers were left scratching their heads: Why did the Court agree to hear the case? The lower courts had been unanimous thus far; every court . . . that had considered similar (or identical) statutes had (1) applied strict scrutiny and (2) struck them down as violating the First Amendment . . . Entm't Software Ass'n v. Swanson, 519 F.3d 768 (8th Cir. 2008); Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir.), cert. denied, 534 U.S. 994 (2001); Entm't Merchants Ass'n v. Henry, No. Civ-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), aff'd, 469 F.3d 641 (7th Cir. 2006); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

Id.

20. See *supra* note 19 and accompanying text.

21. See *Brown*, 131 S. Ct. at 2747 (Alito, J., concurring) (stating reasons why the Court was wrong in saying that the holding in *Stevens* controls this case). See generally *infra* Part II.

22. See *Brown*, 131 S. Ct. at 2738 (reasoning that the interactive nature of video games allowing the player to participate in the violent action on screen and determine its outcome is nothing new: since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to).

23. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 718 (Random House 1970) (“The Court's inability to develop a comprehensive theory of the First Amendment leaves it without satisfactory tools to deal with many new developments that are emerging in the system of freedom of expression.”).

24. See *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting)

The majority's different conclusion creates a serious anomaly in First Amendment law. *Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13 year old boy a magazine with an image of a nude woman, while protecting a sale to that 13 year old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment

Supreme Court made a mistake and should have made one of two more logically based arguments: (1) placing violence within the *Ginsberg* standard; or (2) overruling the *Ginsberg* standard completely. Each would correct the Court's mistake by eliminating the current "anomaly," thus creating a more consistent First Amendment standard for minors.²⁵ Consequently, because of this decision, there will continue to be much uncertainty and inconsistency in future First Amendment cases involving minors.

Part I of this Note begins by delving into the history of the First Amendment, beginning with what it looked like in the eyes of the framers to its current construction. Part I next explores the case law, which helped form the Supreme Court's decision in *Brown*. Part II starts with an analysis of the case law used by the Supreme Court in *Brown*. It argues that the Court was incorrect both in its reasoning and ultimate holding that nudity and violence are to be judged by different standards with respect to minors. Part II closes by illustrating the problem of the current state of minors' First Amendment rights as a result of *Brown*. Finally, Part III proposes two possible solutions the Supreme Court in *Brown* could have made to solve the inconsistency of minors' First Amendment rights. The first possible solution is to apply the obscenity-for-minors standard from *Ginsberg* to violence, thereby eliminating the application of strict scrutiny.²⁶ Accordingly, this solution suggests that violence be treated as obscenity for minors. The second possible solution is more extreme, advocating that the Supreme Court overrule its decision in *Ginsberg*, giving children and adults the same First Amendment rights.

would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless?

Id.

25. See *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (explaining that in most matters it is more important that the applicable rule of law be settled than that it be settled rightly; however, when interpreting the Constitution, that policy is at its weakest, and it is more important to be settled rightly).

26. This solution is similar to the approach advocated by Justice Breyer in his dissenting opinion. However, it differs in that it places emphasis on the offensiveness of violence instead of the resulting harm that violence can cause.

I. HISTORY

A. *The First Amendment*

The First Amendment to the United States Constitution states: “Congress shall make no law . . . abridging the freedom of speech.”²⁷ Enacted in 1791, “[t]he First Amendment undoubtedly was a reaction against the suppression of speech and of the press that existed in English society.”²⁸ Besides knowing this, however, it is extremely difficult to ascertain what the framers specifically intended with the creation of the First Amendment.²⁹ Today, the most basic principle of the First Amendment is that “as a general matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”³⁰ However, the courts have established that “the First Amendment . . . permit[s] restrictions upon the content of speech in a few limited areas.”³¹ Obscenity, formally introduced in 1957, represents one of those few limited areas.³²

The California statute³³ in *Brown* sought to impose restrictions on minors’ ability to purchase violent video games by attempting to

27. U.S. CONST. amend. I. The scope of this Note is tailored to the freedom of speech provision within the First Amendment.

28. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 950 (Vicki Been et al. eds., 4th ed. 2011).

29. *See id.* at 952–53 (“Not surprisingly, then, Supreme Court cases dealing with freedom of expression focus less on the framers’ intent than do cases involving many other constitutional provisions . . . [Thus], the courts must decide what speech is protected by the First Amendment and what can be regulated by the government.”).

30. *See Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002).

31. *Brown*, 131 S. Ct. at 2733 (noting that defamation, fraud, incitement, and fighting words are also limited areas where the First Amendment has permitted restrictions). For the purposes of this Note, obscenity is the only unprotected class that is discussed.

32. *See Roth v. United States*, 354 U.S. 476, 485 (1957). *See also* KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY 45 (Rodney A. Smolla et al. eds., 1996) (“[E]arlier decisions . . . had assumed obscene material was not protected by freedom of speech . . . but *Roth* [in 1957] squarely so held.”). *But see* CHEMERINSKY, *supra* note 28, at 1050 (“Many disagree with the Court that obscenity should be deemed a category of unprotected speech. They argue that the very definition of obscenity . . . focuses on controlling thoughts—something that should be beyond the reach of the government.”).

33. CAL. CIV. CODE §§ 1746–1746.5 (West 2009), *declared unconstitutional by Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

place it within the obscenity exception.³⁴ The Supreme Court began its opinion by stating that video games qualify for First Amendment protection.³⁵ It then faced two key issues. The first issue was should the Court place violence within the obscenity-for-minors standard from *Ginsberg*. Then, if it does not, the second issue was whether the California statute satisfies the strict scrutiny standard.³⁶ In First Amendment cases involving obscenity, most litigation is associated with whether the obscenity exception can be expanded to new forms of speech, and if not, then whether the proposed regulation can meet the strict scrutiny standard.³⁷ Unique to cases like *Brown* is that the litigation deals more narrowly with whether the *Ginsberg* standard can be expanded.³⁸

B. The Obscenity Exception

In 1957, the Supreme Court in *Roth v. United States*³⁹ first formally recognized obscenity as a form of unprotected speech.⁴⁰ In declaring obscene material unprotected under the First Amendment, the Court found that the state had a compelling interest in guarding society from obscenity.⁴¹ Stemming from *Roth* was a definition of

34. See *Brown*, 131 S. Ct. at 2734 (noting that California tried to make violent-speech regulation look like obscenity regulation by mimicking the New York statute regulating obscenity for minors).

35. See *id.* at 2733 (“Like the protected books, plays, and movies that preceded them, video games 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). That suffices to confer First Amendment protection.”). See also *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 958 (8th Cir. 2003) (“[Video games] are as much entitled to the protection of free speech as the best of literature.”).

36. See generally *Brown*, 131 S. Ct. at 2735, 2738.

37. See generally, e.g., *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Winters v. New York*, 333 U.S. 507 (1948).

38. See *Brown*, 131 S. Ct. at 2735. See also *supra* note 19 and accompanying text.

39. 354 U.S. 476 (1957).

40. See *id.* at 485.

41. *Id.* at 484 (noting that implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance). “[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality” *Id.* at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

obscenity that clearly tied the concept to sex.⁴² Sixteen years later, the Supreme Court limited the obscenity standard in *Miller v. California*.⁴³ The Court was concerned with the inherent dangers of regulating any form of expression.⁴⁴ Thus, the basic guidelines for the trier of fact became and remain today:

- (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.⁴⁵

C. *The Ginsberg (Obscenity-for-Minors) Standard*

Although a standard by which to judge obscenity seemed to be solidified in *Miller*, the Supreme Court placed a wrinkle in obscenity years earlier in *Ginsberg v. New York*⁴⁶ when it created a separate obscenity standard for minors.⁴⁷ In *Ginsberg* the Court recognized that the concept of obscenity may vary according to whom the questionable material is directed or from whom it is quarantined.⁴⁸ It

42. See SAUNDERS, *supra* note 32, at 63.

43. 413 U.S. 15, 27 (1973). The Court confined the permissible scope of such regulation to works that depict or describe patently offensive "hard core" sexual conduct. *Id.*

44. *Id.* at 23-24.

45. *Id.* at 24 (citations omitted) (internal quotation marks omitted).

46. 390 U.S. 629 (1968).

47. In *Ginsberg*, the Supreme Court affirmed the District Court's holding that magazines, which were sold to a sixteen-year-old boy, containing pictures depicting the showing of female buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering any portion thereof below the top of the nipple was defined as obscene even though it was not considered obscene to adults. See *Ginsberg*, 390 U.S. at 631-33.

48. *Id.* at 636. New York Penal Law § 484-h provided that:

It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor: (a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors, or (b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative

stated, “that even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”⁴⁹ The Court decided it could exercise its power to protect the health, safety, welfare, and morals of its community by barring distribution to children of books recognized to be suitable for adults.⁵⁰ Thus, in establishing a separate obscenity-for-minors standard, the Court recognized that the well-being of children was within the State’s constitutional power to regulate.⁵¹

D. Restrictions on Violent Speech

Obscenity statutes in general have generated much uncertainty in many First Amendment cases because of the impossibility to formulate a definition.⁵² With a separate standard for minors in *Ginsberg*, a new gray area arose as to what First Amendment protection minors must receive.⁵³ Restrictions targeting violent

accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole is harmful to minors.

Id. at 647 (quoting New York Penal Law § 484-h).

49. *Ginsberg*, 390 U.S. at 638.

50. *Id.* at 636. Although the Court barred dissemination of obscene material to minors, the Court went on to state that: “the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.” *Id.* at 639.

51. *See id.* at 639. The Supreme Court further reasoned that even without scientifically proven evidence that obscenity is or is not a basic factor in impairing the ethical and moral development of youth and a clear and present danger to the people of the state, society’s transcendent interest in protecting the welfare of children justifies reasonable regulation of the sale of material to them. *See id.* at 640–43.

52. *See SAUNDERS, supra* note 32, at 63–64 (“[If] [t]he Court’s definition [in *Roth*], is taken to limit obscenity to sexual or eliminatory depictions and descriptions, it is too narrow. [However, some have argued] [t]he concept of obscenity extends to other varieties of materials, and violent depictions may present as central a paradigm of obscenity as sexual materials.”). *See also* CHEMERINSKY, *supra* note 28, at 1052 (“[S]ome [even] argue that obscenity should not be a category of unprotected expression Justice Brennan, who wrote the opinion in *Roth*, dissented in *Paris Adult Theater* and said: ‘I am convinced that the approach initiated 16 years ago in *Roth* . . . cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values.’”).

53. *Compare* *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975) (“[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”) (internal citations omitted) *with* *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (“The power of the state to control the conduct of children reaches beyond the scope of

speech have been a recurring issue stuck within these uncertain areas of the First Amendment.⁵⁴ In *Brown*, the majority placed controlling weight on two cases involving such an issue on violent speech.⁵⁵ It used these cases to narrowly define the *Ginsberg* standard, excluding violence from its purview.⁵⁶

In *Brown*, the majority first looked to *United States v. Stevens*,⁵⁷ a recent case in which the Court struck down a statute aimed at stopping the distribution of animal cruelty depictions.⁵⁸ In *Stevens*, the Court dealt with whether the prohibition of animal cruelty depictions is consistent with the freedom of speech guaranteed by the First Amendment.⁵⁹ In support of the statute, the Government argued that lack of a historical warrant did not matter and that a categorical exclusion for violence should be considered under a simple balancing test.⁶⁰ The Supreme Court ultimately rejected the Government's argument for two reasons: first, a new category of unprotected speech

its authority over adults.”), and *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring) (explaining that the First Amendment rights of minors are not “co-extensive with those of adults”), and *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982) (finding that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, than are adults).

54. See *supra* note 7 and accompanying text. See also Jessalyn Hershinger, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 VAND. L. REV. 473, 474–77 (1993).

55. See *Brown*, 131 S. Ct. at 2734–35.

56. *Id.*

57. 130 S. Ct. 1577 (2010). In *Brown*, Justice Scalia states that the holding in *Stevens* controls the case. Therefore, Justice Scalia's application and interpretation of *Stevens* determined the ultimate outcome in *Brown*. See *Brown*, 131 S. Ct. at 2734.

58. *Stevens*, 130 S. Ct. at 1592.

59. *Id.* at 1582–83 (explaining that the statute at issue was 18 U.S.C. § 48, which applied to any visual or auditory depiction in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if that conduct violates federal or state law where the creation, sale, or possession takes place).

60. *Id.* at 1585. The Government's proposed balancing test was: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” *Id.*

could not be added based on a simple balancing test,⁶¹ and second, the statute was overly broad.⁶²

Next, the majority applied *Winters v. New York*,⁶³ a case dating back to 1948 that also dealt with a statute restricting violent speech.⁶⁴ In reversing the Court of Appeals' decision,⁶⁵ the Supreme Court struck down the statute on grounds that it failed a heightened vagueness standard.⁶⁶ Thus, the Court held that violence did not fall within obscenity in this case because of this vagueness and "the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidding publications."⁶⁷

61. *Id.* at 1586 (explaining its decision to exclude child pornography from the protection of the First Amendment in *New York v. Ferber*, 458 U.S. 747 (1982)). Specifically, the Supreme Court stated: "the State of New York had a compelling interest in protecting children from abuse, and . . . the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*." *Id.*

62. *Id.* at 1587 ("In the First Amendment context . . . a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal quotation marks and citations omitted). The Court specifically explained that the statute at issue is overly broad because it refers to any depiction in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, which could be illegal in some jurisdictions and legal in others. *See id.* at 1588–89.

63. 333 U.S. 507 (1948).

64. *Id.* at 508. New York Penal Law § 1141 stated: "1. A person who prints, 2. Prints, utters, publishes, sells, lends, gives away, distributes, or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper 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" is guilty of a misdemeanor for obscene prints and articles. *Id.*

65. *See id.* at 517–18. The Court of Appeals in this case "held that collections of criminal deeds of bloodshed or lust 'can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense.'" *Id.* at 513.

66. *Id.* at 520 ("Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." (citing *Herndon v. Lowry*, 301 U.S. 242, 259 (1937))). Moreover, "[t]here must be ascertainable standards of guilt." *Winters*, 333 U.S. at 515. "Men of common intelligence cannot be required to guess at the meaning of the enactment." *Id.* "The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt." *Id.* at 515–16 (internal citations omitted). "Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." *Id.* at 516 (quoting *State v. Diamond*, 27 N.M. 477, 485 (N.M. 1921)).

67. *Winters*, 333 U.S. at 519.

E. Restrictions on Violent Video Games

*American Amusement Machine Association v. Kendrick*⁶⁸ was essentially the first case to recognize that video games are no different from other forms of media.⁶⁹ In this case, the Seventh Circuit dealt with an ordinance barring minors from video arcade games containing simulated graphic violence.⁷⁰ Like the California statute in *Brown*, the ordinance tried to place violence within the unprotected class of obscenity.⁷¹ Following *Winters*, Judge Posner struck down the ordinance recognizing that violence is not obscenity.⁷² However, he departed from the traditional explanation that obscenity must be associated with sex,⁷³ even admitting the

68. 244 F.3d 572 (2001).

69. *Id.* at 577 (“All literature . . . is interactive; the better it is, the more interactive.”).

70. *See id.* at 573.

The ordinance defines the term “harmful to minors” to mean “an amusement machine that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under” that age, and contains either “graphic violence” or “strong sexual content.” “Graphic violence,” which is all that is involved in this case (so far as appears, the plaintiffs do not manufacture, at least for exhibition in game arcades and other public places, video games that have “strong sexual content”), is defined to mean “an amusement machine’s visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfigurement [disfigurement].”

Id.

71. *Id.* at 574 (noting that “the ordinance brackets violence with sex, and the City tries to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity, which is normally concerned with sex and is not protected by the First Amendment.”).

72. *Id.*

73. *Id.* at 574–75. Instead of stating that obscenity can only be associated with sex, Judge Posner placed an emphasis on obscenity’s offensiveness:

Obscenity is to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting, but it generally is not believed to inflict temporal (as distinct from spiritual) harm; or at least the evidence that it does is not generally considered as persuasive as the evidence that other speech that can be regulated on the basis of its content, such as threats of physical harm, conspiratorial communications, incitements, frauds, and libels and slanders, inflicts such harm.

Id.

importance in protecting against violence.⁷⁴ The crux of his argument was based upon the City's underlying purpose for the enactment of the ordinance.⁷⁵ Thus, because the City's purpose for shielding children from the violent video games was based on the underlying harm, instead of the offensiveness of the violence, the ordinance was deemed unconstitutional.⁷⁶

F. *Strict Scrutiny*

As exemplified in the cases above, where the content of speech places it in one of the categories of speech protected by the First Amendment, strict scrutiny is employed to determine the constitutionality of the content-based regulation.⁷⁷ Courts developed

74. *Id.* at 575 (“Protecting people from violence is at least as hallowed a role for government as protecting people from graphic sexual imagery.”).

75. *Id.* at 574 (noting that “the main worry about obscenity, the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis ordinance, but that it is offensive”).

76. *Id.* at 575, 580.

No proof that obscenity is harmful is required either to defend an obscenity statute against being invalidated on constitutional grounds or to uphold a prosecution for obscenity. Offensiveness is the offense.

One can imagine an ordinance directed at depictions of violence because they, too, were offensive. Maybe violent photographs of a person being drawn and quartered could be suppressed as disgusting, embarrassing, degrading, or disturbing without proof that they were likely to cause any of the viewers to commit a violent act. They might even be described as “obscene,” in the same way that photographs of people defecating might be, and in many obscenity statutes are, included within the legal category of the obscene, even if they have nothing to do with sex. In common speech, indeed, “obscene” is often just a synonym for repulsive, with no sexual overtones at all.

But offensiveness is not the basis on which Indianapolis seeks to regulate violent video games.

Id. at 575 (internal citations omitted).

77. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 56 n.12 (1976); see also *R.A.V. v. St. Paul, Minnesota*, 505 U.S. 375, 387 (1992) (“The rationale of the general prohibition [against content-based restrictions] is that content discrimination ‘raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.’” (quoting *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991))). But see *N.Y. v. Ferber*, 458 U.S. 747, 763–64 (1982) (“It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”).

the “strict scrutiny” standard in an attempt to determine whether content-based restrictions⁷⁸ on protected speech are valid.⁷⁹ In order for a statute to be valid under the standard of strict scrutiny, it must be narrowly tailored⁸⁰ to promote a compelling Government interest,⁸¹ and “if a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”⁸² Two cases⁸³ help illustrate the application of strict scrutiny as it relates to the California statute in *Brown*.

In *United States v. Playboy Entertainment Group*, the Supreme Court confronted the challenge to a section of the Telecommunications Act of 1996.⁸⁴ This section required cable television operators offering channels dedicated to “sexually-oriented programming” to completely scramble or fully block those channels, or to limit their transmission to hours when children were unlikely to be viewing the program.⁸⁵ The Supreme Court concluded that the

78. “As general rule, laws that by their terms distinguish favored speech from disfavored speech on basis of ideas or views expressed are content-based, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral.” 16B C.J.S. *Constitutional Law* § 827 (citing *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994)).

79. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011).

80. Where a State’s purposes for a proposed legislation affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

81. The State must prove an “actual problem” justifying the restriction on speech. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 822 (2000). Furthermore, the curtailment of free speech must be actually necessary to the solution. See *R.A.V.*, 505 U.S. at 395.

82. *Playboy*, 529 U.S. at 813. “It is rare that a regulation restricting speech because of its content will ever be permissible.” *Id.* at 818.

83. (1) *Playboy*, 529 U.S. at 803, 813; and (2) *Hialeah*, 508 U.S. at 546.

84. *Playboy*, 529 U.S. at 806. Explaining the purpose behind the enactment of § 505:

Even before enactment of the statute, signal scrambling was already in use. Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs. Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as “signal bleed.” The purpose of § 505 [was] to shield children from hearing or seeing images resulting from signal bleed.

Id. at 803.

85. *Id.* at 806. The time determined when children were unlikely to be viewing set by administrative regulation was the time between 10 p.m. and 6 a.m. *Id.*

Government failed to provide any evidence⁸⁶ to prove an actual problem⁸⁷ and that the Government could further those interests in less restrictive ways.⁸⁸ The Court reasoned that in order for the cable providers to comply with the section, too much speech would be restricted.⁸⁹ Therefore, even though the speech was indecent and entered the home, because of the lack of evidence of an actual problem,⁹⁰ the objective of shielding children did not suffice to support a blanket ban if the protection could be accomplished by a less restrictive alternative.⁹¹

In *Church of Lukumi Babalu Aye v. Hialeah*, the Supreme Court considered ordinances passed targeting the practice of Santeria⁹² forbidding the unnecessary killing of “an animal in a public or private ritual or ceremony not for the primary purpose of food

86. *Id.* at 820 (explaining the district court’s finding that the Government presented no evidence on the number of households actually exposed to signal bleed; all the Government presented was a handful of isolated incidents over sixteen years, with no survey-type evidence on the magnitude of the problem).

87. *Id.* at 822–23 (“The question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.”).

88. *Id.* at 809–10 (noting that “[o]ne plausible, less restrictive alternative could be found in another section of the Act: § 504, which requires a cable operator, upon request by a cable service subscriber . . . without charge, to fully scramble or otherwise fully block any channel the subscriber does not wish to receive”). “Where a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.” *Id.* at 816.

89. *Id.* at 812. The Supreme Court’s explanation:

It is evident that the only reasonable way for a substantial number of cable operators to comply with the letter of § 505 is to time channel, which silences the protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewers . . . To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection.

Id.

90. *Id.* at 822 (noting that “[t]his is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition”).

91. *Id.* at 814.

92. See *Hialeah*, 508 U.S. 520, 524 (1993). “The basis of the Santeria religion is the nurture of a personal relation with the *orishas* [gods], and one of the principal forms of devotion is an animal sacrifice.” *Id.* The *orishas*, or gods, depend on sacrifice for survival. *Id.* at 524–25. “Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration.” *Id.* at 525.

consumption.”⁹³ The City, backing the ordinances, argued that they advanced two interests: protecting the public health and preventing cruelty to animals.⁹⁴ The Court disagreed and struck down the ordinances as unconstitutional, stating that they did not meet the strict scrutiny standard⁹⁵ because the ordinances were both overinclusive⁹⁶ and underinclusive.⁹⁷

II. ANALYSIS

In *Brown v. Entertainment Merchants Association*, the Supreme Court struck down a California statute that banned the sale of certain violent video games to children without parental supervision.⁹⁸ In support of the California statute, the State argued that violence should be treated as obscenity for minors because of the underlying harm both can cause to children.⁹⁹ The Court disagreed, stating that violence is not obscenity and classified the statute as a content-based regulation, which subsequently failed strict scrutiny.¹⁰⁰

In *Brown*, the Court analyzed the uncertainty surrounding minors’ First Amendment rights¹⁰¹ and the obscenity exception.¹⁰² Both have perplexed courts since the formation of obscenity in *Roth*,¹⁰³ along

93. *Id.* at 526–27.

94. *Id.* at 543.

95. *Id.* at 547.

96. *Id.* at 537–38 (explaining that the ordinances are overinclusive because the “legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice”).

97. *Id.* at 543. The Supreme Court explained why the ordinances are underinclusive:

They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. . . . Despite the city’s proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. *Id.* For example, fishing—which occurs in Hialeah—is legal.

Id. (citation omitted).

98. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2742 (2011).

99. *See Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 954, 958 (2009).

100. *See Brown*, 131 S. Ct. at 2735, 2742.

101. *See supra* note 53 and accompanying text.

102. *See supra* note 52 and accompanying text.

103. *See supra* notes 39–42 and accompanying text.

with the refinements in *Miller*¹⁰⁴ and *Ginsberg*.¹⁰⁵ Attempting to curtail this uncertainty, the majority placed controlling weight on its opinion in *Stevens*,¹⁰⁶ stating, “new categories of unprotected speech may not be added to the list.”¹⁰⁷ The majority then buttressed its argument from *Stevens* with its opinion from *Winters*,¹⁰⁸ which “made clear that violence is not part of the obscenity.”¹⁰⁹ Thus, the Court concluded that “[b]ecause speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York*.”¹¹⁰

As Justice Alito points out in his concurring opinion, the majority in *Brown* improperly placed controlling weight on *Stevens*.¹¹¹ Similar

104. See *supra* notes 43–45 and accompanying text. See also Post, *supra* note 19, at 31–32. Explaining the confusing features of the *Miller* standard:

First, . . . it doesn’t enable you to look at any particular item and answer the question, “Is this photograph, or magazine, or video ‘obscene’ and thus unprotected by the First Amendment?” Instead, it specifies the process that the government must follow when it gets around to defining something as obscene. Second, by . . . applying contemporary *community standards* . . . the *Miller* standard clearly contemplates that First Amendment protection will expand and contract as one moves from one community to another.

Id.

105. See *supra* notes 46–51 and accompanying text. See also Post, *supra* note 19, at 36. Explaining that *Ginsberg* introduced even more confusion into the exception:

Ginsberg, . . . technically speaking, isn’t a First Amendment case at all—it’s a *not* First Amendment case. It’s about the regulation of *unprotected* speech—speech that is obscene as to minors—about which the First Amendment has nothing to say (at least, when the state regulates its distribution to minors).

Id.

106. See *Stevens*, 130 S. Ct. at 1586.

107. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (citing *Stevens*, 130 S. Ct. at 1586).

108. See *Winters v. New York*, 333 U.S. 507, 519–20 (1948).

109. See *Brown*, 131 S. Ct. at 2735 (“Our opinion in *Winters*, which concluded that the New York Statute failed a heightened vagueness standard applicable to restrictions upon speech entitled to First Amendment protection, made clear that violence is not part of . . . obscenity. . . .”) (citations omitted).

110. *Id.*

111. *Id.* at 2747. Although Justice Alito concluded that the California violent video game law failed to provide the fair notice that the Constitution requires, he still recognized that the Court was wrong in saying that the holding in *Stevens* controls this case for three reasons. *Id.* at 2746–47.

to what Justice Alito advocates, there are two additional reasons why *Stevens* does not apply. First, the subject of the statute in *Stevens* related to the selling of animal cruelty depictions to all individuals, whereas the statute in *Brown* involved targeted acts of children actively engaging in and creating violence through video games.¹¹² The statute in *Brown* targeted a much narrower audience—children, while also serving a much more important purpose—their well-being.¹¹³ Second, unlike the statute in *Stevens*, which was deemed overly broad,¹¹⁴ the California statute is not overly broad because it was designed to target only games with a rating of M or higher.¹¹⁵

The majority in *Brown* also improperly applied *Winters*.¹¹⁶ In *Winters*, the Court refused to classify violence as obscenity because the statute failed a heightened vagueness standard.¹¹⁷ In *Brown*, however, the statute could satisfy a heightened vagueness standard.¹¹⁸ To illustrate, the statute in *Winters* dealt with dissemination of printed material made up of criminal news,¹¹⁹ where because of its subjective nature, a distributor might not know exactly which story he may or may not be punished for.¹²⁰ To the contrary, the statute in

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. . . . Second, *Stevens* does not support the proposition that a law like the one at issue must satisfy strict scrutiny. . . . Third, *Stevens* expressly left open the possibility that a more narrowly drawn statute targeting depictions of animal cruelty might be compatible with the First Amendment.

Id. (citations omitted).

112. *See Brown*, 131 S. Ct. at 2762 (Breyer, J., dissenting) (“[I]t is more difficult to mount a facial First Amendment attack on a statute that seeks to regulate activity that involves action as well as speech.”) (citing *Broadrick v. Oklahoma* 413 U.S. 601, 614 (1973)).

113. *See Brown*, 131 S. Ct. at 2732–33.

114. *United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010).

115. *See Cross*, *supra* note 17, at 313 (noting that “supporters of the California bill, including James Steyer, the founder of Common Sense Media who played a major role in pushing the bill, have made it clear that the games affected would be ‘those rated M or higher’”).

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

117. *Id.* *See also supra* note 66 and accompanying text.

118. *See infra* notes 119–22 and accompanying text.

119. *See supra* note 64 and accompanying text.

120. *See Winters*, 333 U.S. at 519–20 (“[I]t does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition.”).

Brown involved the restriction of extremely violent video games.¹²¹ In such cases the manufacturers or distributors of the video games can easily identify the games they will or will not be punished for due to the rating system already in place by the Entertainment Software Rating Board (ESRB).¹²² Therefore, the reason the Court did not treat violence as obscenity in *Winters* is not present in *Brown*.

By basing its opinion on *Stevens* and *Winters* in deciding that violence does not fit within *Ginsberg*,¹²³ the majority's reasoning is illogical and lacks common sense.¹²⁴ A more logical approach would have been analyzing whether the purpose of the bill was based on offensiveness, similar to that of the Seventh Circuit in *American Amusement Machine*.¹²⁵ Instead, the Court used an arbitrary cut-off line between violence and nudity based on historical tradition¹²⁶ that

121. See *supra* note 9 and accompanying text.

122. See Cross, *supra* note 17, at 309–10.

Alarmed by the threat of congressional action and concerned about the ability of consumers to make informed choices, the major producers of video games united to form the Entertainment Software Association (“ESA”). These producers also created the Entertainment Software Rating Board (ESRB) to “independently appl[y] and enforc[e] ratings, advertising guidelines, and online privacy principles adopted by the computer and video game industry”. . . . Using a system based on the MPAA’s ratings for movies, the ESRB assigns a letter rating to a game based on its appropriateness for a given age group. The ESRB goes a step further than the MPAA, providing more than thirty specific content descriptors that indicate which aspects of the game might raise concerns. These descriptors not only provide warning if a game includes violence, strong language, or use of controlled substances, they further differentiate the degree and quality of the content.

Id. (alterations in original) (footnotes omitted).

123. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2735 (2011) (“The California Act . . . does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. . . . Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.”).

124. See *id.* at 2747 (Alito, J., concurring) (“As a result of today’s decision, a State may prohibit the sale to minors of what *Ginsberg* described as ‘girlie magazines,’ but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.”).

125. See *supra* notes 70–76 and accompanying text.

126. *Brown*, 131 S. Ct. at 2736 (explaining that California would have fared better in the creation of a new exception for “violent-as-to-minors” speech “if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none”).

was grounded on inconsistent case law with respect to both obscenity and minors alike.¹²⁷

After classifying the statute as a content-based regulation, the Supreme Court struck it down for failing to be “justified by a compelling government interest and . . . narrowly drawn to serve that interest.”¹²⁸ If the majority had extended the *Ginsberg* standard to cover violence, the statute, similar to other statutes targeting obscenity, would not have been subjected to strict scrutiny.¹²⁹ In other words, the statute’s failure to overcome strict scrutiny would not have mattered.¹³⁰ Nonetheless, a detailed look into the Court’s reasoning is necessary because aspects of the strict scrutiny analysis are flawed.

Like the Court in *Playboy*, the majority correctly determined that because California lacked evidence, it could not establish a compelling government interest for its restriction on violent video games.¹³¹ The majority concluded that there was not an “actual problem” because California failed to show a direct causal link between violent video games and harm to minors.¹³² Like Justice Breyer, one could attempt to undercut the majority¹³³ by pointing out

127. See *supra* notes 52–53 and accompanying text.

128. See *Brown*, 131 S. Ct. at 2738.

129. See *R.A.V. v. St. Paul, Minnesota*, 505 U.S. 377, 387 (1992) (explaining that “[t]here is no problem whatever, for example, with a State’s prohibiting obscenity (and other forms of proscribable expression) . . . for . . . it would not discriminate on the basis of content”). See also *supra* note 78 and accompanying text.

130. See SAUNDERS, *supra* note 32, at 61 (“The most important benefit derived from the inclusion of excessively violent materials within the obscene is that there would no longer be a need to meet strict scrutiny to justify regulation of such materials.”).

131. *Brown*, 131 S. Ct. at 2738–39 (noting that “California relie[d] primarily on research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children.”).

132. See *id.* at 2739. All California could show was “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.” *Id.* (footnote omitted). Moreover, Dr. Anderson’s testimony in a similar lawsuit admitted that the effects found from children’s exposure to violent video games are the same effects found when children watch cartoons starring Bugs Bunny or the Road Runner. *Id.*

133. *Brown*, 131 S. Ct. at 2769 (Breyer, J., dissenting). Rationalizing why there are conflicting studies:

Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions But associations of public health professionals who do possess . . . expertise have reviewed many of these studies and found a significant risk that violent

the numerous scientific studies that support California's views.¹³⁴ However, this argument is likely weak at best. For example, Justice Breyer's suggestion would create a balancing test,¹³⁵ an idea that was specifically rejected by *Stevens*.¹³⁶ In addition, the studies are unlikely to be differentiated from the lack of evidence in *Playboy*.¹³⁷ The studies relied on by California in *Brown* have been rejected outright by every court to consider them,¹³⁸ analogous to this lack of evidence in *Playboy*.¹³⁹

Although the majority correctly determined that California lacked evidence to prove there was an actual problem involving violent video games, it was wrong in two other instances. First, the majority erroneously implied that the voluntary rating system¹⁴⁰ for video games was a less restrictive alternative at least as effective as California's statute.¹⁴¹ Specifically, the majority pointed to a 2009 study by the Federal Trade Commission (FTC),¹⁴² which found that

video games, when compared with more passive media, are particularly likely to cause children harm.

Id.

134. *See Brown*, 131 S. Ct. at 2769 (noting over one thousand studies point to a causal connection between media violence and aggressive behavior in some children).

135. *Brown*, 131 S. Ct. at 2766 (Breyer, J., dissenting).

Rather, [than] applying [strict scrutiny mechanically], I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying "compelling interests," the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, "the statute works speech-related harm" [] out of proportion to the benefits that the statute seeks to provide.

Id.

136. *See Stevens*, 130 S. Ct. at 1577, 1586.

137. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000).

138. *See Brown*, 131 S. Ct. at 2739. *See also Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 832 (M.D. La. 2006) ("It appears that much of the same evidence has been considered by numerous courts and in each case the connection was found to be tenuous and speculative.").

139. *See supra* notes 90–91 and accompanying text.

140. *See supra* note 115 and accompanying text.

141. *See Brown*, 131 S. Ct. at 2740–41.

142. FTC, REPORT TO CONGRESS, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN (Dec. 2009), available at <http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf>.

This report documents the current state of marketing of violent entertainment products to children based upon a review of documents from industry members and Commission monitoring of television, print, and Internet advertising. It also assesses pertinent revisions to industry self-regulatory policies since the last report . . . This report also

the video game industry outpaced the movie and music industries in their respective voluntary rating systems.¹⁴³ Thus, the majority concluded that the “system does much to ensure that minors cannot purchase seriously violent video games on their own” and in turn is a less restrictive alternative.¹⁴⁴

However, as Justice Breyer points out, “this voluntary system has serious enforcement gaps” and is not a less restrictive alternative due to its failure to adequately prevent minors from buying violent games.¹⁴⁵ In addition, this case differs significantly from *Playboy*, where a less restrictive alternative was accurately found.¹⁴⁶ In *Playboy*, the Government attempted to impose a “blanket ban” on television shows, even for adults, in order to protect children.¹⁴⁷ This is distinguishable from *Brown* because California was strictly targeting children. Therefore, because the ESRB rating system in place is not equally as effective and the California statute is not a blanket ban on adults’ freedom of speech, the majority should have at least held that it passes muster under this prong of the strict scrutiny standard.

Next, the majority in *Brown* incorrectly held that the statute was both underinclusive and overinclusive.¹⁴⁸ The majority pointed out two reasons for classifying the statute as underinclusive. The first reason is that California only singled out sellers of video games and not booksellers, cartoonists, and movie-producers, despite the fact

provides the results of the Commission’s 2009 undercover shopping survey on the progress of the three entertainment sectors in enforcing policies restricting children’s access to R-rated movies and unrated DVDs, music with Parental Advisory Labels, and M-rated games.

Id.

143. *Brown*, 131 S. Ct. at 2741 (citing the 2009 FTC Report to Congress, *supra* note 142). Specifically, the Court noted that it outpaced the other industries in: “(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children’s access to mature-rated products at retail.” *Id.*

144. *Id.* at 2741.

145. *Id.* at 2770 (Breyer, J., dissenting) (explaining that in the same 2009 FTC report that the majority looks to, “20% of those under 17 are still able to buy M-rated video games, and breaking down sales by store, one finds that this number rises to nearly 50% in the case of one large national chain.”).

146. *See supra* note 88 and accompanying text.

147. *See supra* note 89 and accompanying text.

148. *See Brown*, 131 S. Ct. at 2740–42.

that they also subject children to violent speech.¹⁴⁹ The second reason is that “[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.”¹⁵⁰ The majority also asserted that the statutory coverage is overinclusive 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.”¹⁵¹

The underinclusive and overinclusive rationales articulated by the majority both can be critiqued using reasoning similar to Justice Alito’s concurring opinion. Specifically, he suggested that the interactive nature of video games might well be different from other types of media.¹⁵² Thus, unlike the ordinances in *Hialeah*,¹⁵³ the statute in *Brown* was not underinclusive because it had a valid reason to single out the suppliers of violent video games since such games differ from other types of media.¹⁵⁴ Likewise, there are two separate justifications explaining why the statute should not be rendered underinclusive simply because it allows children to play violent video games if one parent approves. First, the statute is modeled after the New York statute in *Ginsberg* allowing children to possess sexual

149. *Id.* at 2740.

150. *Id.* (explaining that there are not “requirements as to how this parental or avuncular relationship is to be verified; apparently the child’s or putative parent’s, aunt’s, or uncle’s say-so suffices, which is not how one addresses a serious social problem”).

151. *Id.* at 2741.

152. *Id.*

. . . In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. . .

. . . There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.

Id.

153. *See supra* note 96 and accompanying text.

154. *See supra* note 145 and accompanying text.

material if a parent approves.¹⁵⁵ Second, as Justice Thomas's dissent points out, there are numerous laws in place that impose restrictions on minors unless a parent approves.¹⁵⁶

Lastly, categorizing the statute as overinclusive because some parents may not care if their children purchase violent video games is inaccurate. Unlike in *Hialeah*,¹⁵⁷ this flat prohibition is necessary because of the ESRB and parents' failure to adequately monitor violent video game purchases.¹⁵⁸ Furthermore, as recognized in *Ginsberg*, "society's . . . interest in protecting the welfare of children justif[ies] [a] reasonable regulation of the sale of material to them."¹⁵⁹ Parents may not care if their children look at pictures of sex or nudity, yet children are still prohibited from purchasing them.

Arguments can be made that the statute in *Brown* was the least restrictive alternative and was narrowly tailored (not overinclusive or underinclusive). However, due to the lack of evidence presented, an argument cannot be made that the statute can meet the compelling government interest prong. This failure to meet the compelling government interest prong resulted in the Supreme Court striking down the statute.¹⁶⁰ According to Justice Breyer, the *Brown* decision has created a serious "anomaly" in First Amendment law.¹⁶¹ To illustrate the law as it currently stands, a minor¹⁶² is now prohibited under *Ginsberg* from buying a *Playboy* at a convenient store, even though the majority of the magazine consists of articles albeit minor nudity. However, this same minor is legally allowed to walk into a Gamestop or Bestbuy and purchase a game such as *JFK Reloaded*.¹⁶³

155. See *supra* note 50 and accompanying text.

156. See *Brown*, 131 S. Ct. at 2758 (Thomas, J., dissenting) (noting that boys could not enlist in the military without parental consent and laws that set age limits restricting marriage without parental consent).

157. See *supra* note 96 and accompanying text.

158. See *supra* note 145 and accompanying text.

159. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. Ct. App. 1965) (Flud, J., concurring)).

160. *Brown*, 131 S. Ct. at 2742.

161. See *supra* note 24 and accompanying text.

162. "'Minor' means any natural person who is under 18 years of age." CAL. CIV. CODE § 1746(a) (2009).

163.

The stated goal of *JFK Reloaded* is to debunk assassination conspiracy theories by buttressing the Warren Commission's conclusion that Lee Harvey Oswald acted alone

Does this make any sense at all? Yes, according to the majority's opinion in *Brown*.¹⁶⁴ However, the Supreme Court in *Brown* should have never allowed this "anomaly" to occur, and the Constitution should be interpreted correctly.¹⁶⁵

III. PROPOSAL

There are two possible solutions the Supreme Court in *Brown* should have employed to resolve the inconsistencies attached to minors' First Amendment rights, instead of worsening the problem and creating the current "anomaly." It should be noted that neither solution advocates for any change to the current obscenity laws with respect to adults. The first solution treats violence as obscenity for minors, using the *Ginsberg* standard. The second solution advocates for the Supreme Court to overrule its decision in *Ginsberg*, thereby abolishing the obscenity-for-minors standard. Both these solutions are similar in that each would help create a more concrete First Amendment standard for minors, eliminating the "anomaly" that now exists. However, both these solutions are much different. The first would lead to greater censorship for minors, whereas the second would virtually eliminate censorship for minors.

A. *Treat Violence and Obscenity with Respect to Minors the Same*

Distinctions between children and adults are deeply rooted within case law interpreting the Constitution because of the need to protect

and fired only three bullets. So, the game places you in the precise place where Oswald stood—the sixth-floor window of the Texas Schoolbook Depository—and challenges you to re-create his three shots. . . . The closer you get to matching [Oswald's] three trajectories, the closer you get to a perfect score of 1,000. (The game designers are also offering a cash prize to the player who gets the highest score.) . . .

. . . When [you] finally manage[] to kill JFK and watch[] his head blow open[,] . . . he flop[s] forward like a rag doll . . .

Clive Thompson, *A View to a Kill: JFK Reloaded is Just Plain Creepy*, SLATE (Nov. 22, 2004, 6:34 PM), http://www.slate.com/articles/technology/gaming/2004/11/a_view_to_a_kill.html.

164. See *Brown*, 131 S. Ct. at 2735.

165. See *supra* notes 24–25 and accompanying text.

the well-being of our country's children.¹⁶⁶ This solution follows that view closely because it treats violence as obscenity for minors. This solution mirrors Justice Breyer's dissent¹⁶⁷ because it places violence within the context of the *Ginsberg* obscenity-for-minors standard.¹⁶⁸ It differs however, in that it focuses on the offensiveness of violence, rather than the resulting harm of violence.¹⁶⁹

Comparing the similarities between nudity and violence is at the heart of this solution. The Supreme Court in *Roth* stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."¹⁷⁰ Clinging to this standard by which obscenity has been judged since its inception, how is extreme violence any different from nudity? How is there no redeeming social importance when a minor looks at a picture containing nudity, but there exists redeeming social importance when that minor reenacts the assassination of John F. Kennedy?¹⁷¹ Moreover, is the picture of mere nudity more repulsive or offensive¹⁷² than the assassination reenactment? The contradictions exemplified by these questions show the non-sensible view in the majority's opinion. Specifically, it fails to recognize how different modern-day media is from 1968 media. In 1968, protecting children from images of nudity may have been a priority for concerned parents and legislatures regarding the development and well-being of children.

166. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young."); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."); *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors."); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The well-being of its children is . . . a subject within the State's constitutional power to regulate."); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("[The] power of the state to control the conduct of children reaches beyond the scope of its authority over adults.").

167. *Brown*, 131 S. Ct. at 2761 (Breyer, J., dissenting).

168. See *supra* notes 46–51 and accompanying text.

169. This approach uses reasoning similar to that of Judge Posner in *American Amusement Machine Ass'n*. See *supra* notes 71–74 and accompanying text.

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

171. See *supra* note 163 and accompanying text.

172. See *supra* note 73 and accompanying text.

But today, with the magnitude of children¹⁷³ playing extremely violent video games,¹⁷⁴ it would hardly be logical to say extreme violence is of less concern to parents than nudity.

Although California's purpose for its statute was the underlying harm caused by violent video games,¹⁷⁵ the majority should have looked beyond its purpose. The Court instead should have placed an emphasis on the fact that violence is just as offensive, if not more, than nudity. Should different standards exist for two forms of speech that are equally as offensive? The majority says yes based on an outdated, 1968 *Ginsberg* standard that existed before the current obscenity law even took shape in *Miller*.¹⁷⁶

A solution of this nature would have created a consistent First Amendment standard for minors and an observance of the long-standing tradition in protecting the well-being of children.¹⁷⁷ Moreover, it would have eliminated the Court's concern about satisfying strict scrutiny.¹⁷⁸ Nonetheless, it does suffer from a wave of judicial opposition.¹⁷⁹ Therefore, even if the majority did not place controlling weight on *Stevens*, it may still have found a different reason not to treat violence as obscenity, and thus, the statute would fail to satisfy strict scrutiny.¹⁸⁰

173. See *supra* note 4 and accompanying text.

174. See, e.g., *supra* note 6 and accompanying text.

175. See *supra* note 8 and accompanying text.

176. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734–35 (2010).

177. See *Brown*, 131 S. Ct. at 2760 (Thomas, J., dissenting) (“[T]he tradition of parental authority is not inconsistent with our tradition of individual liberty . . . [and] legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for full growth and maturity that make eventual participation in a free society meaningful and rewarding.”) (quoting *Bellotti v. Baird*, 443 U.S. 622, 638 (1979)). See also *supra* note 166 and accompanying text.

178. See SAUNDERS, *supra* note 32, at 201 (“The recognition that material may be sufficiently violent so as to be obscene, removes [the] seemingly insurmountable legislative hurdles.”).

179. Post, *supra* note 19, at 38 (stating that courts have been unanimous in not treating violence as obscenity, thereby applying strict scrutiny and striking down similar statutes as violating the First Amendment).

180. *Id.* at 56 (“[A]ll the fighting [in *Brown*], about whether or not this statute falls within ‘the *Ginsberg* “obscene-as-to-minors” exception,’ were entirely irrelevant to the outcome of the case; under this long line of post-*Ginsberg* precedent, the statute would receive (and cannot satisfy) strict First Amendment scrutiny . . .”).

B. Abolish the Obscenity-for-Minors Standard

Acknowledging the reluctance by courts to treat violence as obscenity, this second proposal is an alternative solution that the majority in *Brown* should have applied. It overrules *Ginsberg* and abolishes the obscenity-for-minors standard. This solution may seem to run afoul of mainstream modern society, which stresses the importance of protecting children from offensive content.¹⁸¹ However, if one believes that extreme violence is no more offensive than mere nudity, this solution no more adversely affects the well-being of children than the current law does. The same obscenity standard under *Miller* for adults would remain unchanged. For example, children would be shielded from extreme sexual conduct, but not from nudity or violence. Thus, it creates a much more consistent First Amendment standard for minors, and brings an end to the continuous legislation proposed and the lengthy court proceedings that ensue in response.¹⁸²

Similar to the previous solution, this solution recognizes that the shielding of children from mere nudity and not extreme violence is an “anomaly” that must be corrected. Advocating that the Supreme Court should have overruled *Ginsberg* “is a significant political and legal event . . . because it represents a dramatic form of legal change.”¹⁸³ Most notably, if *Ginsberg* were to be overruled, there would be no separate First Amendment standard dealing with obscenity for minors.¹⁸⁴ Instead, the current First Amendment standard for obscenity as to adults would control, ending the tireless

181. See *U.S. Public Says Regulate Violent Video Games, the Focus of Brown v. Entertainment Merchants*, FAIRLEIGH DICKINSON UNIV. (June 6, 2011), <http://publicmind.fdu.edu/2011/vmerchants> (“Four of seven voters say states should have the ‘right to regulate the sale of violent video games in order to protect people under 18, the same way states regulate the sale of cigarettes, alcohol, and pornography’ to protect minors. Political independents are the most supportive of state power to regulate these games, with two thirds (68%) favoring this authority.”).

182. See *supra* note 19 and accompanying text for a list of court cases that have revolved around the First Amendment and violent video games.

183. John F. Spriggs, *Explaining the Overruling of Supreme Court Precedent*, 46 J. POL. 1091, 1092 (2001).

184. It must be noted that the solution this proposal advocates for in overruling *Ginsberg* would only create a separate First Amendment standard for minors with respect to obscenity.

amount of litigation that arises in connection with minors' First Amendment rights because of *Ginsberg*.¹⁸⁵

Some may argue that overruling *Ginsberg* is too dramatic of a change in First Amendment law, and that following prior precedent, or *stare decisis*, "is not an inexorable command."¹⁸⁶ Accordingly, a decision is properly overruled where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking."¹⁸⁷ Following this line of thought, the decision in *Ginsberg* came down in 1968,¹⁸⁸ five years before the current *Miller* obscenity standard¹⁸⁹ was developed containing nothing about minors.¹⁹⁰ The basis for the decision in *Miller* was to limit obscenity because of the dangers inherent in censorship.¹⁹¹ It is nearly impossible to fathom that had *Ginsberg* been decided after *Miller*, the Court would have developed a lesser standard for minors, thereby allowing more censorship.

Moreover, "when governing decisions are unworkable or are badly reasoned, 'th[e] Court has never felt constrained to follow precedent.'"¹⁹² Classifying nudity as unprotected speech while ignoring violence based solely on *Ginsberg* is hardly logical reasoning. In following *Ginsberg*, the Court is consistent with precedent but, as demonstrated by the majority in *Brown*, is unworkable. If the Court overrules *Ginsberg*, future legislatures could plainly see that minors are entitled to significant First Amendment rights (the same as adults). Accordingly, it would stop legislatures from wasting time and resources by continuing to pass bills that will never pass constitutional muster. Most importantly however,

185. See *supra* note 19 and accompanying text.

186. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

187. *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). See also *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 618 (2007) (Scalia, J., concurring) ("Today's opinion is, in one significant respect, entirely consistent with our previous cases Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently.").

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

189. See *supra* note 45 and accompanying text.

190. See *Miller v. California*, 415 U.S. 15 (1973).

191. See *supra* note 44 and accompanying text.

192. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allright*, 321 U.S. 649, 665 (1944)).

overruling *Ginsberg* would fix the current “anomaly” in minors’ First Amendment law and finally settle the law correctly.¹⁹³

CONCLUSION

The Constitution needs to be interpreted correctly,¹⁹⁴ and there thus needs to be a consistent First Amendment standard for minors. The current “anomaly” that is minors’ First Amendment rights could have been resolved in *Brown* by either treating violence as obscenity or overruling *Ginsberg*. Both solutions are more logically sound and make more common sense than the current law, yet the Supreme Court has failed to implement either solution. Video games remain as violent¹⁹⁵ and as popular as ever.¹⁹⁶ In response, concerned legislatures and parents have sought to impose regulations.¹⁹⁷ Up until this point these attempts have failed in every level of the judicial system, most recently with the Supreme Court in *Brown*. Yet, because the majority in *Brown* failed to develop a clear First Amendment standard for minors, concerned legislatures will continue trying to pass similar bills in the same circular process, amassed with uncertainty.

193. See *supra* note 25 and accompanying text.

194. See *supra* note 25 and accompanying text.

195. See, e.g., *supra* note 6 and accompanying text.

196. See *supra* note 4 and accompanying text.

197. See *supra* note 7 and accompanying text.