

Sex, Lies, and Videogames: *Brown v. Entertainment Merchants Association*

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In *Brown v. Entertainment Merchants Association*, a decision that veteran Supreme Court watcher Linda Greenhouse called “the most surprising decision”¹ of the term (and the one that also received Greenhouse’s “most unusual judicial performance” award, for Justice Stephen Breyer’s dissenting opinion), the Supreme Court (7-2) struck down California’s prohibition on the sale of violent videogames to minors on the grounds that it offended First Amendment protections for the freedom of speech.² Whether or not Greenhouse is correct—I think she’s on to something, a point to which I’ll return below—the case presents a fascinating snapshot of the state of First Amendment doctrine in the early years of the 21st century, and contains enough peculiarities and doctrinal oddities to keep law professors and their students busy for years to come.

To place the decision in its correct context, I’ll begin with a brief review of “the somewhat tortured history of the Court’s obscenity decisions”;³ though *Brown* is not explicitly about “obscenity,” the decision rests entirely on, and is inexplicable without reference to, those decisions. Next, I’ll examine each of the four opinions issued by the Court—Justice Antonin Scalia for the majority (joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan), Justice Samuel Alito (joined by Chief Justice John

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¹ Linda Greenhouse, A Supreme Court Scoreboard, N.Y. Times Opinionator, July 13, 2011, <http://opinionator.blogs.nytimes.com/2011/07/13/a-supreme-court-scorecard/>.

² *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729 (2011).

³ *Miller v. California*, 413 U.S. 15, 19 (1973).

Roberts) concurring in the judgment, and the two dissenting opinions by Justices Clarence Thomas and Stephen Breyer—in some detail, for they constitute a rather remarkable collection. In the final section I'll discuss some of the potential implications of the Court's decision for First Amendment doctrine and for future battles about the regulation of speech.

I. The Law of the Obscene

As something of an outsider to the study of the First Amendment,⁴ it has always struck me as not a little odd that obscenity doctrine plays such a large role in our First Amendment jurisprudence. I will leave for future historians and sociologists to ponder the fact that a significant segment of our First Amendment doctrine has developed in the context of attempts to regulate and suppress sexually themed speech: the “obscene,” the “indecent,” the “pornographic.” My strong suspicion (though I have not, I admit, confirmed this) is that other developed legal systems around the world do not spend as much time as ours limning the boundaries separating these categories, or considering these questions.

But be that as it may, the general contours of obscenity doctrine are well-known, well-established, and fairly straightforward. As a general matter, as every first-year law student dutifully learns, “the government[’s] power to restrict expression because of its message, its ideas, its subject matter, or its content”⁵ is severely limited by

⁴ I should note at the outset that questions about the First Amendment, and constitutional law generally, are at the margins of my own scholarly interests. In the fields in which I'm most comfortable—Internet and intellectual property law—one does, of course, come across a fair number of hard constitutional (especially First Amendment) questions these days, so I am a good deal more familiar with that doctrine than I am with, say, the Bankruptcy Code, the Administrative Procedure Act, or the law of search and seizure. But I generally come to these constitutional questions more as an advocate—as in this case, where, along with several colleagues, I submitted an amicus brief to the Court supporting the respondents. See Brief of First Amendment Scholars (Professors Cole, Karst, Post, Redish, Van Alstyne, Varat and Winkler) as Amici Curiae in Support of Respondents, *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448). I have described my own views about the First Amendment as being “pretty simple” and “absolutist,” see David G. Post, *In Search of Jefferson's Moose: Notes on the State of Cyberspace* 188 (2009), and I candidly acknowledge that the many intricacies of much constitutional doctrine (and scholarship) often elude me.

⁵ *Brown*, 131 S. Ct. at 2733 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

the “strict scrutiny” such efforts will receive in the courts. The government’s burden of justification in such cases—to demonstrate that it has “a compelling interest” in achieving the goal it is pursuing, that it has taken action “narrowly tailored” to advance that interest, and that there are no “less speech-restrictive alternatives” available to accomplish that purpose as effectively⁶—is not only substantial, it is well-nigh insurmountable.⁷ “Strict in theory, fatal in fact,”⁸ as we were taught in law school.

Regulation of “obscene” speech, however, gets no special First Amendment-imposed scrutiny at all. Though it may indeed be “speech,” obscene speech stands outside “the freedom of speech” that the First Amendment protects:

From 1791 to the present, . . . the First Amendment has “permitted restrictions upon the content of speech in a few limited areas,” and has never “include[d] a freedom to disregard these traditional limitations.” *United States v. Stevens*, [130 S. Ct. 1577, 1584 (2010)] (quoting *R. A. V. v. St. Paul*, 505 U. S. 377, 382–83 (1992)). These limited areas—such as obscenity, *Roth v. United States*, 354 U. S. 476, 483 (1957), incitement, *Brandenburg v. Ohio*, 395 U. S. 444, 447–49 (1969) (per curiam), and fighting words, *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942)—represent “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” *id.*, at 571–72.⁹

So the government is free, subject only to whatever constraints arise elsewhere (that is, outside the First Amendment), to regulate,

⁶ *Id.* at 2738; see also *Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004).

⁷ See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000) (“It is rare that a regulation restricting speech because of its content will ever be permissible.”); *Brown*, 131 S. Ct. at 2747 (Alito, J., concurring) (describing strict scrutiny burden as “perhaps insurmountable”).

⁸ See *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

⁹ *Brown*, 131 S. Ct. at 2733 (some internal citations omitted); see also *Ashcroft*, 535 U.S. at 574 (“Obscene speech, for example, has long been held to fall outside the purview of the First Amendment.”) (citing *Roth v. United States*, 354 U.S. 476, 484–85 (1957)).

or to prohibit entirely, the production, sale, and distribution—though not, interestingly, the possession¹⁰—of “obscene” material.

The rationale for this exception? In *Roth v. United States*, the first case squarely holding that obscenity stands outside the First Amendment, the Court, speaking through Justice William Brennan, explained it as follows:

The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish “any filthy, obscene, or profane song, pamphlet, libel or mock sermon” in imitation or mimicking of religious services. Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266 [(1952)]. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But 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

¹⁰ *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (mere private possession of obscene material cannot constitute a criminal offense).

them is clearly outweighed by the social interest in order and morality. . . .”¹¹

Notice the two separate doctrinal justifications for the obscenity exception: the historical (“In light of this history, . . . At the time of the adoption of the First Amendment . . .”) and the sociological (obscenity is “no essential part of any exposition of ideas” and is of “slight social value as a step to truth”).

Predictably enough, a good deal of the early confusion in the obscenity cases centered on the definitional question: What is “obscene” speech? And who gets to decide what is, or is not, obscene? After a decade or so “during which [the] Court struggled with the intractable obscenity problem,”¹² and despite “considerable vacillation over the proper definition of obscenity,”¹³ and notwithstanding Justice Potter Stewart’s oft-quoted aphorism (“I know it when I see it”),¹⁴ the Court ended “over a decade of turmoil”¹⁵ in *Miller v. California*,¹⁶ promulgating the now-familiar formula:

Miller set forth the governing three-part test for assessing whether material is obscene and thus unprotected by the First Amendment: “(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.”¹⁷

The *Miller* formula has two noteworthy features. First, the Court’s characterization of it as a “test for assessing whether material is obscene and thus unprotected by the First Amendment” is not quite

¹¹ *Roth v. United States*, 354 U.S. 476, 482–85 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (internal citations omitted)).

¹² *New York v. Ferber*, 458 U.S. 747, 754 (1982) (quoting *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part)).

¹³ *Id.*

¹⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to the category of “hard-core” pornography).

¹⁵ *Ashcroft*, 535 U.S. at 574.

¹⁶ *Miller*, 413 U.S. 15 (1973).

¹⁷ *Ashcroft*, 535 U.S. at 574 (quoting *Miller*, 413 U.S. at 24).

accurate. 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. It's a meta-definition, if you will. It enables you to determine, if the government is punishing, or threatening to punish, you for the content of your photograph, or magazine, or video, whether the particular definition of prohibited speech contained in "applicable state law" under which such punishment is being imposed comports with the Constitution; it asks, that is, whether there was a finding that "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest," and that the work depicts "sexual conduct specifically defined by the applicable state law," and that it does so "in a patently offensive way," and so on.

Second, by declaring that speech can be deemed "obscene" only if "the average person, applying contemporary *community standards*" deems it to be so, the *Miller* standard clearly contemplates that First Amendment protection will expand and contract as one moves from one community to another. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity,"¹⁸ and it is "neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."¹⁹ This feature of obscenity doctrine (though some might deem it a bug, not a feature) has led us into some difficult doctrinal thickets, as legislatures and courts have struggled to define the relevant "community" whose standards apply to an obscenity determination in the Internet age.²⁰

But putting those complications aside, *Roth-Miller* draws a fairly clear line between the protected and the unprotected: *Roth* tells us

¹⁸ *Miller*, 413 U.S. at 33.

¹⁹ *Id.* at 32.

²⁰ See *Ashcroft*, 535 U.S. 564 (2002), where the Court struggled, in a series of fractured opinions, to define the correct interpretation of "community standards" regarding Internet speech.

that speech is either “in” (and subject to the full panoply of First Amendment protection against content regulation) or “out” (in which case the First Amendment is indifferent to its regulation), and *Miller* tells us how the line between in and out is to be drawn.

That’s where things stood—and where, by and large, they still stand—with respect to the obscene. Considerable confusion was introduced into this simple scheme early on, however, as the Court confronted attempts to regulate the distribution of the “nasty-but-not-quite-obscene” to minors. Most people, I suspect, would agree that there is material that is not obscene but that we might nonetheless not like to see in the hands of nine-year-olds. Rigid line-drawing of the *Roth-Miller* variety, however, doesn’t lend itself terribly well to adjustment for context, and the Court’s struggles with this issue have led to a great deal of doctrinal confusion—to which, as we’ll see below, the *Brown* decision may have contributed its fair share.

Ginsberg v. New York,²¹ one of the earliest of these “distribution to minors” cases, is the source of a great deal of that confusion and of a great deal of subsequent mischief. In *Ginsberg*, the owner of a Bellmore, Long Island, luncheonette had been convicted of selling “girlie magazines”—concededly *not* obscene²²—to a 16-year-old boy in violation of a New York statute that made it unlawful “knowingly to sell . . . to a minor . . . (a) any picture . . . which depicts nudity . . . and which is harmful to minors, [or] (b) any . . . magazine . . .

²¹ 390 U.S. 629 (1968). As Justice Breyer points out, *Ginsberg* is “often confused with a very different, earlier case, *Ginzburg v. United States*, 383 U.S. 463 (1966).” *Brown*, 131 S. Ct. at 2763 (Breyer, J., dissenting).

²² The material in question “contained pictures which depicted female “nudity” in a manner defined in subsection 1(b) [of the statute], that is “the showing of . . . female . . . buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . . ,” and (2) that the pictures were “harmful to minors” in that they had, within the meaning of subsection 1(f) “that quality of . . . representation . . . of nudity . . . [which] . . . (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.” *Ginsburg*, 390 U.S. at 632–33. In declaring that these materials fall outside the bounds of the “obscene,” the Court cited *Redrup v. New York*, 386 U.S. 767 (1967), a case holding that the paperback books *Lust Pool*, *Shame Agent*, *High Heels*, and *Spre*, as well as the magazines *Gent*, *Swank*, *Bachelor*, *Modern Man*, *Cavalcade*, *Gentleman*, *Ace*, and *Sir*, were not “obscene” and unprotected.

which contains [such pictures] and which, taken as a whole, is harmful to minors."²³

The Court—speaking, as in *Roth*, through Justice Brennan—upheld the conviction, though its opinion is somewhat less than pellucid in regard to its reasons for doing so. Although there is some language in the majority opinion that suggests that the decision rested on a ground involving lesser First Amendment rights for minors,²⁴ most of the opinion can be read as “adjust[ing] the definition of obscenity,”²⁵ placing additional material into the “obscenity” category (and therefore entirely outside First Amendment protection). The Court endorses (though it never quite articulates or explains) the theory of “variable obscenity”:

Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.²⁶

²³ Ginsberg, 390 U.S. at 631–32.

²⁴ See, e.g.:

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as § 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. [W]e cannot say that the statute invades the area of *freedom of expression constitutionally secured to minors*.

Id. at 636–37 (emphasis added).

²⁵ *Id.* at 638.

²⁶ *Id.* at 636 (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966):

The concept of variable obscenity is developed in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960). At 85 the authors state: “Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.”

Id. at 635 n.4.

Though they are not obscene, these “girlie magazines,” the Court seemed to be saying, are “not . . . constitutionally protected”—at least, as far as their dissemination to children is concerned. The Court described its action as “sustain[ing] state power to *exclude material defined as obscenity*” by the New York statute.²⁷ So just as New York may prohibit the sale or distribution *to anyone* of material that is obscene (*as to everyone*), subject only to non-First-Amendment rational basis review, so too may it prohibit the sale and distribution *to minors* of material that is obscene (*as to minors*), subject only to that rational basis review.

Two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, *at least if it was rational for the legislature to find that the minors’ exposure to such material might be harmful*. First of all, constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The State also has an independent interest in the well-being of its youth . . . “to protect the welfare of children,” and to see that they are “safe-guarded from abuses” which might prevent their “growth into free and independent well-developed men and citizens.”²⁸

The “only question,” then, was “whether the New York Legislature might *rationaly conclude*, as it has, that exposure to the materials proscribed by § 484-h constitutes such an ‘abuse’” from which minors should be safeguarded.²⁹

[O]bscenity is not protected expression. . . . To sustain state power to *exclude material defined as obscene by § 484-h* 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*. . . . [We] cannot say that § 484-h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no *rational relation* to the objective of safeguarding such minors from harm.³⁰

²⁷ *Id.* at 641 (emphasis added).

²⁸ *Id.* at 639–41 (emphasis added).

²⁹ *Id.* at 641 (emphasis added).

³⁰ *Id.* at 641–43 (emphasis added).

Thus was a new constitutional category born: “obscene-as-to-minors.”³¹

Ginsberg, then, 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).

One doesn’t have to be Hugo Black or Thomas Jefferson to see the camel poking its nose under this particular tent. How capacious is the category of speech that is “obscene as to minors”? How much leeway will the state be permitted in placing speech into that category?

II. The California Statute

The California statute at issue here

prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” 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

³¹ As the Ninth Circuit put it when ruling on the case that is the subject of this article:

The *Ginsberg* Court applied a rational basis test to the statute at issue because it placed the magazines at issue within a sub-category of obscenity—obscenity as to minors—that had been determined to be not protected by the First Amendment . . .

Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 959 (9th Cir. 2009). See also *Ferber*, 458 U.S. at 749 n.2 (noting that two states prohibit dissemination only “if the material is *obscene as to minors*”) (emphasis added); *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975) (“Speech that is neither *obscene as to youths* nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”) (emphasis added); *Brown*, 131 S. Ct. at 2743 (Alito, J., concurring) (“The law at issue in *Ginsberg* prohibited the sale to minors of materials that were deemed ‘harmful to minors,’ and the law defined ‘harmful to minors’ simply by adding the words ‘for minors’ to each element of the definition of obscenity set out in what were then the Court’s leading obscenity decisions.”).

serious literary, artistic, political, or scientific value for minors." Violation of the Act is punishable by a civil fine of up to \$1,000.³²

The district court applied strict scrutiny and invalidated the act, enjoining its enforcement. California appealed to the Ninth Circuit, arguing that *Ginsberg* controlled and validated what the state had done:

The State's argument on appeal [is] that we should not apply strict scrutiny and instead should . . . analyze the Act's restrictions under what has been called the "variable obscenity" or "obscenity as to minors" standard first mentioned in *Ginsberg*. In essence, the State argues that the Court's reasoning in *Ginsberg* that a state could prohibit the sale of sexually-explicit material to minors that it could not ban from distribution to adults should be extended to materials containing violence. This presents an invitation to reconsider the boundaries of the legal concept of "obscenity" under the First Amendment.³³

The Ninth Circuit rejected the invitation:

Ginsberg is specifically rooted in the Court's First Amendment obscenity jurisprudence, *which relates to non-protected sex-based expression—not violent content*, which is presumably protected by the First Amendment. *See* 390 U.S. at 640. *Ginsberg* explicitly states that the New York statute under review "simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests of such minors." . . . The *Ginsberg* Court applied a rational basis test to the statute at issue because it placed the magazines at issue within a sub-category of obscenity—obscenity as to minors—that had been determined to be not protected by the First Amendment, and it did not create an entirely new category of expression excepted from First Amendment protection.³⁴

³² Brown, 131 S. Ct. at 2732–33.

³³ Schwarzenegger, 556 F.3d at 957–58.

³⁴ *Id.* at 959 (emphasis added).

III. The Supreme Court's Opinion(s)

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 (including the courts of appeals in the Seventh and Eighth Circuits, in addition, now, to the Ninth) that had considered similar (or identical) statutes had (1) applied strict scrutiny and (2) struck them down as violating the First Amendment.³⁵ Moreover, the Court had just, the previous week, issued its decision in *United States v. Stevens*, invalidating by an 8-1 margin a federal statute that criminalized depictions of animal cruelty.³⁶ *Stevens* squarely and resoundingly rejected the government's argument that such depictions should be "added to the list" of categorically unprotected speech (joining "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct").³⁷ The Court made it abundantly clear that it was not interested in attempts to expand these categories beyond their "traditional limitations":³⁸

The Government contends that . . . categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's "legislative judgment that . . . depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection," and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys

³⁵ *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).

³⁶ 130 S.Ct. 1577 (2010).

³⁷ *Id.* at 1584–85 (internal citations omitted).

³⁸ *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. at 383).

First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

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

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. . . .³⁹

Strong words indeed. With uniformity in the lower courts, and a near-unanimous declaration, still ringing in our ears, that the Court will be very stingy when asked to expand the categories of unprotected speech at a legislature’s behest—more or less *precisely* what California was asking for here, and precisely what the Ninth Circuit had rejected—the cert grant really was puzzling; four justices (at least) were unhappy, for some reason, with this status quo. It looked like a real battle was shaping up—at least a 5-4 cliffhanger.⁴⁰ That the Court subsequently took so long to issue its decision—the case had been argued on November 2, 2010, and the decision was delayed until the very last day of the 2010 term, June 27, 2011—seemed to confirm that something complicated and possibly important was happening behind the wizard’s curtain: some dramatic reformulation of First Amendment doctrine, perhaps, or some new law about the state’s relationship with minors, or some shifting alliances among the justices.

When the decision was finally handed down, Linda Greenhouse wasn’t the only person surprised that the Court not only had affirmed the Ninth Circuit, but that it had done so by a vote of 7-2. That hardly clears up the question as to why the Court granted

³⁹ *Id.* at 1585–86 (internal citations omitted).

⁴⁰ See Lyle Denniston, Argument preview: Kids and Video Games, SCOTUSblog, Oct. 26, 2010, <http://www.scotusblog.com/?p=107224> (opining that “at least four Justices—the number needed to grant review—seemed at least temporarily persuaded by California’s argument that the issue was one of ‘national importance’ because of the rise of what the state called ‘a new, modern threat to children’”).

cert in the first place. But even more surprising was the lineup, which was not only unusual but unique; in almost two decades of service together on the Court, this was the first time, as far as I have been able to determine, that Justices Breyer and Thomas were together, alone, in dissent.

Justice Scalia's opinion for the Court (joined only by Justices Ginsburg, Kennedy, Sotomayor, and Kagan for a majority—another unusual alliance) is straightforward: *Ginsberg* is not a shield from heightened First Amendment scrutiny any time a legislature deems speech "harmful to minors"; it only applies to speech that is harmful to minors because it is *obscene* as to minors. The decision relies heavily on *Stevens* for the proposition that "new categories of unprotected speech may not be added to the list by a legislature that concludes [that] certain speech is too harmful to be tolerated."⁴¹ As Scalia says,

without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs."⁴²

And just as the Court rejected the federal government's attempt in *Stevens* to "shoehorn" speech about animal cruelty into the category of the "obscene," so too does it reject California's "attempt to make violent-speech regulation look like obscenity regulation".⁴³

Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, *but only depictions of "sexual conduct"* . . . [V]iolence is not part of the obscenity that the Constitution permits to be regulated.⁴⁴

If violent speech, like depictions of animal cruelty, can't be shoehorned into the category of the "obscene," it follows almost *a fortiori*

⁴¹ See *Brown*, 131 S. Ct. at 2734 ("That holding [in *Stevens*] controls this case.").

⁴² *Id.* (quoting *Stevens*, 130 S. Ct. at 1585).

⁴³ *Id.*

⁴⁴ *Id.* at 2734–35.

that it can't be shoehorned into the category of speech that is "obscene-as-to-minors." *Ginsberg*, the Court declares, did not permit the New York legislature to regulate material that (merely) had been deemed "harmful to minors," it permitted the New York legislature to regulate *sexual* material that had been deemed harmful to minors. The statute that was upheld in *Ginsberg* was, the Court emphasizes, "a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child";⁴⁵ it merely "adjust[ed] the definition of *obscenity*," taking an already-existing category of unprotected speech and adjusting its contours to fit the "social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests' [of] minors."⁴⁶

Rational legislative judgments that those materials are harmful to children because of their *sexual content* will be upheld (as in *Ginsberg*); but the legislature is not free to expand the boundaries of that obscene-as-to-minors category to include whatever material it (rationally or not) has declared harmful to minors:

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.⁴⁷

The Court declares that it might entertain the creation of a new exception for "violent-as-to-minors" speech "if there were a long-standing tradition in this country of specially restricting children's access to depictions of violence."⁴⁸ But there is no such tradition.⁴⁹ So the California statute is (simply) "a restriction on the content of

⁴⁵ *Id.* at 2735 (emphasis in original).

⁴⁶ *Id.* (quoting *Ginsberg*, 390 U.S. at 638).

⁴⁷ *Id.* at 2736 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975)).

⁴⁸ *Id.*

⁴⁹ *Id.* The opinion here goes off into a short riff on the widespread depiction of violence in books and movies to which we give children access, citing *Grimm's Fairy Tales*, *The Inferno*, *The Odyssey*, and *The Lord of the Flies* (while somehow managing to omit "The Itchy & Scratch Show" from *The Simpsons*, which is both a parodic cartoon commentary on the availability of hyper-violent cartoon fare consumed by (fictional) children, and also itself watched by millions of children (and adults) tuning in to *The Simpsons*).

protected speech” and receives the Full Monty of strict scrutiny.⁵⁰ California must show more than that the California legislature was not acting irrationally in declaring violent videogames a threat to the health or well-being of the state’s minors; it must show that the statute “is justified by a compelling government interest and is narrowly drawn to serve that interest.”⁵¹

If you’re like me, this is the point, in Supreme Court First Amendment opinions, where you stop reading closely and begin skimming. The hard, outcome-determinative battle is over; now it only remains for the Court to find reasons why the statute fails strict scrutiny, which it virtually always does.⁵² But it’s worth taking a quick look at this portion of the Court’s opinion, for I will return to it in the discussion below. The Court holds that the statute fails both strict scrutiny prongs. It fails the “compelling interest” requirement because while there is certainly *some* evidence that violent video games cause harm—enough, certainly, for a rational legislature to act on—California “cannot show a direct causal link between violent video games and harm to minors”⁵³ with the “degree of certitude *that strict scrutiny requires.*”⁵⁴ A belief—even a reasonable belief—in that causal link is not sufficient; under this most assertive form of judicial scrutiny, California “bears the risk of uncertainty, [and] ambiguous proof will not suffice.”⁵⁵

Second, even if California were able to demonstrate the existence of that causal link between violent speech and harm to minors, the statute would nonetheless be unconstitutional because it is not narrowly tailored to achieve its asserted goal. It is “wildly underinclusive” because it only covers violent video games, and not the wide range of other violent speech (in movies, cartoons, nursery rhymes, fairy tales . . .) to which children are exposed, and because the statute is content to “leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or

⁵⁰ *Id.* at 2738; see also *id.* at 2757 (Alito, J., concurring) (“[T]he Court now holds that any law that attempts to prevent minors from purchasing violent video games must satisfy strict scrutiny instead of the more lenient standard applied in *Ginsberg*”).

⁵¹ *Id.* at 2738.

⁵² See *supra* notes 7–8 and accompanying text.

⁵³ Brown, 131 S. Ct. at 2738.

⁵⁴ *Id.* at 2739 n.8 (emphasis added).

⁵⁵ *Id.*

uncle) says it's OK."⁵⁶ This alone, the majority declares, is enough to defeat the legislation.⁵⁷ Moreover, the statutory coverage is also "vastly overinclusive":⁵⁸ though the state asserted that the statute was designed to "aid parental authority,"

[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. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring . . . that restriction of First Amendment rights requires.⁵⁹

Justice Alito, concurring for himself and Chief Justice Roberts, would hold the statute unconstitutional on the "narrower ground that the law's definition of 'violent video game' is impermissibly vague."⁶⁰ Due process requires that "laws give people of ordinary intelligence fair notice of what is prohibited"—especially in the context of speech regulation because of "the obvious chilling effect" that vagueness has on speech.⁶¹ The obscenity doctrine (as I noted above) doesn't define obscenity, but it does require that it *be* defined, with specificity; statutes targeting unprotected obscenity must target "depict[ions] or descri[ptions] of] sexual conduct *specifically defined* by the applicable state law."⁶² But the California law does not meet this vital threshold requirement; it does not define "violent video games" with the "'narrow specificity' that the Constitution

⁵⁶ *Id.* at 2740; see also *id.* ("That is not how one addresses a serious social problem.")

⁵⁷ *Id.*

⁵⁸ *Id.* at 2741.

⁵⁹ *Id.* (emphasis in original).

⁶⁰ *Id.* at 2742 (Alito, J., concurring).

⁶¹ *Id.* at 2743.

⁶² *Id.* at 2744 (citing *Miller*, 413 U.S. at 24). The Court in *Miller* gave "a few plain examples of what a state statute could define for regulation" under the standard announced in the opinion, including "[p]atently offensive representations or descriptions of ultimate sexual acts [and] [p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

demands.”⁶³ Reasonable people could disagree about exactly *what* the California statute prohibited:

The threshold requirement of the California law does not perform the narrowing function served by the limitation in *Miller*. . . . It provides that a video game cannot qualify as “violent” unless “the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.”

For better or worse, 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. The California law’s threshold requirement would more closely resemble the limitation in *Miller* if it targeted a narrower class of graphic depictions.⁶⁴

The other definitional provisions of the statute—targeting speech that “a reasonable person . . . would find appeals to a deviant or morbid interest of minors [and] patently offensive to prevailing standards in the community as to what is suitable for minors”—are also “not up to the task,” because (unlike obscenity) there are no “generally accepted standards regarding the suitability of violent entertainment for minors.”⁶⁵

The California Legislature seems to have assumed that these [community] standards are sufficiently well known so that a person of ordinary intelligence would have fair notice as to whether the kind and degree of violence in a particular game is enough to qualify the game as “violent.”

There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. . . . Although our society does not generally regard all depictions of violence as suitable for children or adolescents, the prevalence of violent depictions in children’s literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite “deviant” or “morbid” impulses.⁶⁶

⁶³ Brown, 131 S. Ct. 2741.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2745.

⁶⁶ *Id.* at 2746.

IV. The Dissents

If you're looking for a good illustration, perhaps to show friends or students, of just how odd the discourse in the Supreme Court can be at times, look no further. With only a little bit of imaginative effort, the four opinions in this case could be seen as coming out of four entirely different legal systems; it's as though the same statute had been presented for consideration to the highest court in the United States, Romania, Morocco, and Australia, and these are the opinions that emerged from that process.

Justice Thomas's dissenting opinion expresses the hard-headed and uncompromising originalism for which he is well known:

When interpreting a constitutional provision, "the goal is to discern the most likely public understanding of [that] provision at the time it was adopted." *McDonald v. Chicago*, [130 S. Ct. 3020, 3072 (2010)] (Thomas, J., concurring in part and concurring in judgment). Because the Constitution is a written instrument, "its meaning does not alter." *McIntyre v. Ohio Elections Comm'n*, 514 U. S. 334, 359 (1995) (Thomas, J., concurring in judgment) (internal quotation marks omitted). "That which it meant when adopted, it means now." *Ibid.* (internal quotation marks omitted). . . .

As originally understood, the First Amendment's protection against laws "abridging the freedom of speech" did not extend to all speech. . . . In my view, the "practices and beliefs held by the Founders" reveal another category of excluded speech: speech to minor children bypassing their parents. The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents. . . . The founding generation would not have considered it an abridgment of "the freedom of speech" to support parental authority by restricting speech that bypasses minors' parents.⁶⁷

In support of this latter proposition—which, more or less, ends the constitutional inquiry for Justice Thomas—he relies, *inter alia*,

⁶⁷ Brown, 131 S. Ct. at 2751–52 (Thomas, J., dissenting).

on Wadsworth's *The Well-Ordered Family* (1712), Cotton Mather's *A Family Well-Ordered* (1699), *The History of Genesis* (1708), Locke's *Some Thoughts Concerning Education* (1692), Burgh's *Thoughts on Education* (1749), along with a number of more recent scholarly studies focused on child-rearing practices during the Founding period.⁶⁸

That is originalism on steroids and, to my eye, rather poignantly illustrates the weakness of the approach. I understand, and am sympathetic to, the notion that the meaning of a constitutional provision should be informed by the meaning given to it by those who drafted and ratified it. But can that really mean that we will look to the child-rearing principles of Cotton Mather and John Locke to define, for all time, the scope of the constitutional protection for free speech? Even assuming that Justice Thomas (or anyone else) can reconstruct the sociology of the 18th century to definitively support the notion that parents possessed "absolute authority" over their children, and that "total parental control over children's lives" was the governing societal norm—what then? The question in this case is not "do parents have absolute authority over their children?" The question in the case is, rather, "how does what the state did *here* relate to (1) the authority of parents over their children, (2) the power of the state to protect the well-being of children, and (3) the constitutional protection for 'the freedom of speech'?" That's a hard question in 2011, and it would have been a hard question in 1791, because it involves *categorization*: Is this, actually, a case about the authority of parents over their children? Or is it a case about the extent of the state's power to protect minors? The scope of the First Amendment rights of video game manufacturers? Or the scope of the First Amendment rights of minors? Nothing in Justice Thomas's historical research tells me, or can possibly tell me, how people in the 18th century would have answered *those* questions. Let me put it this way: I know enough about discourse in the late 18th century to know that if you had walked into a bar in, say, Richmond, or Boston, or Philadelphia, in 1791 and made any of the following statements, you would have gotten a nice little argument going:

- "The government has just decreed that children can't attend religious services. Can it do that?"

⁶⁸ See *id.* at 2752–57.

- “The government has just decreed that all schoolbooks must include endorsements of John Adams’s candidacy for the presidency, and a defense of the Alien and Sedition Act. Can it do that?”
- “The government has just decreed that adults may not sing to children who are not their own. Can it do that?”

Justice Thomas believes that all those questions can be answered in the affirmative—and, more importantly, that “18th century society” would have answered all those questions in the affirmative. (Indeed, he believes the former precisely *because* he believes the latter.) His belief is misplaced, in my opinion. No amount of historical research can tell us what “the answer” to any of those questions would have been—in 1791, 1891, or 1991—because there is no “answer” that “society” can give to those questions. They’re contested and contestable propositions, depending on (among other things) how you characterize what the government was doing: helping parents or usurping their role, for example.⁶⁹

⁶⁹ Another reason that the opinions in this case may well end up in First Amendment casebooks is the *sotto voce* argument between Justices Scalia and Thomas, the Court’s most committed originalists, on this very point. Here is Scalia responding to Thomas’s dissent:

Justice Thomas . . . denies that persons under 18 have any constitutional right to speak or be spoken to without their parents’ consent. Most of his dissent is devoted to the proposition that parents have traditionally had the power to control what their children hear and say. This is true enough. And it perhaps follows from this that the state has the power to enforce parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their children are forbidden to attend. *But it does not follow that the state has the power to prevent children from hearing or saying anything without their parents’ prior consent.* The latter would mean, for example, 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. . . . It could be made criminal to admit a person under 18 to church, or to give a person under 18 a religious tract, without his parents’ prior consent. . . . Such laws do not enforce parental authority over children’s speech and religion; they impose governmental authority, subject only to a parental veto. In the absence of any precedent for state control, uninvited by the parents, over a child’s speech and religion (Justice Thomas cites none), and in the absence of any justification for such control that would satisfy strict scrutiny, those laws must be unconstitutional.

Brown, 131 S. Ct. at 2736 n. 3.

At the far other end of the spectrum from Justice Thomas's rigid and uncompromising stance, Justice Breyer's dissent is all balance and nuance. The most eye-catching feature of his dissenting opinion (and the one that earned it Ms. Greenhouse's designation as "most unusual judicial performance" of the 2010 term⁷⁰) are the two lengthy appendices, listing "peer-reviewed academic journal articles"⁷¹—the "vast preponderance of which," the majority opinion informs us, "is outside the record"⁷²—on the topic of "psychological harm resulting from playing violent video games," categorized as either supporting (Appendix A, the longer of the two) or not supporting (Appendix B) the hypothesis that violent video games are harmful to minors.

I cannot say for certain exactly why Justice Breyer thought that this extensive listing would advance the constitutional discussion (as opposed to, say, a sentence or two along the lines of "There are lots of studies, some on one side and some (fewer) on the other.'). He begins with his own recharacterization of the case—thereby nicely illustrating the point I made above concerning the significance of characterization—as being about neither the authority of parents over their children nor depictions of violence:

[T]he special First Amendment category I find relevant is not (as the Court claims) the category of "depictions of violence," but rather the category of "protection of children."⁷³

Categorized that way, of course, *Stevens*—which the majority, you will recall, found controlling⁷⁴—is entirely irrelevant, for it had nothing to do with the "protection of children." Justice Breyer applies what he calls "a strict form of First Amendment scrutiny"⁷⁵ to review of the California statute, although it is clearly not the "strict scrutiny" of ordinary usage:

⁷⁰ See Greenhouse, note 1, *supra*.

⁷¹ Brown, 131 S. Ct. at 2771 (Breyer, J., dissenting).

⁷² *Id.* at 2739 n.8 (majority opinion).

⁷³ *Id.* at 2762 (Breyer, J., dissenting).

⁷⁴ See *supra* note 41 and accompanying text.

⁷⁵ Brown, 131 S. Ct. at 2762 (Breyer, J., dissenting); see also *id.* at 2765 ("I would determine whether the State has exceeded [constitutional] limits by applying a strict standard of review.').

Like the majority, I believe that the California law must be “narrowly tailored” to further a “compelling interest,” without there being a “less restrictive” alternative that would be “at least as effective.” I would [however] not apply this strict standard “mechanically.” Rather, in applying it, 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.”*⁷⁶

It’s a kind of multifactor cost-benefit balancing test, meant to be difficult, though “not impossible” to satisfy.⁷⁷ As applied to the statute at issue, it reveals no constitutional flaw. The California law “imposes no more than a modest restriction on expression.”⁷⁸ The “interest that California advances in support of the statute is compelling”—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.”⁷⁹ There is “considerable evidence that California’s statute significantly furthers this compelling interest.”⁸⁰ And Justice Breyer finds “no ‘less restrictive’ alternative to California’s law that would be ‘at least as effective’” as the statutory scheme it enacted.⁸¹

The most revealing portion of his opinion comes when introducing the material in those appendices. After a fairly lengthy discussion of the social science literature on the harm to children from exposure

⁷⁶ *Id.* at 2765–66 (emphasis added).

⁷⁷ *Id.* at 2766.

⁷⁸ *Id.*

⁷⁹ *Id.* at 2767 (quoting Ginsberg, 390 U.S. at 639–40).

⁸⁰ *Id.*

⁸¹ *Id.* at 2770; see also *id.* at 2771:

The upshot is that California’s statute, as applied to its heartland of applications (i.e., buyers under 17; extremely violent, realistic video games), imposes a restriction on speech that is modest at most. That restriction is justified by a compelling interest (supplementing parents’ efforts to prevent their children from purchasing potentially harmful violent, interactive material). And there is no equally effective, less restrictive alternative.

to violent video games and the “many scientific studies that support California’s views,”⁸² Justice Breyer acknowledges that “[e]xperts debate the conclusions of all these studies [and that] some of those critics have produced studies of their own in which they reach different conclusions.”⁸³ He continues: “I, like most judges, lack the social science expertise to say definitively who is right. But . . .”⁸⁴

At this point, I admit I expected something like: “But I defer to the legislative judgment of the people of California.” Instead, he writes that

associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.⁸⁵

After a review of these “meta-analyses”⁸⁶ (by such groups as the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association), he concludes:

Unlike the majority, I would find sufficient grounds in *these studies and expert opinions* for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children.⁸⁷

So he would “defer” to the legislature here, but only because of his independent (and off-record) examination of the studies and expert opinions in the academic literature.

⁸² *Id.* at 2768.

⁸³ *Id.* at 2769.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2768.

⁸⁷ *Id.* at 2770 (emphasis added).

V. Discussion

The *Brown* decision was hailed by many, and probably most, commentators as a big victory for free speech and the First Amendment,⁸⁸ and I suppose it is. It does seal up a crack—when read along with *Stevens*, two cracks—in what we might call the wall of separation between speech and state: “obscenity” may be outside the scope of the First Amendment, but the government can’t get away with simply defining any speech it wishes to suppress as “obscene” (*Stevens*) or “obscene as to minors” (*Brown*) and avoid the heightened scrutiny to which content-based regulation is ordinarily subject under the First Amendment.

Two things, though, might give us pause. To begin with, on the legal question at the heart of the case—will a legislature’s decision to prohibit the distribution of purportedly harmful but non-obscene speech receive the highest level of First Amendment scrutiny?—the Court appears to be split into a somewhat more fragile 5-4 alignment than the overall vote might suggest. Justice Alito and Chief Justice Roberts did not, technically speaking, reach the level-of-scrutiny question in their concurrence, having decided the threshold (vagueness) question in the respondents’ favor; but their “brief[] elaborat[ion]” of the “reasons for questioning the wisdom of the Court’s

⁸⁸ See, e.g., Catherine J. Ross, The Supreme Court Was Right to Strike Down California’s Video Game Law, Wash. Post, June 27, 2011, <http://www.washingtonpost.com/opinions/the-supreme-court-was-right-to-strike-down-californias-video-game-law/2011/06/27/AG6jYDoH;usstory.html> (“The justices rejected a radical challenge to free speech—in the process protecting all of us, not just children.”); David G. Savage, Supreme Court Strikes Down California Video Game Law, L.A. Times, June 28, 2011, <http://www.latimes.com/entertainment/news/la-na-0628-court-violent-video-20110628,0,5099090.story> (noting that the decision “highlights a consistent theme of the high court under Chief Justice John G. Roberts Jr.: Freedom of speech is almost always a winner, even if the context is unusual”); Brent Jones, Our View: Even Violent Video Games Are Protected, USA Today, Jun. 27, 2011, <http://www.usatoday.com/news/opinion/editorials/2011-06-27-Even-violent-video-games-are-protected;usn.htm> (describing “why the Supreme Court was right Monday in giving the makers of violent video games the same protections as the pamphleteers, printers and orators of the 18th century”); Tony Mauro, Roberts Court Extends Line of Permissive First Amendment Rulings in Video Game Case, The AmLaw Daily, June 28, 2011, <http://amlawdaily.typepad.com/amlawdaily/2011/06/scotusfirst-amendmentvideo.html> (*Brown* decision continues an “undeniable trend line” in favor of “classic First Amendment protection for even the most objectionable speech”).

approach⁸⁹ makes it fairly clear that they are inclined to answer the question in the negative:

[T]he Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. . . . In some of these games, the violence is astounding. . . . When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand. . . . I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.⁹⁰

So whether this particular crack is truly sealed up or just papered over for the moment remains to be seen.

A more troubling feature of the decision concerns what Justice Breyer refers to in his dissent as the “serious anomaly in First Amendment law”⁹¹ created by the majority’s holding:

Ginsberg makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that

⁸⁹ Brown, 131 S. Ct. at 2746 (Alito, J., concurring).

⁹⁰ *Id.* at 2748, 2749, 2751.

⁹¹ *Id.* at 2771 (Breyer, J., dissenting).

extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?⁹²

It's a very good question: What kind of First Amendment is that, and is it indeed the one that we now have? Justice Alito noted the same anomaly:

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.⁹³

It appears to be, unfortunately, a correct reading of First Amendment doctrine post-*Brown*. Tellingly, the majority opinion—notwithstanding Justice Scalia's usual penchant for engaging directly with objections raised in the other opinions, as he does in regard to a number of other matters several times in his opinion here—contains no reference or response to this charge, an implied concession, in my view, that the majority recognizes that it has no good rejoinder to the point.

It is unfortunate, because the system of legal doctrine has any number of self-correction and self-repair mechanisms, and serious anomalies—points of doctrine that look silly, as this one does—often lead to re-assessments and revisions, with no guarantee that any such a revision will be a more speech-protective one. And it's also unfortunate because it was so unnecessary; the majority had ample opportunity to bring this area of First Amendment doctrine more closely into line with common sense, and failed to seize it.

To see that, we need to go to the majority's treatment of *Ginsberg*. The majority reads *Ginsberg* to declare that material that is "obscene as to minors," like other "obscene" speech, is outside the protection of the First Amendment, and that a legislature's decision to regulate or prohibit such speech will be given only the lightest touch of rational basis review. To which, in *Brown*, the Court simply adds: we will strictly enforce the boundaries around this category, and

⁹² *Id.*

⁹³ *Id.* at 2747 (Alito, J., concurring).

only allow the legislature to place sexually themed material into it, not just anything the legislature deems “harmful to minors.”

It’s a plausible reading of *Ginsberg*, entirely consistent with the language in the *Ginsberg* opinion itself. It is, however, *not* the reading that courts, including the Supreme Court itself, had been giving *Ginsberg* over the past 20 years or so.

To see this, consider this rather unexceptional statement of the “strict scrutiny” test, from the Ninth Circuit’s opinion in this case:

We ordinarily review content-based restrictions on protected expression under strict scrutiny, and thus, to survive, the Act “must be narrowly tailored to promote a compelling Government interest.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *Id.*; see also *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”); *Reno v. ACLU*, 521 U.S. 844, 876–77 (1997) (finding relevant the fact that a reasonably effective method by which parents could prevent children from accessing internet material which parents believed to be inappropriate “will soon be widely available”).⁹⁴

It’s all very familiar, almost boilerplate, First Amendment “strict scrutiny” language. But notice: each of the cases cited (*United States v. Playboy*, *Sable Comm. v. FCC*, and *Reno v. ACLU*) deal with *restrictions on the distribution of sexually themed material to minors*⁹⁵—*Ginsberg*

⁹⁴ Schwarzenegger, 556 F.3d at 958.

⁹⁵ In *Playboy*, cable operators successfully challenged a federal statute requiring operators “who provide channels ‘primarily dedicated to sexually-oriented programming’ either to ‘fully scramble or otherwise fully block’ those channels 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.,” 529 U.S. at 806. In *Sable*, the challenged federal statute “made it a crime to use telephone facilities to make ‘obscene or indecent’ interstate telephone communications ‘for commercial purposes to any person under eighteen years of age or to any other person without that person’s consent,’” 492 U.S. at 120. Finally, in *Reno*, the statute criminalized both “the knowing transmission of obscene or indecent messages to any recipient under 18 years of age” and the “sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age,” 521 U.S. at 857–60.

cases—and yet they all are being cited as exemplars of “strict scrutiny.” How can that be?

Or consider another case in this recent line, *Ashcroft v ACLU*, where the Court again upheld a challenge to a statute “enacted by Congress to protect minors from exposure to sexually explicit materials on the Internet.”⁹⁶ Here, without even so much as a nod in *Ginsberg’s* direction,⁹⁷ the Court again applied heightened scrutiny to the statutory scheme, demanding that the government show that there were no “less restrictive alternatives” available to it and that “speech is restricted no further than necessary to achieve the goal” of shielding minors from harm. The Court struck down the statute on the grounds that “there are a number of plausible, less restrictive alternatives to the statute” that would allow the government to achieve its purpose of protecting minors from harm—primarily, software filters that impose only “selective restrictions” on speech and that “may well be more effective” than the statutory restrictions at keeping harmful material out of the hands of minors.⁹⁸

It’s more than a little curious. In all these cases, attempts to regulate the distribution of sexually themed material to minors received (and, as it happens, failed) heightened scrutiny—not the rationality review seemingly called for by *Ginsberg*.

Ginsberg, I would suggest, had all but vanished from the scene, along with the notion that speech in the “obscene as to minors” category could be suppressed without being subject to any First Amendment scrutiny at all. Under these and a host of other post-*Ginsberg* precedents, a regulation targeting the distribution of even sexually themed material to minors must be narrowly tailored to

⁹⁶ 542 U.S. 656, 659 (2002).

⁹⁷ The majority opinion in *Ashcroft* does not even mention *Ginsberg*.

⁹⁸ *Id.* at 667. The opinion cites *Playboy* for support:

The closest precedent on the general point is our decision in *Playboy Entertainment Group*. *Playboy Entertainment Group*, like this case, involved a content-based restriction designed to protect minors from viewing harmful materials. The choice was between a blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it. Absent a showing that the proposed less restrictive alternative would not be as effective, we concluded, the more restrictive option preferred by Congress could not survive strict scrutiny.

Id. at 670 (citations omitted).

achieve its purposes, and it must be the least restrictive alternative available to solve the problem being addressed; it must, in short, survive strict First Amendment scrutiny.

The majority here in *Brown* could easily have taken this approach, treating this case not as a *Ginsberg* case, but as a *Playboy-Reno-Sable-Ashcroft* case: The statute must satisfy the “narrow tailoring” requirement, *not because it is targeted at something other than sexually themed material, but because it is a content-based suppression of speech that gets, as always, the strictest of scrutiny.* There’s no “anomaly” here at all; this “wildly overinclusive” and “vastly underinclusive” statute is *not* narrowly tailored to achieve its purpose, and it is therefore unconstitutional—*whether or not it targets depictions of topless, or merely maimed, women.*

So all the ink spilled in this case, and all the fighting, 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-*Ginsburg* precedent, the statute would receive (and cannot satisfy) strict First Amendment scrutiny—proving, once again, I suppose, how important characterization can be in constitutional litigation.

What is most troubling, then, about *Brown* is that it appears to resurrect a version of *Ginsberg* that had been, if not exactly sent to the glue factory, at least turned out to pasture some time ago. The entire Court has now endorsed a version of *Ginsberg* that shields some speech from First Amendment scrutiny altogether. Two cheers to the Court for making that category smaller than California wanted it to be. But the post-*Ginsberg* precedent had virtually eliminated the category altogether. This may, or may not, matter down the road; we’ll see. But a home run for the First Amendment it’s not, and I’m not prepared to jump on that bandwagon quite yet.