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## Protecting Children? The Evolution of the First Amendment: A Historical Timeline of Children and Their Access to Pornography and Violence

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# PROTECTING CHILDREN? THE EVOLUTION OF THE FIRST AMENDMENT: A HISTORICAL TIMELINE OF CHILDREN AND THEIR ACCESS TO PORNOGRAPHY AND VIOLENCE

Nicole DiGiose\*

## I. Introduction

The United States Constitution states: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>1</sup> The Constitution ensures that the government will not infringe upon certain rights, and perhaps one of the most important rights that a person retains is their right to freedom of speech. While the Constitution ensures that free speech will not be violated, there are some exceptions that are not covered by the First Amendment: obscenity,<sup>2</sup> fighting words,<sup>3</sup> incitement,<sup>4</sup> and defamation,<sup>5</sup> to name a few. However, when children are involved, freedom of speech issues become unclear. While adults are able to enjoy certain means of speech, historically the Supreme Court has decided that children and

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\* J.D. Candidate, 2013, Pace University School of Law. I would like to thank my family and friends for their continued love and support, especially my mother, Dale—without all of you, I wouldn’t have made it to where I am today. I would also like to thank Professor Bennett Gershman for sparking my interest in constitutional law and his guidance and assistance with this paper—without your help, I’m afraid this paper would still be scribbles in a notebook!

1. U.S. CONST. amend. I.

2. *Miller v. California*, 413 U.S. 15, 24 (1973).

3. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

4. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

5. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

their innocence may not be protected, and their rights may be closer to those that adults enjoy.<sup>6</sup>

This paper will explore the evolving relationship between children and their access to potentially harmful materials. The timeline will start at Part II.A with the landmark decision of *Prince v. Massachusetts*,<sup>7</sup> a 1940's case, wherein children were afforded the most constitutional protection.<sup>8</sup> In Part II.B, this paper will evaluate another landmark decision: *Ginsberg v. New York*.<sup>9</sup> In this 1968 case, the Supreme Court declared that children shall not have access to harmful, pornographic materials.<sup>10</sup> By the 1990s, there appeared to be a notable shift in how the Supreme Court decided cases pertaining to children and their access to potentially harmful materials.<sup>11</sup> Part III of this paper will assess less stringent protections of children. Particularly, Part III.A will review *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,<sup>12</sup> a 1996 case concerning children and their access to materials on cable television.<sup>13</sup> Additionally, in Part III.B, this paper will explore children's access to materials on the Internet in *Reno v. ACLU*.<sup>14</sup> In Part III.C, this paper will take an interesting look at *Ashcroft v. Free Speech Coalition*,<sup>15</sup> a 2002 case exploring a new technological development, virtual child pornography. In Part IV.A, the timeline will come to an end with the recently decided *Brown v. Entertainment Merchants Ass'n*,<sup>16</sup> wherein the Supreme Court opted to allow children to have access to violent video games, a 180 degree shift from the *Ginsberg* decision regarding pornography, decided only forty-five years earlier.

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

7. 321 U.S. 158 (1944).

8. See discussion *infra* Part II.A.

9. 390 U.S. 629 (1968).

10. See discussion *infra* Part II.B.

11. See discussion *infra* Parts III.A, III.B.

12. 518 U.S. 727 (1996).

13. See discussion *infra* Part III.A.

14. 521 U.S. 844 (1997).

15. 535 U.S. 234 (2002).

16. 131 S. Ct. 2729 (2011).

Finally, in Part IV.B, this paper will evaluate this timeline of landmark Supreme Court decisions to determine if the Supreme Court went too far with the *Brown* decision. In 2011, the Court decided that children should have access to violent video games, which may have potentially harmful effects, rather than ensuring their innocence.<sup>17</sup> In making this decision the Court ignored new technological advances and potential adverse effects these games may have on children's psychological and behavioral development. This paper will address these issues and speculate as to what may happen in the future.

## II. Children Afforded the Most Constitutional Protection

### A. *Prince v. Massachusetts* (1944)

The *Prince* case displays an important foundation laid by the Court: protecting children is of the utmost importance.<sup>18</sup> Although the case does not directly involve a child's access to harmful materials, it involves a child's exposure to a dangerous practice: child labor.<sup>19</sup> Sarah Prince was attempting to exercise her religious convictions by distributing Jehovah's Witness magazines.<sup>20</sup> She was out with her nine-year-old niece, Betty, who was attempting to help Prince with her sales.<sup>21</sup> When approached by a police officer trying to enforce a statute prohibiting child labor, Prince refused to disclose Betty's age and identity.<sup>22</sup> The statute prohibiting child labor read, "[n]o boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise . . . in any street or public place."<sup>23</sup> The statute went on to say, "[a]ny parent, guardian or custodian having a minor under his control who compels or

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17. *Id.* at 2741.

18. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

19. *See generally id.*

20. *Id.* at 161.

21. *Id.* at 159-60.

22. *Id.* at 162.

23. *Id.* at 160-61 (quoting MASS. GEN. LAWS ANN. ch. 149, § 69 (West 2012)).

permits such minor to work in violation of any provision . . . shall for a first offence be punished . . . .”<sup>24</sup> Prince claimed that Betty was “exercising her God-given right and her constitutional right to preach the gospel . . . .”<sup>25</sup> Prince was convicted of violating Massachusetts’s child labor laws, and subsequently appealed.<sup>26</sup>

In his decision, Justice Rutledge acknowledged that parents have a right to give their children “religious training and to encourage them in the practice of religious belief . . . .”<sup>27</sup> However, he went on to say, neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the *state* as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.<sup>28</sup> He continued to say “that the state has a *wide range of power for limiting parental freedom and authority in things affecting the child’s welfare*; and that this includes, to some extent, matters of conscience and religious conviction.”<sup>29</sup> Finally, he stated, “the state’s authority over children’s activities is *broader* than over like actions of adults.”<sup>30</sup>

This decision set the stage for the later Supreme Court decisions aimed at protecting children.<sup>31</sup> Although this case pertained to child labor, it nonetheless showed that the government has the authority to limit certain rights in an effort to protect the welfare of children.<sup>32</sup> Furthermore, *Prince* held that the state has a “wide range of power” to limit what parents can and cannot do regarding their own children, especially in regard to matters of “conscience and religious conviction.”<sup>33</sup> The words “wide range of power” in areas of “conscience” and “religious conviction” imply that the Court is

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24. *Id.* at 161 (quoting MASS. GEN. LAWS ANN. ch. 149, § 81 (West 2012)).

25. *Id.* at 162.

26. *Id.* at 159.

27. *Id.* at 165.

28. *Id.* at 166 (emphasis added) (citations omitted).

29. *Id.* at 167 (emphasis added).

30. *Id.* at 168 (emphasis added).

31. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968).

32. *Prince*, 321 U.S. at 168.

33. *Id.* at 167.

willing to protect children even if it means restricting parents' rights. The words "wide range of power," especially, indicate that it is within the Court's authority to get involved in some aspects of private life that will protect children, perhaps even matters of pornography and violence, since such matters are definitely encompassed in the phrase "conscience or religious conviction." The Court is ultimately saying that they can, and will, do whatever possible to protect the well-being of children. Although the Court attempts to limit their decision by stating, "[o]ur ruling does not extend beyond the facts the case presents,"<sup>34</sup> numerous future courts have cited to this decision, reiterating the overall tone of the decision,<sup>35</sup> which implies one of the Court's priorities: protecting children even if it means interfering with parenting decisions.<sup>36</sup>

#### B. *Ginsberg v. New York* (1968)

The *Ginsberg* case is perhaps one of the most important cases to date pertaining to protecting children and their access to harmful materials.<sup>37</sup> It has been cited in over 750 cases and as recently as December 4, 2012. In *Ginsberg*, the appellant operated a stationary and luncheonette on Long Island, where he sold lunch and magazines, including "girlie" magazines.<sup>38</sup> Here, the so-called "girlie" magazines were those that contained pictures which depicted female nudity, particularly female buttocks or female breasts, with less than a full opaque covering.<sup>39</sup> The appellant was convicted of personally selling two "girlie" magazines to a sixteen-year-old boy, on two separate occasions in October 1965, in violation of Section 484-h of the New York Penal Law.<sup>40</sup> The lower court found that the

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34. *Id.* at 171.

35. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999).

36. *Prince*, 321 U.S. at 171.

37. *Ginsberg*, 390 U.S. at 629.

38. *Id.* at 631.

39. *Id.* at 632.

40. *Id.* at 631. The law in question in *Ginsberg* reads, in pertinent part:

magazines contained pictures that depicted female “nudity” and that the pictures were “harmful to minors,” but the appellant appealed the conviction until it reached the Supreme Court.<sup>41</sup> The Supreme Court granted certiorari to determine whether the New York law violated the appellant’s First Amendment rights and affirmed the decision, holding that the state had an “exigent interest in preventing the distribution to children of objectionable material,”<sup>42</sup> the statute did not invade “the area of freedom of expression constitutionally guaranteed to minors,”<sup>43</sup> and the argument that the statute was void for vagueness was wholly without merit.<sup>44</sup>

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1. Definitions. As used in this section:

(a) ‘Minor’ means any person under the age of seventeen years . . .

(f) ‘Harmful to minors’ means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(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 . . . .

2. 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) . . . or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse, and which, taken as a whole is harmful to minors.

*Id.* at 645-47 (quoting N.Y. PENAL LAW § 484-h (McKinney 1965) (current version at N.Y. PENAL LAW § 235.21 (McKinney 2012))).

41. *See id.* at 631-33.

42. *Id.* at 636.

43. *Id.* at 637.

44. *Id.* at 645.

The Court first noted that the “girlie” magazines involved in this matter fit into the definition of obscenity, which “is not within the area of protected speech or press.”<sup>45</sup> Since obscenities do not fall within First Amendment protections, the Court is required to apply the more stringent strict scrutiny standard.<sup>46</sup> However, here the Court applied a lessor scrutiny due to the fact that the case dealt with a prohibition on the sale to minors of sexual material that would be considered obscene for a child.<sup>47</sup> The Court determined that the statute could be sustained so long as the legislature’s judgment that the proscribed materials were harmful to children “was not irrational.”<sup>48</sup> The Court reasoned that the well-being of children was within the State’s constitutional power to regulate since “it was rational for the legislature to find that the minors’ exposure to such material might be harmful.”<sup>49</sup> Furthermore, “[t]he State . . . has an independent interest in the well-being of its youth.”<sup>50</sup> The interest in protecting the well-being of our nation’s youth was first recognized in *Prince v. Massachusetts*, wherein the State “ha[d] an interest to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens.”<sup>51</sup>

In *Ginsberg*, the State showed that the law was substantially related to the interest of protecting children with legislative findings showing that the condemned material was “a basic factor in impairing the ethical and moral development of . . . youth . . . .”<sup>52</sup> There was “no lack of studies [that] purported to demonstrate” this idea.<sup>53</sup> Although these studies did not demonstrate a causal link, they did not disprove a

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45. *Id.* at 635 (citing *Roth v. United States*, 354 U.S. 476, 485 (1957)).

46. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2735 (2011).

47. *Ginsberg*, 390 U.S. at 641-42.

48. *Id.*

49. *Id.* at 639.

50. *Id.* at 640.

51. *Id.* at 640-41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)) (internal quotation marks omitted).

52. *Id.* at 641 (quoting N.Y. PENAL LAW § 484-h (McKinney 1965) (current version at N.Y. PENAL LAW § 235.21 (McKinney 2012))).

53. *Id.*

causal link either; this was sufficient for the Court.<sup>54</sup> The Court went on to emphasize that there is a difference between minors and adults: adults may have constitutional rights to some materials, but minors do not.<sup>55</sup> Here, there was an “*exigent interest* in preventing distribution to children of objectionable material.”<sup>56</sup> Once again, the Court stressed that protecting children, particularly their well-being, development, and morals, is more important than protecting their constitutional right to access certain questionable and potentially harmful materials. The Court again reiterated the holding of *Prince*: “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”<sup>57</sup> One of the Court’s priorities was still to safeguard children from any harm that could potentially damage their moral and/or ethical development, even if adults could lawfully access the materials in question.

### III. Less Stringent Protection of Children

#### A. Denver Area Educational Telecommunications Consortium, Inc. v. FCC (1996)

After the Court decided cases pertaining to child labor and sexually explicit print materials, the 1990s saw cases decided involving different mediums. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,<sup>58</sup> the Supreme Court decided whether the Cable Television Consumer Protection and Competition Act of 1992, implemented by the Federal Communications Commission (“FCC”), was constitutional.<sup>59</sup> The Act was originally challenged by various

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54. *Id.* at 642.

55. *Id.* at 636.

56. *Id.* (emphasis added).

57. *Id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

58. 518 U.S. 727 (1996).

59. *Id.*

[I]n an effort to control sexually explicit programming conveyed over access channels, Congress enacted . . . three provisions . . . . The first . . . “permit[ted] a cable operator to

cable providers, who were victorious when a panel of the United States Court of Appeals for the District of Columbia Circuit found all three provisions of the Act unconstitutional.<sup>60</sup> However, the Court of Appeals sitting en banc came to the opposite conclusion, finding that the Act was constitutional.<sup>61</sup>

Justice Breyer opened his decision by stating, “[t]he history of this Court’s First Amendment jurisprudence . . . is one of continual development . . . [and] has been applied to new circumstances requiring different adaptations of prior principles and precedents.”<sup>62</sup> This statement indicates that the 1990s have brought different mediums to light and may need to be addressed differently. He further stated that the tradition embodies the Court’s dedication to protect speech from regulation, “but without imposing . . . formulas so rigid that they become a straitjacket that disables government from responding to serious problems.”<sup>63</sup> This is a noticeable departure from the language of the previous two Supreme Court decisions cited in this paper. While the Court must protect constitutionally guaranteed rights, they may not do so in an extreme nature. Finally, before addressing the specific issue in *Denver*, Justice Breyer reiterated the Court’s power to address extraordinary problems with “appropriately tailored”

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. . . prohibit[] programming that the cable operator reasonably believe[d] describe[d] or depict[ed] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.” The second . . . require[d] cable operators to segregate and . . . block similar programming if they decide[d] to permit . . . its broadcast. . . . The third provision . . . “enable[d] . . . cable operator[s] . . . to prohibit the use . . . of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.”

*Id.* at 734-36 (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)).

60. *Id.* at 736 (citing *Alliance for Cmty. Media v. FCC*, 10 F.3d 812 (1993)).

61. *Id.* (citing *Alliance for Cmty. Media v. FCC*, 56 F.3d 105 (1995)).

62. *Id.* at 740.

63. *Id.* at 741.

regulations.<sup>64</sup> Citing *Ginsberg*, the Court stated that this case dealt with an extremely important justification that the “Court has often found *compelling*- the need to protect children from exposure to patently offensive sex-related material.”<sup>65</sup>

The Court found that the first provision was constitutionally permissible for various reasons: the need to protect children, the fact that children have a wide range of access to television broadcasting, and the permissive nature of the restriction.<sup>66</sup> Overall, the first restriction allowed operators to reschedule programming, rather than implementing a complete ban, while balancing the interests of protecting children and protecting speech.<sup>67</sup> The second and third provisions, however, did not pass constitutional muster.<sup>68</sup> The second provision required a complete restriction on patently offensive materials on leased channels.<sup>69</sup> While the Court again stated that protecting children is a “compelling interest,” they found that the “segregate and block” requirement was not the proper way to manage this interest.<sup>70</sup> In reaching this conclusion, the Court used a hybrid test resembling strict scrutiny: whether the regulation was the “least restrictive alternative” and whether it was “narrowly tailored” to meet its objective.<sup>71</sup> The Court held that the second provision was “overly restrictive, ‘sacrific[ing]’ important First Amendment interests for too ‘speculative a gain.’”<sup>72</sup> Finally, the Court looked at the third provision, one that was very similar to the permissible first provision, but dealt with public access channels. Historically, operators have not exercised editorial control over these channels.<sup>73</sup> Additionally, the Court pointed out that there are supervising boards for these channels to monitor what goes on the air, and there was no need to have

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64. *Id.*

65. *Id.* at 743 (emphasis added) (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

66. *See id.* at 743-46.

67. *See id.* at 747.

68. *See id.* at 753-66.

69. *Id.* at 753.

70. *Id.* at 755.

71. *Id.*

72. *Id.* at 760 (citations omitted).

73. *Id.* at 761 (citing H.R. REP. NO. 98-934, at 30 (1984)).

this provision.<sup>74</sup> The government simply did not meet its burden, which resembled strict scrutiny, to prove that the provision “[was] necessary to protect children or that it [was] appropriately tailored” to do so.<sup>75</sup>

This case represents somewhat of a middle ground in the Court’s mindset toward protecting children’s innocence and well-being via their access to potentially harmful materials, versus protecting First Amendment rights. While the Court explicitly pointed out, at least three separate times in the decision,<sup>76</sup> that children and their protection from harmful materials represents a compelling governmental interest, it still concluded that the regulations in *Denver* did not appropriately balance the competing interests.<sup>77</sup> Since the case involved obscene materials, the hybrid test, which resembles strict scrutiny, was appropriate.<sup>78</sup> However, the regulations did not meet the hybrid test.<sup>79</sup> The laws simply did not regulate the area narrowly enough, meaning that the children’s First Amendment rights prevailed.<sup>80</sup>

#### B. *Reno v. ACLU* (1997)

The Internet has revolutionized the way our society works by transforming the way we transmit data and information. Instead of physically going to a store to purchase something, consumers can do so in the comfort of their homes with the simple click of their mouse. However, with such a wide-open information network, it is almost inevitable that harmful materials may end up on the Internet and in the hands of naive children who should be shielded from access to these materials. The first major Supreme Court ruling regarding materials distributed over the Internet came in 1997, in *Reno v. ACLU*.<sup>81</sup>

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74. *Id.* at 762.

75. *Id.* at 766 (citations omitted).

76. *See id.* at 743, 747, 755.

77. *Id.* at 756.

78. *Id.* at 755.

79. *Id.*

80. *Id.* at 756.

81. 521 U.S. 844 (1997).

The court started by noting that

[t]he Internet has experienced “extraordinary growth.” The number of “host” computers—those that store information and relay communications—increased from about [three hundred] in 1981 to approximately 9,400,000 by the time of the trial in 1996. . . . About [forty] million people used the Internet at the time of trial, a number that [was] expected to mushroom to [two hundred] million by 1999.”<sup>82</sup>

Users can take advantage of a wide variety of communication techniques, the most relevant to the case being e-mail, mail exploders, listservs, newsgroups, chat rooms, etc.<sup>83</sup> “From the publishers’ point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions . . . .”<sup>84</sup> The Internet also provides a means to transmit obscene or sexually explicit material.<sup>85</sup> In order to protect children, various systems were developed to help control the material available on a home computer by blocking inappropriate sites, for example.<sup>86</sup> Eventually, commercial pornographic cites popped up that charged users for access as a means of age verification.<sup>87</sup> In 1996, the Telecommunications Act was passed, which included The Communications Decency Act of 1996 (“CDA”), which further included “the ‘indecent transmission’ provision and the ‘patently offensive display’ provision.”<sup>88</sup> The CDA stated that it was a crime to make, create, solicit, or initiate the transmission of indecent or sexually explicit material to anyone under the age of eighteen.<sup>89</sup>

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82. *Id.* at 850 (footnote omitted).

83. *Id.* at 851.

84. *Id.* at 853.

85. *Id.*

86. *Id.* at 854-55.

87. *Id.* at 856.

88. *Id.* at 859 (footnote omitted); see Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

89. *Reno*, 521 U.S. at 859-61 (citing 47 U.S.C. § 223(a) (2006)).

The lower court entered a preliminary injunction against the enforcement of the two challenged provisions, holding that the statutes violated the First Amendment, because they were overbroad, and the Fifth Amendment, because they were vague.<sup>90</sup> The government appealed, attempting to rely, in part, on the Court's decision in *Ginsberg*.<sup>91</sup>

However, the government was unsuccessful in its appeal and the Supreme Court affirmed the lower court's decision, enjoining the Act.<sup>92</sup> Specifically, the Court pointed out differences between the statute in *Ginsberg* and the CDA, finding that the statute in *Ginsberg* was much narrower in four important respects.<sup>93</sup> "First, . . . in *Ginsberg*[,] 'the prohibition against sales to minors [did] not bar parents . . . from [buying] the magazines for their children.'"<sup>94</sup> On the other hand, under the CDA, neither the parents' consent nor their participation could get around the statute.<sup>95</sup> "Second, the New York statute applied only to commercial transactions, whereas the CDA contains no such limitation."<sup>96</sup> Third, the statutes differed on their definitions pertaining to the material they forbade. The New York statute stated that in order to be harmful to minors, the material must be "utterly without redeeming social importance for minors."<sup>97</sup> Meanwhile, the CDA "fail[ed] to provide any definition of [the term] indecent."<sup>98</sup> Finally, New York defined a minor as anyone under the age of seventeen, while the CDA defined a minor as anyone under the age of eighteen.<sup>99</sup>

These four differences help emphasize the notion that the Court had become more meticulous about requirements to block certain material. One regulation was able to pass constitutional muster, while the other was found unconstitutional. This can be attributed to the language of the

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90. *Id.* at 862-63.

91. *Id.* at 864.

92. *Id.* at 885.

93. *Id.* at 865.

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

95. *Id.*

96. *Id.* (citation omitted).

97. *Id.* (quoting *Ginsberg*, 390 U.S. at 646).

98. *Id.*

99. *Id.* at 865-66.

regulations: the language of the regulation in *Ginsberg* was both more meticulous and more specific. This suggests that the Court requires a more specific and narrowly tailored restriction, which the CDA did not possess. The Court concluded that the CDA did not have the “precision that the First Amendment requires” for content-based restrictions.<sup>100</sup> The CDA suppressed a large amount of speech, which adults have a constitutional right to enjoy, in order to deny minors access to potentially harmful speech.<sup>101</sup> This burden on speech is impermissible if the legitimate purpose can be achieved by less restrictive means.<sup>102</sup> The Court appears to be prioritizing rights over the protection and innocence of children, especially when the material is suitable for adults. The Court goes on to state that just because something is offensive does not mean that it may be suppressed.<sup>103</sup> The Court is now erring on the side of preserving the free flow of ideas rather than censoring and limiting access to them. Finally, the Court recognizes that there is a strong governmental interest in protecting children from harmful materials.<sup>104</sup> However, this “interest does not justify an unnecessarily broad suppression of speech addressed to adults.”<sup>105</sup> “[T]he government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’”<sup>106</sup> “[R]egardless of the strength of the government’s interest in protecting children, ‘[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.’”<sup>107</sup> The Court’s language makes it evident that one of its new priorities is to protect the rights of free speech and expression rather than ensuring children develop morally and ethically, as the Court once stated in *Ginsberg*.

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100. *Id.* at 874.

101. *Id.*

102. *Id.*

103. *Id.* at 875 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

104. *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Pacifica Found.*, 438 U.S. at 749).

105. *Id.*

106. *Id.* (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996)).

107. *Id.* (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983)).

C. *Ashcroft v. Free Speech Coalition* (2002)

*Ashcroft v. Free Speech Coalition* discussed the situation surrounding the Child Pornography Prevention Act (“CPPA”).<sup>108</sup> In 1996, the CPPA was passed.<sup>109</sup> The Act “extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children.”<sup>110</sup> The Act focused on *virtual* child pornography, which uses adults who look like minors or computer images to simulate child pornography.<sup>111</sup> This new technology made it possible to create realistic images of people and children who did not exist.<sup>112</sup> At the time the Free Speech Coalition challenged the statute, there was a circuit split over whether the CPPA was constitutional.<sup>113</sup> The Supreme Court granted certiorari to decide whether the CPPA infringed upon First Amendment Rights.<sup>114</sup> The Court held that the CPPA was overbroad and therefore, unconstitutional.<sup>115</sup> Because teenage sexuality has been a theme of art, movies, and literature in modern society, the Court concluded that these images could not be considered obscene, as any possessor of these items would be subject to punishment.<sup>116</sup> The Court also held that “[v]irtual child pornography is not ‘intrinsically related’ to the sexual abuse of children . . . .”<sup>117</sup> Finally, the Court found that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it” and the argument that virtual child pornography may encourage pedophiles to act unlawfully

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108. 535 U.S. 234 (2002).

109. *Id.* at 239.

110. *Id.*

111. *Id.* at 239-40.

112. *Id.* at 240.

113. *See id.* at 244.

114. *Id.*; *see* *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2001); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999).

115. *Ashcroft*, 535 U.S. at 258.

116. *Id.* at 247-49.

117. *Id.* at 250.

is unsustainable,<sup>118</sup> absent a showing that the speech will incite imminent lawless action.<sup>119</sup>

The Court reiterated what it has said in previous decisions: “that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.”<sup>120</sup> The Court went on to say that “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”<sup>121</sup> “The government may suppress speech for advocating the use of force or a violation of law only if ‘such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’”<sup>122</sup> The Court did not find the incitement outlined in *Brandenburg* in this case; rather, there was only a remote connection between the virtual pornography and the chance that pedophiles may act on it.<sup>123</sup>

The Court’s holding in *Ashcroft*, like its holding in *Reno*, found that the CPPA did not meet the precise restriction required by the First Amendment. Rather than upholding a law blocking questionable materials, the Court preferred to tread lightly and preserve the rights of its citizens. The Court may be ignoring something very important—the fact that this speech could really harm children and that perhaps more narrowly drawn laws, rather than sweeping prohibitions, could possibly pass constitutional muster.

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118. *Id.* at 253.

119. *Id.*

120. *Id.* at 252 (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)).

121. *Id.* at 253 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)).

122. *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

123. *See id.* at 253-54.

#### IV. Going Too Far? Children's First Amendment Rights Favored over Their Protection

##### A. *Brown v. Entertainment Merchant's Ass'n* (2011)

This small selection of cases, dating from the 1940s to the new millennium, shows a change in the Supreme Court's attitude, especially with the invention of new interfaces to access information. Originally, one of the Court's priorities was to protect children and their purity.<sup>124</sup> As the years passed, new technology was discovered and used by the masses, society's values changed, and access to information became easier. This influenced one of the Court's new priorities: to ensure that First Amendment rights are protected. *Brown v. Entertainment Merchant's Ass'n*, a recent Supreme Court decision, dealt with the censuring of violent video games from minors in the state of California.<sup>125</sup> A California Act was passed that "prohibit[ed] the sale or rental of 'violent video games' to minors, and require[d] their packaging to be labeled '18.'"<sup>126</sup> The Act applied to minors under the age of eighteen,<sup>127</sup> and defined video games as "any electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own monitor, or is designed to be used with a television set or a computer monitor, that interacts with the user of the device."<sup>128</sup> The Act prohibited violent video 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 the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the

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

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

126. *Id.* at 2732 (quoting CAL. CIV. CODE §§ 1746-1746.5 (West 2009)).

127. CAL. CIV. CODE § 1746(a) (West 2009).

128. *Id.* § 1746(c).

game as a whole, would find appeals to a deviant or morbid interest of minors

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.<sup>129</sup>

The definitions of heinous, cruel, depraved, and torture include things that are “shockingly atrocious” or involve “a high degree of pain,” “physical abuse,” “substantial risk of death,” “mental abuse,” etc.<sup>130</sup> To determine if the violence depicted in

129. *Id.* § 1746(d)(1).

130. *Id.* § 1746(d)(2). The definitions read, in full:

(A) “Cruel” means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) “Depraved” means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

(C) “Heinous” means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) “Serious physical abuse” means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

the game was especially cruel, depraved, or heinous, factors to be considered were the “infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim’s body, and the helplessness of the victim.”<sup>131</sup>

A pre-enforcement challenge was brought by video game and software industries in the United States District Court for the Northern District of California.<sup>132</sup> The District Court “concluded that the Act violated the First Amendment and permanently enjoined its enforcement.”<sup>133</sup> On appeal, the decision was affirmed.<sup>134</sup> The Supreme Court granted certiorari to determine whether the ban of “violent video games” for minors violated their First Amendment rights.<sup>135</sup> The Court affirmed the lower court’s decision, and held that video games qualify for First Amendment protection,<sup>136</sup> new categories of unprotected speech may not be added,<sup>137</sup> that “[b]ecause the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest,”<sup>138</sup> and that because California was unable to meet that burden, the statute was unconstitutional.<sup>139</sup>

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(E) “Torture” includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

*Id.*

131. § 1746(d)(3).

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

133. *Id.* (citing *Video Software Dealers Ass’n v. Schwarzenegger*, No. C-05-04188 (RMW), 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007)).

134. *Id.* (citing *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009)).

135. *Id.*

136. *Id.* at 2733.

137. *Id.* at 2734; *see also* *United States v. Stevens*, 130 S. Ct. 1577 (2010).

138. *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2738 (citation omitted).

139. *Id.* at 2739.

B. *Analysis of the Brown Decision*

In its decision, the Court first “acknowledge[d] that video games qualify for First Amendment protection.”<sup>140</sup> Furthermore, the Court determined that *United States v. Stevens*,<sup>141</sup> a case holding “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,” was controlling in *Brown*.<sup>142</sup> The Court in *Stevens* held that violent speech regulations could not be made to look like obscenity regulations.<sup>143</sup> This is of particular importance because by failing to either create a new category of unprotected speech or categorize violence with obscenities, the Court determined that the appropriate test was strict scrutiny.<sup>144</sup> The strict scrutiny standard of review requires “a compelling government interest that is narrowly drawn to serve that interest,”<sup>145</sup> as opposed to the lesser scrutiny applied in *Ginsberg*, where minors and unprotected speech (obscenities) were involved.<sup>146</sup> This means that violence is a protected form of speech, unlike obscenities, which is why it receives the highest level of scrutiny. Furthermore, “[t]he State must specifically identify an ‘actual problem’ in need of solving,” and infringing on free speech must be necessary to solve that problem.<sup>147</sup> This standard is very demanding, and the Court held that California did not meet it.<sup>148</sup> The State provided evidence that was not compelling, such as “studies purporting to show a connection between exposure to . . . video games and harmful effects,” but these studies were rejected because they showed a correlation, rather than showing that the games *cause* minors to act aggressively.<sup>149</sup>

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140. *Id.* at 2733.

141. 130 S. Ct. 1577 (2010).

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

143. *Id.* (citing *Stevens*, 130 S. Ct. at 1591).

144. *See id.* at 2738.

145. *Id.*

146. *Id.* at 2735 (citing *Ginsberg v. New York*, 390 U.S. 629 (1969)).

147. *Id.* at 2738.

148. *Id.* (citing *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 818 (2000)).

149. *Id.* (citations omitted).

In the present case, as well as in other attempts to regulate violent video games, “[s]tates have commonly advanced two [legitimate] rationales . . . : ‘preventing violent, aggressive, and antisocial behavior; and preventing psychological or neurological harm to minors who play . . . [the] games.’”<sup>150</sup> Unfortunately, “beyond mere recitation of a compelling interest, the government bears the burden to ‘demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.’”<sup>151</sup> Again, unfortunately, the courts almost always view the states’ scientific evidence with great skepticism.<sup>152</sup> It is interesting to note that just forty-five years prior, the Court in *Ginsberg* actually embraced studies that were less than conclusive in their proof of causation.<sup>153</sup> This inconsistency provides even more evidence that values and priorities have shifted over a relatively short period of time.

In order to further arguments that violent “video games [should] fall under exceptions to the First Amendment’s protections,” and thereby trigger a lesser degree of scrutiny, various states have unsuccessfully attempted to argue “that video games constitute [(1)] obscene speech, [(2)] speech that is harmful to minors, and [(3)] speech that incites imminent lawless action.”<sup>154</sup>

As stated above and reaffirmed by the *Stevens* case, violence does not fall under the category of obscenity.<sup>155</sup> Obscenity is defined as “works, which taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and . . . do not have serious literary,

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150. James Dunkelberger, Comment, *The New Resident Evil? State Regulation of Violent Video Games and the First Amendment*, 2011 B.Y.U. L. REV. 1659, 1665-66 (2011) (quoting *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009)).

151. *Id.* at 1666 (quoting *Video Software Dealers Ass’n*, 556 F.3d at 962).

152. *Id.* at 1666-67.

153. See *Ginsberg v. New York*, 390 U.S. 629, 641-42 (1968).

154. Gregory Kenyota, Note, *Thinking of the Children: The Failure of Violent Video Game Laws*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 785, 799-800 (2008).

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

artistic, political, or scientific value.”<sup>156</sup>

In attempting to rely on the concept that video games are harmful to minors, states have urged the Court to rely on the decision in *Ginsberg*.<sup>157</sup> Since the statue in *Brown* mirrors the statute in *Ginsberg*, the Court in *Brown* evaluated why one was successful and one was not.<sup>158</sup> *Ginsberg* involved obscenities, which are not protected by the First Amendment; therefore, they could be regulated as long as the finding that they were harmful to children was not irrational, thereby passing intermediate scrutiny.<sup>159</sup> Violent video games, on the other hand, do not fall into an unprotected category and the Court in *Brown* was unwilling to create one.<sup>160</sup> Because “minors are entitled to a significant measure of First Amendment protection . . . only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”<sup>161</sup> The Court acknowledges that a state *does* possess “power to protect children from harm, but [this] does not [extend to] . . . ideas to which children may be exposed.”<sup>162</sup> Rather than protecting children from these potentially harmful ideas, the Court found that suppression of these ideas would be more detrimental to others’ First Amendment rights: “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.”<sup>163</sup>

States have also attempted to argue that violent video games incite imminent lawless action.<sup>164</sup> This argument would trigger the *Brandenburg v. Ohio*<sup>165</sup> test, requiring the state to

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156. *Kenyota*, *supra* note 154, at 800 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

157. *Id.*

158. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2735 (2011).

159. *See id.*

160. *See id.*

161. *Id.* at 2735-36 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975)).

162. *Id.* at 2736 (citing *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

163. *Id.* (quoting *Erznoznik*, 422 U.S. at 213-14).

164. *Kenyota*, *supra* note 154, at 801.

165. 395 U.S. 568 (1942).

show that “(1) playing video games somehow tells people to commit violent acts and (2) video game players are likely to do so. . . .”<sup>166</sup> Unfortunately, as the majority points out, the studies relied upon could not establish a solid causal link between playing games and imminent violence.<sup>167</sup> However, these studies may still be in their infancy with room for further development. In looking at this argument, it is important to evaluate the video games themselves. For example, games such as Grand Theft Auto IV encourage users to commit crimes, such as burglary, robbery, assault, arson, murder, prostitution, drug trafficking, as well as evading police in the process.<sup>168</sup> Grand Theft Auto’s website even contains a “comedic” poll: “Has GTA IV influenced you to commit crimes?”<sup>169</sup> The options that users can select from include: (1) “[n]o, it’s just a game”; (2) “[o]nly petty crimes”; (3) “[s]tealing has become a hobby”; (4) “[y]es, can’t say more, cops are coming”; (5) “I am the living incarnation of Niko” (the game’s main character).<sup>170</sup> While some gamers may find this poll comedic, it still points out that some people could have the mentality to act upon what they play out in these so called “harmless” games.

Perhaps even more shocking, life may have actually imitated art (if video games can even be considered art) in 1999, with the occurrence of one of the most horrific tragedies and deadliest school shootings in U.S. history.<sup>171</sup> On April 20, 1999, two teenagers attending Columbine High School opened fire and killed thirteen people and injured another twenty-one.<sup>172</sup> In a subsequent investigation of the tragedy, it was revealed that the two teens were obsessed with the game DOOM, wherein “players took the role of a marine trapped on

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166. Kenyota, *supra* note 154, at 801.

167. *See id.* at 802.

168. *See* GRAND THEFT AUTO IV, <http://www.gta4.net/overview/> (last visited Jan. 7, 2013).

169. *Id.*

170. *Id.*

171. *See* Kenyota, *supra* note 154, at 790-92.

172. James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A16, available at <http://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gun-down-many-23-kill.html?ref=columbinehighschool&pagewanted=1>.

Mars that had to shoot and kill aliens in order to escape.”<sup>173</sup> One of the teens responsible for Columbine even stated in a video made before the shootings, “it’s going to be like fucking Doom!”<sup>174</sup> How videogames cannot be said to influence or even incite players to reenact what they do in their realistic virtual world is absurd— especially when there are specific examples of these horrific virtual crimes playing out in reality, and not only in virtual reality!

The Court in *Brown*, perhaps incorrectly, analogized video games to protected books, plays, and movies, because they all “communicate ideas—and even social messages.”<sup>175</sup> The majority then went on to compare various books throughout history that have not been suppressed, yet contained gore, citing literature such as Grimm’s Fairy Tales, Snow White, Cinderella and Hansel and Gretel.<sup>176</sup> However, the Court did not seem to acknowledge nor take into account the difference between reading a book and engaging in the interactive media within video games.<sup>177</sup> The Court even went so far as to say that a book is just as interactive as a video game!<sup>178</sup> However, there are vast differences between the two. Books do not have features such as virtual reality, uncanny graphics or motion control which are standard in the newest, most technologically-advanced games.<sup>179</sup> Instead, books require readers to take what they have read and use their imagination to paint a picture in their minds. Video games, on the other hand, paint these pictures for users on the screens right in front of them. Furthermore, it is important to note that video game technology is still in its infancy. “New developments . . . allow for far more graphic and realistic violent acts than ever previously depicted . . . [and can apply] to almost every human sense.”<sup>180</sup> There are even visual enhancements that support

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173. Kenyota, *supra* note 154, at 790.

174. *Id.* at 790-91.

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

176. *See id.* at 2736.

177. *See id.* at 2737-38.

178. *See id.* at 2738.

179. *See* Eric T. Gerson, Note, *Video Game Violence and the Technology of the Future*, 76 BROOK. L. REV. 1121, 1123-24 (2011).

180. Robert Bryan Norris, Jr., Note, *It’s All Fun and Games Until Someone Gets Hurt: Brown v. Entertainment Merchants Association and the*

three-dimensional gaming,<sup>181</sup> making it nearly impossible to analogize this technology with a book, containing only written words on paper. Games and systems such as Microsoft's Kinect completely eliminate the need for a controller, instead using a camera and infrared lens to map a player's actual body movements in three dimensions, literally placing them in the game.<sup>182</sup> Additionally, this gaming system "allows for voice commands and facial recognition technology,"<sup>183</sup> again, much more advanced than reading a book and drawing imagery with one's own imagination.

Another important effect of video games on their users is the impact of experience. "Evidence of video games psychological, emotional, and experiential impact can be found in a virtual reality program called Virtual Iraq . . . ."<sup>184</sup> This game was used to treat soldiers suffering from Post Traumatic Stress Disorder ("PTSD").<sup>185</sup> Published results from the program show that eighty percent of those who completed the program "showed . . . statistically and clinically meaningful reductions in PTSD, anxiety, and depression."<sup>186</sup> This study helps to illustrate how video games can trigger certain stimuli in one's brain. However, while this game and study were used to *treat* soldiers, isn't it possible that it would have opposite effects on different users, especially those not under medical supervision? The Federal Communications Committee conducted a study in 2007, regarding the possible effects violent programming can have on children.<sup>187</sup> This study was conducted at the "request [of] thirty-nine members of the U.S. House of Representatives."<sup>188</sup> It found that there was deep concern among both health professionals and parents, as to the

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*Problem of Interactivity*, 13 N.C. J.L. & TECH. ON. 81, 85 (2011).

181. *Id.* at 86.

182. *See id.* at 87.

183. *Id.*

184. *Id.* at 102.

185. *Id.* at 102-03.

186. *Id.* at 103 (quoting Albert Rizzo et al., *Development and Clinical Results from the Virtual Iraq Exposure Therapy Application for PTSD*, 1208 ANNALS N.Y. ACAD. SCI. 114, 122 (2010)).

187. *In re* Violent Television Programming and Its Impact on Children, 22 FCC Rcd. 7929 (2007).

188. *Id.* at 7930.

effect violence on television may have on children.<sup>189</sup> Overall, it found “that exposure to violence in the media can increase aggressive behavior in children, at least in the short term.”<sup>190</sup> While this study only tapped into the surface of the issue, perhaps the most important thing that it did was identify that there really could be a problem, a problem that the Court opted to ignore. Even though this study shows a possible effect immediately after viewing violence on television, it still shows an effect—one that must be investigated further to ensure that there really are not any adverse long term effects on society’s youth.

Although the statute in *Brown* was struck down, the majority ends with this quote, perhaps leaving the door open for the future: “California’s legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive.”<sup>191</sup> While the Court acknowledges that the legislature may be on to something, it again reiterates just how important constitutional guarantees are, and is simply not prepared to infringe upon them solely for the benefit of protecting children.

## V. Conclusion—What’s Next?

The timeline of relevant Supreme Court cases evidences a shift in the Court’s attitude throughout the years. At one point in the past, one of the Court’s priorities was to ensure that children were protected from certain harmful things and materials to guarantee their moral and ethical development. However, as time went on and with the invention of new technologies such as the Internet and “virtual child pornography,” the Court began to shift in its attitude, ensuring that certain mediums and materials could not be restricted solely because they could be harmful to children, especially

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189. *Id.* at 7931.

190. *Id.*

191. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741-42 (2011).

when adults were free to enjoy these materials. Furthermore, the Court was not willing to hold that materials may be restricted if they could incite future lawless action. The Court may have potentially erred in deciding the *Brown* case. It failed to distinguish new technology from written materials that have been around for thousands of years. It also failed to acknowledge that these new materials might have an extremely detrimental effect on our youth, such as severe psychological effects or inciting copycat crimes, mimicking what went on in a video game. Whatever the effects may be, the Court simply does not acknowledge that children's innocence could be in jeopardy! When a child is playing a game that instructs players to shoot and kill police, or rape and maim women, society is saying that these behaviors are acceptable.

Nevertheless, by 2011, the Court reaffirmed this shift in values, holding that children's right to access materials should not be restricted based on the material's violent nature without a concrete showing of negative effects on the children. The California law in *Brown* was struck down and considered a constitutional victory, particularly for children. However, it is important to note that the 7-2 decision in *Brown* may really be closer to a 5-4 decision as the Chief Justice and Justice Alito's concurring opinions could almost be read as dissents. Both Justices agreed that the law should have been struck down because of overbreadth; this could mean that a revised and more narrowly tailored restriction on video games could succeed in the future.<sup>192</sup> Furthermore, both the Chief Justice and Justice Alito acknowledged that the technology in video games is new, unknown, and could lead to a major social problem in the future.

[T]he California statute is well intentioned . . . .  
[T]his court should proceed with caution. We  
should make every effort to understand . . . new  
technology. We should take into account the  
possibility that developing technology may have  
important societal implications that will become

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192. *Id.* at 2742-51 (Alito, J., concurring).

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apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older things with which we are familiar.<sup>193</sup>

This warning from the two Justices makes the future seem somewhat unsure. As to where the Court will go in the future regarding children, censorship, and constitutional rights, only time will tell; but if the Court continues to follow the pattern it has over the past seventy years, it seems as though First Amendment rights will continue to take precedent over the protection of children's innocence.

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193. *Id.* at 2742.