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# Children and Categorization: Maintaining a Standard for Recognizing Speech Categories in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011)

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Note*

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TABLE OF CONTENTS


I. Introduction ..... 999
II. Background ..... 1001
A. Categorization and Unprotected Speech Under the First Amendment ..... 1001
B. The Supreme Court's Method of Formally Recognizing a Category ..... 1004
1. Wholesale Balancing—Recognizing Categories Before *Stevens* ..... 1004
2. *United States v. Stevens* Declares a Test: Historical Treatment ..... 1007
C. Variable Definitions of Obscenity: The *Ginsberg* Approach ..... 1008
D. The First Amendment and Speech Toward Children ..... 1009
1. Media Restrictions of Profanity ..... 1010
2. Significant Protection for Minors ..... 1011
E. Recognizing Categories Involving Speech Toward Children: *Brown v. Entertainment Merchants Ass'n* ..... 1012
1. Procedural History ..... 1012
2. The Majority's Decision ..... 1013




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3. Justice Alito's Concurrence ..... 1013
III. Analysis ..... 1015
A. *Ginsberg* Is Off-Point for Recognizing a Category ... 1016
1. *Ginsberg* Does Not Discuss Whether to Recognize a Category but Rather How to Define One ..... 1016
2. Defining a Category Is Distinct from Recognizing One ..... 1018
3. The Similarities in *Ginsberg* May Still Provide a Test by Analogy ..... 1019
B. Replacing *Stevens* with *Ginsberg* Would Drastically Change First Amendment Analysis ..... 1019
1. *Ginsberg* as a Rationality Threshold for Recognition ..... 1019
2. An Alternative Application? ..... 1021
C. Such a Drastic Departure from Standard Methodology Is Inconsistent with the Court's Past Treatment of Speech Toward Children ..... 1023
1. Categorization for Speech with Child Audiences ..... 1024
2. Substantial Protection with Exceptions Both Limited and Narrow ..... 1025
IV. Conclusion ..... 1027

## I. INTRODUCTION

The freedom to speak one's mind free of persecution has long occupied a place of particular gravity in American culture. At its core is the idea that government cannot control our access to certain ideas by restricting some messages but not others—it prohibits government from discriminating against content.[1] To be workable, however, this right must acknowledge exceptions, and it does so by allowing discrimination against certain types of speech to bypass this strict First Amendment protection.[2] So while the Supreme Court prohibits discrimination of most content, there are a few types of speech, such as libel or incitement,[3] that receive more lenient treatment. Accordingly,

1. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 67–68 ("[T]he core value underlying the First Amendment: the right of individuals to make their own choices about what ideas to express, receive, and believe, free of governmental limitations or manipulation.").
2. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 961 (4th ed. 2011) [hereinafter CHEMERINSKY].
3. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

to determine the level of protection, judges must look to the type of speech in question, an approach that forms the fundamental framework for content-discrimination analysis.[4]

In a recent case, *United States v. Stevens*,[5] the Court established a clear standard for such categorization, declaring it would recognize exceptions only for speech that had a firm tradition of regulation.[6] Despite its focus on tradition, the *Stevens* opinion provided little guidance as to whether this held true when children were the recipients of the speech, in which case speech receives lesser protection.[7] Yet because the Court never precisely outlined these differences, it was uncertain whether *Stevens*'s requirement of traditional regulation applied in all contexts of speech categorization, or whether categories could sometimes deserve formal recognition without satisfying this fairly strict requirement. On occasion, First Amendment analysis can change depending on its setting,[8] medium,[9] or audience.[10] So, it seems at least plausible that such situations might be exempt from the full impact of *Stevens*.

Indeed, this was the complication in *Brown v. Entertainment Merchants Ass'n*,[11] where the Court faced a statute limiting the sale of violent video games to minors.[12] The Court had to determine whether such speech deserved recognition as a formal category, exempted from full First Amendment protection. Without a clear answer from the young *Stevens* opinion, the initial dividing point was simply whether the fact of a child audience deserves special merit when considering the recognition of a new category, or whether such speech must have a tradition of regulation, as generally mandated by *Stevens*. There, the Court fractured in its application of *Stevens*. While the majority straightforwardly applied the case without so much as a second

4. *See* Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 918 (2009); Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 53 (1994).

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

6. *Id.* at 1586.

7. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) ("[A] State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.").

8. Many authoritarian environments are treated differently for First Amendment inquiries. *See* CHEMERINSKY, *supra* note 2, at 1188–98 (discussing military, prisons, and schools as meriting added governmental protection).

9. The content of broadcast media, for example, can be more heavily regulated than cable, telephone, and internet, at least with respect to indecent speech. *See* CHEMERINSKY, *supra* note 2, at 1071.

10. For example, the definition of obscenity can vary depending on the age of audience members. *See infra* section II.C.

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

12. *Id.* at 2732–33.

glance,[13] Justice Alito disagreed, suggesting *New York v. Ginsberg*[14] supplied the standard more appropriate for speech toward children.[15]

*Ginsberg* stands as an example of speech receiving lessened protection when children are involved,[16] so Justice Alito's choice raises the interesting possibility of an exception from the *Stevens* requirements for recognizing a speech category. Although the majority rebutted some of Justice Alito's attacks, it gave little discussion as to why *Ginsberg*, a case dealing with treatment of speech directed at children, was inapplicable in a case involving speech directed at children. Justice Alito similarly fails to explain, in his critique of the majority, why it really is the appropriate case or how it fits the analysis. In light of this underexplored disagreement, this Note examines that possibility and its ramifications in more depth and supports the majority's decision, at least in terms of jurisprudential harmony, to avoid the reasoning in *Ginsberg*. In Part II, this Note examines First Amendment jurisprudence, focusing particularly on the method of categorizing speech and the Court's past treatment of speech toward children. In Part III, the discussion turns to the possibility of using the *Ginsberg* decision as precedent, analyzing whether and how such reasoning could apply as an exception to the method established in *Stevens*. The resulting standard would likely be a rational basis test creating a significant difference from standard categorization methodology. The Court's past treatment of children, however, shows such a large difference to be unwarranted.

## II. BACKGROUND

### A. Categorization and Unprotected Speech Under the First Amendment

The First Amendment establishes the right to freedom of expression with a short and simple statement: "Congress shall make no law . . . abridging the freedom of speech."[17] The Supreme Court, however, has always avoided a literal interpretation, allowing certain speech-abridging laws to survive constitutional analysis.[18] In fact, until around World War I, the Supreme Court was largely unsympathetic to First Amendment protection and consistently avoided or struck down free speech claims.[19] Without evidence of much legal

13. *Id.* at 2734.
14. New York v. Ginsberg, 390 U.S. 629 (1968).
15. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2747 (Alito, J., concurring).
16. *Ginsberg*, 390 U.S. at 636–37 (allowing a state to restrict a minor's access to sexual content where it could not restrict an adult's access).
17. U.S. CONST. amend. I.
18. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).
19. David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 520 (1981).

theory or doctrine, the Court appeared simply to permit government regulation whenever speech had a "bad tendency."[20] But without clear guidelines, the Court's determination rested solely on an ad hoc analysis.[21]

After World War I, at the urging of a number of scholars,[22] the Court established a test in which the government could only regulate speech if it exhibited a clear and present danger of "bring[ing] about the substantive evils that Congress has the right to prevent."[23] Although use of this test was somewhat inconsistent over the following four decades,[24] it did reflect a move toward some structure in First Amendment analysis.

In *Chaplinsky v. New York*,[25] the Court began looking to a new approach: categorization.[26] The defendant in *Chaplinsky* was prosecuted under a state statute making it illegal to address someone offensively such that the speech incites a breach of peace.[27] The Court identified "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[28] Among these it included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[29] It thus identified limited categories of content which could be regulated without raising First Amendment concerns. Because the statute's construction confined the crime to fighting words, which the Court identified as one of these categorical exceptions, the law was constitutional.[30]

This categorization approach is a system of analysis in which predefined categories of speech determine the level of constitutional protection.[31] This approach presumes all speech is protected from content discrimination but identifies certain categories—for example, obscenity or defamation—as narrow exceptions for which content dis-

20. *See id.* at 533.
21. *See id.* at 523.
22. *See generally id.* Professor Rabban provides an excellent background on how a number of scholars influenced the Court's understanding of free speech, and prompted Justice Holmes's own transition toward a more libertarian view of the First Amendment.
23. Schenck v. United States, 249 U.S. 47, 52 (1919).
24. *See* CHEMERINSKY, *supra* note 2, at 1019 (In judging incitement, for which the clear and present danger test was originally designed, "the Supreme Court has used at least four major different approaches.").
25. Chaplinsky v. New York, 315 U.S. 568 (1942).
26. *See* Werhan, *supra* note 4, at 54.
27. *Id.* at 573.
28. *Id.* at 571–72.
29. *Id.*
30. *Id.* at 573.
31. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493 n.44 (1975); Farber, *supra* note 4, at 917; Werhan, *supra* note 4, at 53.

crimination is permitted.[32] This analysis of speech-types on a wholesale basis requires the Court to define a category, which it does by identifying the circumstances common to each variation of speech fitting inside the intended category while ignoring facts irrelevant to the category as a whole.[33] Under this approach, a judge will allocate the speech in question to its appropriate predefined category or will conclude that the speech does not fit within any category, and from this its First Amendment protection necessarily follows.[34] As Professor Kathleen Sullivan notes, this method follows a taxonomist's style by requiring a judge to only classify and label the specific speech in accordance with these categories, so that "all the important work in litigation is done at the outset."[35] Thus, because the Supreme Court has shown some categories to receive harsher treatment than others, the outcome of the case often depends on the judge's classification of the speech at issue.[36]

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32. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992); CHEMERINSKY, *supra* note 2, at 961. It should also be noted here that the discussion of some speech as "protected," and other speech as "unprotected" is a simplistic generalization of the Court's complex First Amendment doctrine. Whereas certain categories of speech, such as fighting words and obscenity, are often referred to as "unprotected," they are not "speech entirely invisible to the Constitution." *R.A.V.*, 505 U.S. at 383. Accordingly, a law cannot discriminate against speech within the broader category of unprotected speech by, for example, banning only political obscenity—while operating within the "unprotected" category of obscenity, such a law unconstitutionally discriminates against a protected type of speech: political speech. Similarly, "protected" speech can, in some manners, be regulated. A law may, for example, regulate the "time, place and manner" of some speech, so long as it does not discriminate against content. To add more complexity, some speech, such as commercial speech, enjoys more protection than "unprotected" speech, but less protection than "protected" speech. Thus, it is a spectrum of protection rather than a simple on-off switch, but for the sake of simplicity, discussion will continue referring to speech as either "protected" or "unprotected." For further discussion on the differences between these designations, see Farber, *supra* note 4, at 925–31.

33. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 300–01 (1981) ("In formulating a categorical rule, we isolate what we in our best judgment determine to be the facts on which we wish and expect future cases to turn. In doing so we suppose that these facts will recur and that they will recur in substantially similar contexts.").

34. *See* Ely, *supra* note 30, at 1493 n.44. While the Court's complicated and often controversial treatment of content-discrimination is never so simple as this, the Court does seem to rely on using categories and tiers of scrutiny to give government more power to regulate certain content. *See* Farber, *supra* note 4, at 917–19.

35. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 COLO. L. REV. 293, 293 (1992).

36. *Id.* Courts also have a number of separate tools of analysis at their disposal such as overbreadth and vagueness, which are each grounds for unconstitutionality themselves. Justice Alito, for example, employs vagueness in his concurrence in *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011).

This is not meant to overstate the effect of categorization. Classifying certain speech as "protected" does not automatically mean the restriction is unconstitutional, but it does subject the statute to strict scrutiny.[37] Accordingly, should the government's interest be sufficiently compelling and the law be narrowly tailored to match this interest, a law abridging protected speech can theoretically survive constitutional analysis.[38] But because strict scrutiny is so difficult to overcome, the result of categorization will often suggest the outcome.[39]

Though this approach has received both praise and criticism since its appearance in *Chaplinsky*, the basic framework of discussing levels of protection in terms of "types of speech" has persisted.[40] First Amendment analysis thus typically begins by determining whether the speech at issue belongs to one of the unprotected categories.[41]

## B. The Supreme Court's Method of Formally Recognizing a Category

### 1. *Wholesale Balancing*[42]*—Recognizing Categories Before* Stevens

Over the past half-century, the Supreme Court has modified the *Chaplinsky* list, giving formal recognition to a number of categories of speech.[43] While these recognition cases are few and far between,[44]

37. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 641–42 (1994); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); CHEMERINSKY, *supra* note 2, at 1017; Farber, *supra* note 4, at 919.

38. *See Perry Educ. Ass'n*, 460 U.S. at 45.

39. Sullivan, *supra* note 34, at 296. *But see, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (finding the government's limit on campaign contributions was narrowly tailored to serve a compelling government interest, thus surviving strict scrutiny).

40. *See* authorities in note 4.

41. *See* Farber, *supra* note 4, at 918; *see also* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 11 (1960) ("In determining the constitutionality of any ban on a communication, the first question is whether it belongs to a category that has any social utility.").

42. The theory of categorization in which a category is recognized through wholesale balancing has often been referred to as "definitional balancing." Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment"*, 39 AKRON L. REV. 483, 490 (2006).

43. Farber, *supra* note 4, at 917.

44. While some other cases arguably added categories such as fraud, commercial speech, or true threats, these opinions tend to give little indication as to *how* the Court decided to include their categories. The opinions I discuss in this Part are ones in which the Court clearly gave justification of its recognition of the category.

they provide valuable primary evidence of how the Court goes about recognizing a category.[45]

In *Chaplinsky* itself the Court seemed to justify the categorical exceptions primarily through a balancing test, noting simply that the benefit of each such category is de minimis next to the cost.[46] The Court also noted that regulation of these categories has "never been thought to raise any Constitutional problems"[47] while adding a further justification: excluding these categories merely extended tradition.

In *Roth v. United States*,[48] the Court examined whether "obscenity" truly belonged as one of these categories[49] by addressing the constitutionality of a law criminalizing certain publication and dissemination of obscenity.[50] The Court's analysis began by recogniz-

45. This Note discusses "recognition" of a category, rather than "creation" of one. While the Supreme Court may sometimes seem to create entirely new categories, the Court, in *United States v. Stevens*, 130 S. Ct. 1577 (2010), was determined to avoid the idea of category *genesis*, instead terming its actions as "recognition":

> Our decisions in Ferber and other cases cannot be taken as establishing a freewheeling authority to declare *new categories* of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been *historically unprotected, but have not yet been specifically identified or discussed as such in our case law* . . . . We need not foreclose the future *recognition* of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

*Stevens*, 130 S. Ct. at 1586 (emphasis added). The Court explained its past actions as merely recognizing preexisting but undeclared categories. Although this may be true, it is certainly debatable. Instead of engaging in this discussion, however, I wrestle with the closely related issue of the *manner* in which the Court justifies a categorical exception in the first place. One of the categories I discuss in this section of the background was clearly pre-existent yet unrecognized, whereas the others had a less evident history. In all such cases, however, the Court must choose whether to *recognize* a category, regardless of whether it simultaneously "creates" a new category. *Roth v. United States*, 354 U.S. 476 (1957), for example, was not the first case discussing an exception for "obscenity"—obscenity had been excepted for decades beforehand—but it involved the Court's first decided attempt to justify the category. *New York v. Ferber*, 458 U.S. 747 (1982), on the other hand, dealt with the relatively new problem of child pornography, arguably creating a category simultaneous to recognizing it. Whereas one might argue that the court "created" a category in the latter case, it clearly does not in the former, in which the category of obscenity had long been informally recognized. But in both cases the Court gave formal weight to each category through their justification. *See* Kalven *supra* note 40, at 2. Thus, I use the term "recognition" as a relatively neutral term applicable to any case in which the Court seriously discusses the justification behind a category's exception.

46. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

47. *Id.* at 571–72.

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

49. *See* Farber, *supra* note 4, at 921 ("The only question was whether obscenity in general is 'utterance within the area of protected speech and press.'").

50. *Roth*, 354 U.S. at 481.

ing that many states at the time of the Constitution's ratification recognized less-than-full speech protection for obscenity or for the related acts of profanity or blasphemy.[51] Further, the Court reasoned such speech was "utterly without redeeming social importance"[52] and noted that current obscenity laws of numerous nations and states affirm this value judgment.[53] From these reasons the Court found obscenity constitutionally unprotected.[54] Again though, the Court failed to give a specific test for *how* to recognize a category.

In *New York v. Ferber*[55] the Court addressed whether to recognize an exception for child pornography.[56] Here the Court directly confronted the issue[57] by recognizing a category and identifying a number of justifications for doing so. First, the Court reasoned that the market for child pornography provided incentive for sexual child abuse, creating an intrinsic relationship between the expression and crime.[58] Such a relationship easily led the Court to a compelling government interest in restricting the expression itself.[59] The Court also added that "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[60] Finally, the Court also found that when balanced against the costs child pornography is of de minimis value.[61]

Though useful, these cases fail to show a consistent approach with each giving multiple reasons for their categorical exclusion while failing to explicitly identify a single method or standard by which to judge a potential category for official recognition. In an attempt to resolve this problem, many scholars at the time seized upon the recurrent focus on cost-benefit analysis, finding the Court's language to reveal some form of wholesale balancing as the *primary* inquiry behind categorization.[62] Under such a test a court would examine the proposed

51. *Id.* at 482.
52. *Id.* at 484.
53. *Id.* at 484–85.
54. *Id.* at 485.
55. New York v. Ferber, 458 U.S. 747 (1982).
56. *Id.* at 753.
57. *Id.* at 753.
58. *Id.* at 759.
59. *Id.* at 756–61.
60. *Id.* at 761–62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)) (internal quotation marks omitted).
61. *Id.* at 762–64.
62. *See, e.g.*, CHEMERINSKY, *supra* note 2, at 1017 ("[C]ategories . . . reflect value judgments by the Supreme Court."); Deutsch, *supra* note 41, at 528 (viewing the Court as implicitly applying definitional balancing across its opinions); Sullivan, *supra* note 34, at 295 n.6, 308 (referring to categorization and balancing as "really the same job."); Werhan, *supra* note 4, at 53, 56 (seeing *Chaplinsky* as using "categorical cost-benefit balancing"). *But see* Farber, *supra* note 4, at 920 (seeing it not quite as cost-benefit balancing, but a prepackaged satisfaction of strict scru-

category as a whole to make a blanket assertion of either protection or exclusion for the entire type of speech.[63] Next, a court would balance competing interests for the speech at issue, and should the costs of the speech clearly outweigh the benefits, a First Amendment exception for the entire type of speech should result.[64] Despite a fairly general agreement that a balancing test was the Court's prominent method for recognizing categories, other justifications also underlay the Court's decisions. These alternatives surfaced in *United States v. Stevens*[65] to clearly establish a different method of recognizing categories.

### *2.* United States v. Stevens *Declares a Test: Historical Treatment*

The Supreme Court in *Stevens* dismissed the balancing approach as far too discretionary.[66] *Stevens* involved a federal statute criminalizing the sale, purchase, or commercial production of animal cruelty.[67] The government attempted to persuade the Court to add a category to the list of First Amendment exceptions by advocating that the Court view "[commercial] depictions of animal cruelty" through the lens of a balancing test—weighing its social benefit to its cost.[68] The Court recognized that previous cases seemed to indicate that a category could be justified where the speech's cost outweighs its benefits, but it then asserted that its past opinions had never actually identified categories on the basis of balancing. Instead, it claimed to have merely *described* historically excluded categories as valueless.[69] The Court reasoned that the Constitution forbids any value judgment of speech, finding such a "free-floating test for First Amendment coverage . . . startling and dangerous."[70]

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tiny); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298 (1995) (arguing the Court has at least sometimes based categories on speech's "low value").

63. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 771 (17th ed. 2010) (explaining the application of wholesale balancing); Deutsch, *supra* note 41, at 491 (same); Schauer, *supra* note 32, at 300 (discussing categorization in general); Jeffrey M. Shaman, *Essay: Constitutional Interpretation: Illusion and Reality*, 41 WAYNE L. REV. 135, 162 (1994) ("In a categorical balancing situation, since categories are being used, the balancing focuses on the general category rather than on the particular instance involved in the case.").

64. *See* R.A.V. v. St. Paul, 505 U.S. 377, 400 (1992) (White, J., concurring); Deutsch, *supra* note 41, at 494–95; Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 671 (2002); Werhan, *supra* note 4, at 54.

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

66. *Id.* at 1586.

67. *Id.* at 1582–83.

68. *Id.* at 1585.

69. *Id.* at 1586.

70. *Id.* at 1585.

Rather than accept this "highly manipulable balancing test,"[71] the Court preferred a historical analysis in which it examined whether that type of speech had a long-established tradition of Constitutional exclusion.[72] Under this approach, the Court chose to avoid relying on judicial discretion, instead trusting the test of time to filter the categories truly belonging outside the First Amendment. But this does not necessarily stop the list of categories from expanding. Speech not yet formally recognized as an exception may still find a place on the list even if it has flown under the judicial radar so long as a history of permitted restrictions exists.[73] With no such historical pedigree of regulation, "depictions of animal cruelty" were constitutionally protected.[74]

Thus, the Court reinforced the categorization method as putting formal boundaries on historical limits of free speech and rejecting ad hoc or wholesale balancing analysis as a means adding new categories to the list.[75]

### C. Variable Definitions of Obscenity: The *Ginsberg* Approach

This Note's discussion so far has addressed "regular" First Amendment analysis, but when restrictions target speech toward children, the protection can change. Generally, children enjoy lesser constitutional protection,[76] which includes, in some instances, a diminished protection of free speech rights.[77] This is perhaps most clearly shown in the decision *Ginsberg v. New York*,[78] in which the Supreme Court examined a conviction for selling minors "girlie" magazines.[79] Though girlie magazines were clearly outside the category of "obscenity," the government contended that for minors regulation was still appropriate.[80] In response, the Court noted that, so long as the government's justification was "rational," girlie magazines could sometimes be included in the definition of "obscenity" which would thereby permit restriction.[81] The statute, the Court reasoned, helped enforce parental authority by better enabling parents to properly raise their children.[82] Further, New York case law and legislative findings both indicated

71. *Id.* at 1586.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*; *accord* Strossen, *supra* note 1, at 104.
76. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).
77. *See* authorities cited in note 7.
78. Ginsberg v. New York, 390 U.S. 629 (1968).
79. *Id.* at 631.
80. *Id.* at 634, 639.
81. *Id.* at 639, 641.
82. *Id.* at 639.

sexual material is harmful to children, leading the Court to also find a state interest in protecting children from such material.[83] Accordingly, the Court found the government's reasoning "not irrational" and expanded obscenity's definition to account for children as recipients.[84]

Under this rationale, the Court followed the lead of the New York Court of Appeals and permitted a variable definition of "obscenity."[85] This expanded the definition of obscenity when children were the recipients to include more forms of speech than usual. The Court explained that it "adjust[ed] the definition of obscenity 'to the social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . .' of such minors."[86]

The Court acquired this variable approach from an article by professors William Lockhart and Robert McClure,[87] in which the authors wrestled with the notoriously difficult meaning of "obscenity."[88] They addressed the issue by examining whether some static and inert trait put the "obscene" in obscenity or whether it was instead a "chameleonic quality . . . that changes with time, place, and circumstance."[89] The article noted several circumstances, such as children as speech recipients, which would benefit from viewing obscenity through this second option, as something variable.[90] By accounting for the circumstances surrounding the speech, this variable definition relies on a judge's discretion to determine whether the speech in question is, in the judge's opinion, obscene.[91] Such a solution hearkens back to Justice Stewart's answer to the same problem, allowing judges to know it when they see it.[92] By using this definition in *Ginsberg*, the Court found the involvement of minors to transform some traditionally non-obscene speech into something circumstantially "obscene."

### D. The First Amendment and Speech Toward Children

Involvement of minors will thus distort First Amendment analysis. Though the extent and manner of this distortion is imprecise, the Court has addressed a few First Amendment cases involving children recipients that shed some light on the issue.

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83. *Id.* at 640–42.
84. *Id.* at 642–43.
85. *Id.* at 635–36.
86. *Id.* at 638 (quoting Mishkin v. State of New York, 383 U.S. 502, 509 (1966)).
87. William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 5 MINN. L. REV. 45 (1960).
88. *Id.* at 5.
89. *Id.* at 68.
90. *See generally id.* at 77–84.
91. *Id.* at 77.
92. In *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), Justice Potter Stewart famously struggled pinning down a definition for "hard-core pornography," concluding simply, "I know it when I see it."

*1. Media Restrictions of Profanity*

In *FCC v. Pacifica*,[93] the Court considered a complaint issued by the FCC against a radio station for airing offensive language in an afternoon broadcast.[94] The broadcast was a monologue titled "Filthy Words" which, though aptly named, contained nothing fitting the definition of "obscene."[95] Although indecent language was not itself an unprotected category, the Court analogized the language to obscenity to show that, as with variable obscenity, the circumstances could sometimes place such profanity outside the First Amendment.[96]

In doing so, the Court identified a number of particular factors behind this decision. First, the monologue was broadcast in early afternoon, a time at which children were likely in the audience.[97] Second, broadcast media has a unique pervasiveness, a quality that allows it to invade a home without always warning listeners of impending unwelcome content.[98] This also led both the Court and government to liken such speech to the legal concept of nuisance.[99] Third, the Court analogized the case to *Ginsberg*; the ease with which children can access radio broadcasts amplified the concerns of protecting children and justified taking the particular circumstances into account.[100] After all, even children too young to read could access broadcast media on their own.[101] All of these justifications in combination made the speech unprotected.[102] However, the Court was also careful to emphasize the narrowness of its holding, noting that each of the factors were integral to the holding's justification.[103] After combining these circumstances with the nuisance of broadcast profanity and the concerns in *Ginsberg* the Court found the restriction constitutional.[104]

*Pacifica*-like arguments also appear in a number of later cases. Since that decision, the Court has addressed attempts to regulate unsolicited mailing of contraceptive ads,[105] pre-recorded pornographic telephone messages,[106] indecent Internet content,[107] and cable television.[108] Each of these opinions involved attempts to protect children

93. FCC v. Pacifica, 438 U.S. 726 (1978).
94. *Id.* at 730.
95. *Id.* at 729.
96. *Id*. at 745–48.
97. *Id.* at 732, 750.
98. *Id.* at 748.
99. *Id.* at 750–51.
100. *Id.* at 749–50.
101. *Id.*
102. *Id.* at 750–51.
103. *Id.*
104. *Id.*
105. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).
106. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
107. Reno v. ACLU, 521 U.S. 844 (1997).
108. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000).

from "inappropriate" but non-obscene expression, yet, despite such similarities, the Court distinguished *Pacifica* in each case.[109] Indecent mailings, for example, can be easily monitored, whereas a sudden radio expletive can easily surprise a listener.[110] Similarly, "dial-a-porn" phone services are unlike broadcasting because the speech recipient must actively seek indecency.[111] The Court has thus resisted extending the regulation of profanity past the narrow circumstances of *Pacifica* and unique qualities of broadcasting.

### *2. Significant Protection for Minors*

In *Erznoznik v. City of Jacksonville*,[112] the Court again addressed the issue of children speech recipients when it considered the constitutionality of an ordinance criminalizing any nudity at a drive-in theater visible from a public street.[113] Although simple nudity falls outside the standard view of obscenity,[114] the government supported the law as a means of protecting children from the images.[115] The Court acknowledged some additional leeway for protecting children but added they are nonetheless "entitled to a significant measure of First Amendment protection" and merit different treatment only in narrow and well-defined circumstances.[116] This means the First Amendment almost fully protects speech toward minors, prohibiting governments from simply determining material "unsuitable" for them.[117] In this sense the Court emphasized that "[i]n most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."[118] Thus, even with an expanded definition of obscenity, the prohibition of all nudity was unconstitutional.

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109. *Playboy Entm't Grp.*, 529 U.S. at 815; *Reno*, 521 U.S. at 866–67; *Sable*, 492 U.S. at 127–28; *Bolger*, 463 U.S. at 74; *see also* CHEMERINSKY, *supra* note 2, at 1071 ("The Court . . . has not been willing to extend *Pacifica* beyond the over-the-air—free—broadcast media. In cases involving telephones, cable television, and the Internet, the Court has largely rejected *Pacifica* and has struck down federal regulations of 'indecent' speech.").

110. *Bolger*, 463 U.S. at 74.

111. *Sable*, 492 U.S. at 127–28.

112. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

113. *Id.* at 206.

114. *Id.* at 208.

115. *Id.* at 212.

116. *Id.* at 212–13.

117. *Id.* at 213–14 ("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.").

118. *Id.* at 214.

## E. Recognizing Categories Involving Speech Toward Children: *Brown v. Entertainment Merchants Ass'n*

### *1. Procedural History*

In *Brown v. Entertainment Merchants Ass'n*,[119] the Supreme Court encountered for the first time the distorting effect of speech toward children coupled with regulating speech in a yet unrecognized category. In 2005, California enacted a statute prohibiting the sale or rental of any ultraviolent video games to minors.[120] The statute prohibited certain violent acts done in a way that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[121]

The Entertainment Merchants Association quickly filed suit against a number of state officials.[122] The district judge found strict scrutiny applicable.[123] Under that standard, the judge found insufficient evidence that violent video games actually cause violent behavior or that they significantly differ from other media, which ultimately led the judge to declare the law unconstitutional.[124]

The Ninth Circuit upheld this decision, also finding the law subject to strict scrutiny rather than the "'variable obscenity' standard" in *Ginsberg*.[125] The circuit court found the *Ginsberg* rationale particular to obscenity, which includes only sexual speech.[126] Because violent speech is not part of any categorical exception, the court employed strict scrutiny.[127] As would be expected under strict scrutiny, the statute failed to survive this examination, as the court found insufficient evidence to support a compelling government interest.[128] California, however, continued litigation by successfully petitioning the Supreme Court for certiorari.[129]

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

120. *Id.* at 2732. This statute is codified in the California Code as CAL. CIV. CODE § 1746–1746.5 (West 2009).

121. *Id.* at 2732–33.

122. Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472, at *2–3 (N.D. Cal. Aug. 6, 2007).

123. *Id.* at *24.

124. *Id.* at *30.

125. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 953 (9th Cir. 2009).

126. *Id.* at 960–61.

127. *Id.* at 957.

128. *Id.* at 964.

129. Schwarzenegger v. Entm't Merchs. Ass'n, 130 S. Ct. 2398 (2010).

*2. The Majority's Decision*

The Supreme Court voted 7-2 to affirm the unconstitutionality of the California law. Justice Scalia, writing for the majority, declared video games to be speech within the First Amendment[130] and moved to the first issue—the level of protection for violent speech toward children.[131] For this question the majority found the holding of *United States v. Stevens* controlling, which required any exception from First Amendment protection to have a long tradition of exemption reflecting a "judgment of the American people" throughout history.[132] By recognizing violent speech as clearly outside the obscenity exception, the Court found this law to be California's attempt to establish an entirely separate category.[133]

The majority pressed this distinction to find the *Ginsberg* decision inapplicable as relating to obscenity rather than violence, despite the fact that California had modeled its statute after the law in *Ginsberg*.[134] The majority further distinguished the two cases by noting that California's attempt to establish a whole category was entirely different from the mere adjustment of category boundaries in *Ginsberg*.[135] Reaffirming children's significant First Amendment rights, the majority went on to discuss the historical precedent for regulation of violent speech toward children.[136] After finding insufficient traditional premise for such a category, the Court applied strict scrutiny.[137] Unsurprisingly, the State's evidence was insufficient to pass such scrutiny, leading the Court to declare the law unconstitutional.[138]

*3. Justice Alito's Concurrence*[139]

Justice Alito took a different approach. Instead of walking through a full analysis of the majority opinion, Justice Alito found the statute

130. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).
131. *Id.* at 2733–34. The discussion of *Stevens* and categorization makes it evident that the Court is first addressing the level of protection for the speech at issue.
132. *Id.* at 2734.
133. *Id.* at 2734–35.
134. *Id.* at 2735.
135. *Id.*
136. *Id.* at 2735–36.
137. *Id.* at 2736 ("California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none.").
138. *Id*. at 2738.
139. Although this Note does not go into detail on the dissents, Justices Breyer and Thomas each wrote dissenting opinions. Justice Thomas focused on views expressed by the Framers to argue for the category of "speech to minor children bypassing their parents." *Id.* at 2752 (Thomas, J., dissenting). Justice Breyer, however, runs the statute through both vagueness, as used by Justice Alito, and strict scrutiny, as used by the majority, finding both tests to be satisfied. *Id.* at

unconstitutionally vague.[140] He noted that the California statute was clearly modeled after the one in *Ginsberg* but that it lacked a clear description of violence.[141] By using vagueness to strike down the statute Justice Alito avoided a full analysis of the regulability of violent speech toward children but still spent some time critiquing the majority's approach.[142]

Justice Alito's criticisms were generally that the majority went too far. He accused the majority of overstating its protection of children by applying too strict a standard.[143] He also faulted the majority for creating a "sweeping" opinion which gives strong protection to questionable material.[144] He further commented that the majority quickly equated video games to other forms of expression while ignoring potential differences from video, radio, and literature.[145]

Justice Alito's major categorization-related criticism was the majority's use of *Stevens* to determine First Amendment protection.[146] He attacked the majority's choice on a number of points, noting *Stevens* broadly prohibited creating, selling, or possessing the expression and was directed at everyone.[147] To him, this created a meaningful distinction from the California statute, which prohibited only the purchase or rental of the game to minors.[148] He also attacked the Court's decision to use strict scrutiny from *Stevens*, rather than the "more lenient standard applied in *Ginsberg*."[149] Through these remarks, Justice Alito suggested *Ginsberg* as the more appropriate measure of protection for the California statute, recognizing that the statutes in both cases contained similar prohibited acts and focused specifically on speech toward children.

Further, although the majority expressed a fear of creating a "free-floating power to restrict the ideas to which children may be exposed,"[150] Justice Alito argued that such a law merely reinforces parental authority by allowing them the ability to override the law and provide their children with these prohibited games.[151] Thus, should

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2765, 2771 (Breyer, J., dissenting). Breyer also made an interesting point about the majority's categorization, finding that the speech in question was not "depictions of violence," but "protection of children." *Id.* at 2762.

140. *Id.* at 2742–43 (Alito, J., concurring).
141. *Id.* at 2744–46.
142. *Id.* at 2746.
143. *Id.* at 2747.
144. *Id.*
145. *Id.* at 2748.
146. *Id.* at 2747.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 2736 (majority opinion).
151. *Id.* at 2747 (Alito, J., concurring).

the statute have been sufficiently narrow to pass vagueness analysis, Justice Alito indicated a government-favorable analysis.

## III. ANALYSIS

Until *Entertainment Merchants*, the Court had never addressed whether violent speech received by children claimed a spot on the list of First Amendment exceptions. Thus, the majority's first issue was simply whether such speech merits protection.[152] As such, this framed one of the points of dispute between Justice Scalia's majority and Justice Alito's concurrence, revolving around the simple choice and application of precedent. Where the majority chose to use *Stevens*, Justice Alito argued *Ginsberg* was *Entertainment Merchants*'s "most closely related precedent."[153]

The majority approached the issue by adhering to its existing jurisprudence for new speech categories, applying the clear holding of *Stevens* to determine whether to recognize a new exception.[154] In so doing, the majority quickly discounted *Ginsberg* as inapplicable for such analysis.[155] Meanwhile, however, its opinion failed to fully address the issues raised by Justice Alito, who disapproved of the use of *Stevens* and indicated that *Ginsberg* provided the proper standard for speech toward children.[156]

In the end, both the majority and Justice Alito's concurrence put forth different cases as controlling, but neither opinion fully accounts for its choice. The implications, however, are potentially significant shifts in the scheme of free speech protection. The following analysis examines the underlying doctrine of this disagreement by asking whether *Ginsberg* could serve as an effective replacement for *Stevens* and whether such a replacement could fit with the remainder of existing First Amendment jurisprudence. In the end, this Note shows that the majority (despite its relative brevity) was correct, in the context of existing First Amendment jurisprudence, not to extend *Ginsberg* to this potential application.

Section A argues the approach used in *Ginsberg* was off-point because it was a device used for defining rather than recognizing a category, but that it might still apply by analogy. Section B discusses this possible analogy by examining the likely application of *Ginsberg* as Justice Alito sees it, which seems to drastically depart from "standard" free speech jurisprudence by employing a rational basis test for determining protection. Section C examines the Court's past treat-

152. *Id.* at 2733–34.
153. *Id.* at 2747.
154. *Id.* at 2734 (majority opinion).
155. *Id.* at 2735–36.
156. *Id.* at 2747 (Alito, J., concurring).

ment of speech toward children, concluding that application of the First Amendment in these cases is not so unique as to justify such a drastic departure.

### A. *Ginsberg* Is Off-Point for Recognizing a Category

Before addressing Justice Alito's specific modification of the majority approach, it is first necessary to address whether *Ginsberg* is even applicable as direct authority for categorization in *Entertainment Merchants*. The *Ginsberg* approach dealt with objectionable speech and its application toward children, similar to the law in *Entertainment Merchants*, but the legal issues involved were distinct.

#### *1.* Ginsberg *Does Not Discuss Whether to Recognize a Category but Rather How to Define One*

Creating a proper definition for obscenity has provided courts with a particular challenge.[157] While obscenity is sexual, there is also something to it that shocks and offends beyond mere sexual expression.[158] Since offense cannot justify speech restrictions, this "something more" is what thrusts simple sexual expression beyond the limits of social acceptance and constitutional protection.[159] Although obscenity was one of the first categories,[160] it was notoriously difficult to properly define so as to accurately capture this elusive quality.[161] This difficulty was in part because the "obscene" quality seemed to manifest many different forms, depending on the time, place and circumstances of the speech.[162] That is, a sexual remark regularly spoken in a seedy bar might simply be unthinkable at a formal banquet.

The variable approach deals with this amorphous aspect by basing the boundaries of obscenity partly on the context itself.[163] Rather than defining the term in a vacuum to rigidly apply regardless of circumstances or effect, variable obscenity defines the category as "obscene for its time, place, and circumstances" so judges might

157. *See* Miller v. California, 413 U.S. 15, 37–39 (1973) (Douglas, J., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); CHEMERINSKY, *supra* note 2, at 1052; Shaman, *supra* note 61, at 302.

158. *See Miller*, 413 U.S. at 20 n.2; *id.* at 40–41 (Douglas, J., dissenting); Rosenfeld v. New Jersey, 408 U.S. 901, 909 (1972); Lockhart & McClure, *supra* note 86, at 66.

159. *See Miller*, 413 U.S. at 20 n.2; *id.* at 40–41 (Douglas, J., dissenting); *Rosenfeld*, 408 U.S. at 909; Lockhart & McClure, *supra* note 86, at 66.

160. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

161. *See Miller*, 413 U.S. at 37–39 (Douglas, J., dissenting); *Jacobellis*, 378 U.S. at 197 (1964) (Stewart, J., concurring); CHEMERINSKY, *supra* note 2, at 1052.

162. *See Miller*, 413 U.S. at 40–41 (Douglas, J., dissenting); Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring in part). The language "time, place, and circumstance" appears in professors Lockhart and McClure's discussion on the issue. Lockhart & McClure, *supra* note 86, at 68.

163. *See* Lockhart & McClure, *supra* note 81, at 68.

accurately differentiate, for any given setting, the truly obscene from the appropriately sexual.[164] It is thus a definitional tool, putting a flexible boundary on an existing category.[165]

Following this reasoning, the Court in *Ginsberg* used the variable definition for the previously recognized category of obscenity, thereby using it only for the *scope* of that category's application.[166] Accordingly, after choosing to employ the variable definition, the Court's discussion simply worked to expand the definition for children, focusing on the justifications for using "children recipients" as a relevant circumstance.[167] Under this reasoning, the Court simply enabled obscenity's definition to take the audience into account, allowing for a slightly broader First Amendment exception for child recipients. In this way the Court addressed the questions of *how* to determine the scope of the existing exception and the relevance of children as a factor, but it never addressed *whether* to identify another category of speech. Indeed, the Court itself recognized that it merely adjusted the definition to account for children.[168] Thus, the holding in *Ginsberg* pertains to definition rather than addressing a recognition question like the one in *Entertainment Merchants*.

164. *See* Lockhart & McClure, *supra* note 81, at 77.

165. Consequently, the Court also adapted similar reasoning for its own general definition of "obscenity" several years after *Ginsberg*, in *Miller v. California*, 413 U.S. 15 (1973), by basing its definition on the offensiveness to "the average person, applying contemporary community standards." *Id.* at 24. This, to some extent, also takes circumstances into account by judging obscenity based on the period and community of its utterance.

166. Although a direct use of the approach in *Ginsberg* is off-point, one might, as Justice Alito seems to suggest, use the reasoning and standard behind the decision as a separate test for determining First Amendment protection. This is discussed at greater length in section III.B.

167. Ginsberg v. New York, 390 U.S. 629, 638 (1968) (adjusting the definition of obscenity by assessing the speech "'*in terms of the sexual interests . . .' of such minors*." (emphasis added) (citation omitted)); *see also* Lockhart & McClure, *supra* note 86, at 85 ("[V]ariable 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.").

168. *See Ginsberg*, 390 U.S. at 638 (quoting Mishkin v. New York, 383 U.S. 502, 509 (1966) ("We do not regard New York's regulation . . . as involving an invasion of such minors' constitutionally protected freedoms. Rather [it] *simply adjusts the definition of obscenity* 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . .' of such minors.") (emphasis added)). The majority in *Entertainment Merchants* recognized this point, stating that *Ginsberg* is inapplicable because it merely expands the definition, but does not create an entirely new category. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2735 (2011). But while the majority was correct in this assertion, it never addressed the further possibility of analogizing the two cases.

*2. Defining a Category Is Distinct from Recognizing One*

Although the issues of definition and recognition are related, they are conceptually distinct. Definition is the identification of the quality or set of qualities that, whenever present and regardless of additional circumstances, necessarily merits no First Amendment protection.[169] With fighting words, for example, a necessary quality is the tendency of actual provocation.[170] This potential for a provoked response distinguishes the speech from mere insults, meaning that an effective definition could not simply be "any insulting or abusive language" but instead must be "any insulting or abusive language with the tendency to incite violence against the speaker."[171] Because these qualities establish the speech as outside First Amendment protection, their identification in the definition is necessary to give the category proper scope.[172] The goal of a definition, thus, is accuracy—to describe the category containing the correct qualities which differentiate it from speech deserving First Amendment protection.

The different methods of recognizing categories discussed in section II.B, on the other hand, examine the societal impact or views of speech, making a determination one way or the other as to whether a whole type of speech is protected. The method in *Stevens*, for example, looks to the history of First Amendment treatment for that type of speech,[173] while wholesale balancing looks to the opposing costs and interests involved.[174] Both methods exist, however, to determine the constitutional protection to attribute. The goal then is propriety—to determine what level of protection is appropriate for the speech in question.

An important distinction therefore exists between questions of recognition and definition.[175] Although the issues may lean on one another to make categorization effective, they effect separate goals:

169. *See* Schauer, *supra* note 32, and accompanying text.
170. Gooding v. Wilson, 405 U.S. 518, 523–24 (1972).
171. *See generally Gooding*, 405 U.S. 518 (showing risk of incitement to be a necessary element).
172. *See* CHEMERINSKY, *supra* note 2, at 1018 ("[T]he categorical approach requires careful attention to how the types of unprotected speech are defined . . . . [T]hey determine whether the government can punish the speech or whether the expression is safeguarded by the First Amendment."); Schauer *supra* note 32, at 300–01.
173. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).
174. *See* authorities *supra* note 62–63, and accompanying text.
175. *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 936 (2001) (describing how when the Court "eliminates" a category from protection it will typically also carefully define the speech that can be banned, but noting also that the Court has eliminated a category without attempting to define it); Farber, *supra* note 4, at 925 (noting that *Virginia v. Black*, 538 U.S. 343 (2003) represents both the Court's "official recognition of true threats as unprotected" and "its first definition of the category's boundaries").

definition determines *how* to distinguish between the types of speech, whereas recognition focuses simply on *whether* to protect such speech. Consequently, the definitional issues presented in *Ginsberg* show themselves to be off-point for the recognition issues in *Entertainment Merchants*.

*3. The Similarities in* Ginsberg *May Still Provide a Test by Analogy*

That being said, there are some undeniable similarities between the holding in *Ginsberg* and the act of recognizing a category. They appear not in the issue or holding, but in the effect of the *Ginsberg* analysis. By using the variable approach, the Court expanded the definition, including an area of speech on the periphery of "obscenity" which under a traditional definition would have received full First Amendment protection.[176] By carving out this "obscene for minors" sliver of speech, the Court effectively designated additional speech as "unprotected," similar to the act of recognizing a category in *Ferber* or *Roth*.[177] Thus, while the distinction between the issues in the two cases prevents *Ginsberg* from being directly applicable as a standard for adding categories, it did create an effect similar to adding a category to the list. This similarity may not be on point, but it suggests an application by analogy, a method of analysis to which Justice Alito may have to subscribed.

## B. Replacing *Stevens* with *Ginsberg* Would Drastically Change First Amendment Analysis

Because it is clear that the reasoning in *Ginsberg* does not serve as direct precedent for recognizing categories (but does address a related question), it must then be determined what purpose this precedent can serve. Justice Alito's concurrence adds little input to this effect. While he emphatically rejected *Stevens*, he failed to demonstrate how the latter operates as a method of recognizing First Amendment protection.[178] Thus, it is necessary to parse his language and the reasoning of the *Ginsberg* court to determine its likely application.

*1.* Ginsberg *as a Rationality Threshold for Categorization*

The justifications put forth in *Ginsberg* were the governmental and parental interests in preventing the exposure of children to near-obscene speech.[179] The Court repeatedly suggested that these interests

176. Ginsberg v. New York, 390 U.S. 629, 634–35 (1968).
177. *See* discussion *supra* in section II.B (discussing both cases).
178. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2747 (2011) (Alito, J., concurring).
179. Ginsberg v. New York, 390 U.S. 629, 639–40 (1968).

in protecting children must be "at least rational,"[180] which suggests *Ginsberg* used something akin to rational basis scrutiny as the threshold for expanding the category for minors. From this we might reasonably conclude that employing *Ginsberg* in *Entertainment Merchants* would similarly require a rational basis test as the standard for recognizing categories. Indeed, Justice Alito suggested the "more lenient standard" in *Ginsberg*, indicating the possibility that a rational basis test would guard the threshold to placing a category of speech with a child audience outside the full First Amendment protection.[181] This makes sense as the most likely application of *Ginsberg*'s lenient standard—just as the *Ginsberg* required rationality to expand the definition obscenity for minors, it would require rationality to create a category of speech toward children.

While a rational basis test could operate as a threshold for recognizing categories, there is still a question as to whether it deserves a place in First Amendment jurisprudence. Balancing, to some extent, still exists in First Amendment analysis,[182] but such a rational basis test would be a drastic change for the established method of analyzing content discrimination.

First, it would put the speech recipient, children, as the primary focus rather than the type of speech itself. Instead of examining content it would look to government interests, allowing any restriction promoting a rational interest. This test is, however, a far cry from the approach clearly adopted in *Stevens*, at least for speech toward adults, in which categories are justified by a tradition of exemption.

Additionally, because this test merely requires the government to act rationally, all but the most arbitrary restrictions are constitutional.[183] With this lenient standard the First Amendment would provide little more than nominal protection.[184] Indeed, the rational basis test carries a strong presumption in favor of the government's discretion.[185] But the Court addressed governmental discretion in *Stevens*; it rejected the concept of a legislature restricting speech it deemed "valueless" or "costly," instead giving strong protection to traditional

180. *Id.* at 639, 641, 643.

181. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2747 (Alito, J., concurring).

182. *See* Schauer, *supra* note 32, at 299 (arguing neither categorization nor balancing can be entirely eliminated from the analysis). Even in eliminating wholesale balancing, the protection provided by strict scrutiny does involve some balancing—although, admittedly, this balance assumes a heavy thumb on the side of the right-holder—when it examines the compelling interest.

183. *See* Neelum J. Wadhwani, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 802 (2006).

184. *See id.* at 801 ("Our jurisprudence displays a remarkably nominal fealty to rational basis review, leaving it little more than a hollow test.").

185. Sullivan, *supra* note 34, at 296.

free speech rights.[186] Moreover, the Court has directly opposed a presumption in favor of content restriction by showing such restrictions to strike at the heart of First Amendment protection.[187] Such a test would thus largely circumvent one of the Court's most closely guarded speech protections.

Further, a rational basis test would nearly eliminate the Court's current concept of categorization altogether. Under that standard, legislatures would have broad power to create any content-discriminatory restriction founded on a rational fear, thereby establishing a scheme in which exceptions could swallow the rule. Rather than having "narrowly defined" exceptions to the presumption against speech restrictions, the First Amendment would have a presumption favoring restrictions, using strict scrutiny to protect only those few areas of speech for which regulation is utterly irrational.[188] It can almost go unsaid that a doctrine is objectionable which uses strict scrutiny for the sole purpose of guarding against regulations that could not even pass rational basis scrutiny.

But aside from raising logical difficulties of its own, there is also the difficulty of reconciling such a test for recognizing categories with the method established in *Stevens*. As shown, a rational basis test for recognizing categories would clearly be different in kind from the one established in *Stevens*. It would create a government-weighted standard as well as greatly expand the scope of regulable speech. Considering the important differences from the Court's general treatment of speech regulation, the question then becomes whether such a pronounced exception for speech toward children really can find warrant in the Court's First Amendment jurisprudence. Likely it cannot.

### *2. An Alternative Application?*

Before discussing the Court's past treatment of speech toward children, it is important also to note the possibility that Justice Alito might have sought to put *Ginsberg* in a somewhat different role.

Justice Alito elaborated little on his use of *Ginsberg*, but he did make a number of comparisons that help explain its designation as the "most closely related precedent."[189] At the outset, Justice Alito recognized the California legislature modeled its definition of violence

186. *See* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

187. *See* Strossen, *supra* note 1, at 67, 77 ("[T]he Court has consistently held that content-based restrictions on speech are presumptively unconstitutional.").

188. Also of note is the quizzical situation resulting from using strict scrutiny for protected speech and a rational basis test to recognize categories. It would require a compelling government interest for one specific legislative restriction to survive, but merely a rational one to create an entire categorical exception.

189. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2747 (2011) (Alito, J., concurring).

on the definition of obscenity in *Ginsberg*.[190] Additionally, the statutes both regulate similar activities and recipients—the sale of speech to minors. On this point too, Justice Alito found *Ginsberg* more relevant.[191] He also defended the California statute, arguing that, like the statute in *Ginsberg*, it merely reinforced parental authority by giving parents themselves the ability to buy these games for their children.[192] In these comparisons to *Ginsberg*, however, Justice Alito never discussed the differences between obscenity and violent speech or how the type of speech might affect protection.[193]

As demonstrated in subsection III.A.2, the category recognition process involves the singling out and analysis of certain speech. Whether under the historical analysis adopted in *Stevens* or the balancing approach rejected in that same case, recognizing a category is a question of general applicability for all situations involving speech of that type.[194] The focus is to provide protection specific to that content.[195] Yet Justice Alito's comparisons said nothing about the type of speech itself. Instead of comparing *Ginsberg* to analyze violent expression, he seemed to simply equate the two types of speech and turn his attention to other points of similarity. By focusing on other similarities, he gave no arguments attempting to justify a lasting category of speech useable by later courts for taxonomic "classification" and "labeling." More than anything, his reasoning appeared to simply ignore traditional notions of categorization, placing the speech recipient rather than the type of speech as the primary concern.

In addition to suggesting *Ginsberg* as a replacement test for *recognizing* a category, these comparisons could also be read as replacing the entire system of categorization and installing a rational basis test as the sole mechanism of protecting speech with a child audience. This, based on the sole fact that the audience comprises of children, would question only the rationality of the speech restriction without regard to speech categories. But such a use of *Ginsberg* is difficult to justify. First, it is impossible here to make the analogical connection to *Ginsberg* discussed in subsection III.A.3. That analogy relied on the similarity between the expansion of a category's definition and the creation of a new category—it is a much different thing to analogize the expansion of the category to abolition of categorization and in-

190. *Id.* at 2743.
191. *Id.* at 2747.
192. *Id.*
193. Justice Alito makes clear his distaste for the violence in question. *Id.* at 2749–50. He does not, however, analyze the speech for First Amendment protection, but merely uses this disgust to emphasize the differences between video games and other media. *Id.* at 2750. And as the majority correctly points out, "disgust is not a valid basis for restricting expression." *Id.* at 2738 (majority opinion).
194. *See* authorities *supra* note 62.
195. *See* authorities *supra* notes 30–33, and accompanying text.

statement of a rational basis standard. Second, as noted above, using rationality as a *threshold* for recognizing a formal category allows the exceptions to swallow the rule, enabling the rational basis test to effectively replace categorization altogether.[196] This is essentially the same result as replacing the entire categorization method with a single rational basis test. With effectively the same result, both applications of *Ginsberg* are subject to the same criticisms: both are drastic departures from standard First Amendment jurisprudence in that they presumptively favor regulation.

Thus, while the Court certainly could decide that a legislature need only act rationally to restrict speech toward children, this approach is difficult to analogize to *Ginsberg* and would essentially lead to the same result anyway. For these reasons discussion focuses on *Ginsberg* as supplying a rational basis test for recognizing categories—that is, as a replacement for the tradition inquiry in *Stevens*.

### C. Such a Drastic Departure from Standard Methodology Is Inconsistent with the Court's Past Treatment of Speech Toward Children

By this point it is clear the way in which *Ginsberg* would likely apply: It provides no precedent on point for the question of First Amendment protection, but, because the Court in *Ginsberg* effectively created a new area of unprotected speech for children, the same rational basis test might still apply for recognizing categories of speech toward children. Some may agree that the low bar of a rational basis test is preferable, so as to give legislatures more flexibility in protecting the ears of youths. However, free speech jurisprudence provides little warrant for such legislative flexibility in the case of child audiences where the First Amendment generally guards individual speech rights so strictly.

Granted, the Supreme Court has dealt infrequently with speech toward children,[197] so the inferences regarding its treatment of such cases are limited. But in those few cases, the Court has approached such speech almost as it would with an adult audience in the sense

196. *See supra* subsection III.B.1.

197. The following analysis excludes discussion of children's rights in school settings. This is not for a lack of First Amendment protection. On the contrary, the Court has long found children do not shed their First Amendment rights in school, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969), and that one of the best ways to give them an appreciation for the ideals on which democracy is founded is to give substance to their free speech rights, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638–39 (1943). But while these school cases contain some relevant insight, they are heavily clouded by the setting. Because schools and local governments have interests in educating children and because schools require a certain level of authoritarianism, the interests and rights involved compare awkwardly with those at issue in *Entertainment Merchants*.

that it grounded its discussion in familiar speech categories and expressly limited any special treatment for child audiences. Although this does not show identical protection of speech toward children, it does suggest that such speech is at least guided by the same principles and is protected under a substantially similar First Amendment framework.

*1. Categorization for Speech with Child Audiences*

The Court's past dealing with speech toward children implies treatment parallel to standard categorization practice. In the cases dealing specifically with speech toward children, the Court discussed categorization by turning its analysis on whether some speech fits within the definition of an established exception. By basing protection consistently on speech type, the Court has shown that even if First Amendment protection is not "coextensive" for children, its analytical framework is substantially the same.

Even in *Ginsberg* itself, the Court does not advocate for the dismissal of categorization methodology. Instead the Court simply tinkered with the definition.[198] By acknowledging this was a mere definition adjustment, the Court showed that it was still operating squarely within the categorization framework. In fact, the Court's whole discussion was based on the existing category of obscenity,[199] allowing some flexibility but maintaining a short tether to the category's standard definition.[200]

Similarly, the Court in *Erznoznik* recognized the expanded definition from *Ginsberg* to include certain non-obscene sexual material but understood this category to still retain limited boundaries.[201] It recognized that speech must at least be substantially sexual for this categorical exception to apply—even for children.[202] Accordingly, the Court noted that outside of these categories a legislature simply cannot regulate ideas it finds unsuitable.[203] By thus establishing categories as the means of determining protection and requiring obscenity's variable definition to be definitively sexual, the Court clearly determined protection by applying categorization methodology.

198. *See* discussion *supra* in section III.A.
199. *See* Ginsberg v. New York, 390 U.S. 629, 635–36 (1968).
200. *Ginsberg* gave judges some flexibility to take circumstances into account, but this flexibility could not be used to permit a ban of showing *any* nudity, or of regulating offensive, but non-sexual content. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975). Thus, even with this ability to fluctuate, there were tight limits as to the extent of the fluctuating definition, still maintaining the taxonomic "in or out" approach in which the judge must classify according to a largely-predetermined definition.
201. *Erznoznik*, 422 U.S. at 212–14.
202. *Id.* at 213 n.10.
203. *Id.* at 212–14.

Even in *Pacifica*, the Court recognized categorization framework and grounded its discussion in the obscenity category. The opinion was not crystal clear in its reasoning, but it used the obscenity definition as the foundation for its discussion of profanity.[204] And while the opinion arguably departed somewhat from the categorical framework by putting weight on the context of the speech, the Court managed to account for this by using nuisance rationale.[205] The commission whose opinion the Court was reviewing had based its entire discussion on nuisance theory, in which the circumstances are all-important.[206] It was only out of this emphasis that the Court was willing to account for these circumstances and stretch its categorization foundation.

The Court has thus been unwilling to depart from its standard categorization just for children, doing so only on occasion and with apparent reluctance. Granted, the Court has shown some modification to be appropriate for speech toward children, but it has otherwise employed substantially the same categorization as with any other speech. This parallelism thwarts the idea that the involvement of minors should circumvent the concerns expressed in *Stevens* or result in such a drastic and new scheme of categorization. As such, categorization under a rational basis test seems about as unwarranted for minors as for adults.

### *2. Substantial Protection with Exceptions Both Limited and Narrow*

In both *Ginsberg* and *Pacifica*, the Supreme Court established exceptions for obscenity-related speech toward children. Although these cases show a somewhat more relaxed protection of speech when children are the recipients, the Supreme Court limited their applicability through internal qualifications and later opinions narrowing their holdings. These limitations show the exceptions for children are neither expansive nor universal.

*Ginsberg* permitted the expansion of obscenity for children, but the Court itself qualified the expansion of the obscenity category as "simply adjust[ing] the definition."[207] In the next sentence, the Court reemphasized that this was all the Court was doing[208]—not creating or destroying protections, but merely adjusting them. The Supreme Court in *Erznoznik* emphasized the narrowness of this holding by declaring that *Ginsberg* did not create a broad ability to regulate and is instead confined to certain circumstances where *extra* regulation for

204. FCC v. Pacifica, 438 U.S. 726, 745–46, 749.
205. *Id.* at 750.
206. *Id.*
207. Ginsberg v. New York, 390 U.S. 629, 638 (1968).
208. *Id.*

children is truly warranted.[209] Children thus "are entitled to a significant measure of First Amendment protection."[210] For example, even though laws may restrict minors' access to some non-obscene content, it must at least be significantly erotic.[211] A legislative body cannot simply regulate sexual speech determined unsuitable for minors, but it must be legitimately obscene for them.[212] Thus, while *Ginsberg* does create a more lenient standard, this leniency is tied closely to the actual obscenity category.

The Court similarly qualified its holding in *Pacifica* by expressly emphasizing the narrowness of its decision.[213] The particular pervasiveness of broadcasting, its unique accessibility, and the time of day were each vital in justifying the expansion of obscenity to include profanity, such that profanity was still protected under many other circumstances.[214] In a number of later decisions, the Court seized on this language to distinguish *Pacifica* from profanity in other media.[215] In each of these distinguishing cases, the Court reiterated its statement in *Pacifica* that the regulability of profanity depended heavily upon the circumstances.[216] And in at least two of these later decisions the Court specifically noted the uniquely pervasive and nuisance-like qualities of broadcasting.[217] While *Pacifica* can be seen as creating special treatment based partially on protection of children, the Court has explicitly confined this treatment to specific circumstances showing that having minors in the audience is but one of many factors behind this holding.

The Court's holdings in *Ginsberg* and *Pacifica* are two of the most emblematic cases behind the special treatment of speech toward children.[218] But while both involve more flexible protection for such speech, the Court has closely guarded such leniency by limiting its applicability and clearly establishing substantial protection for chil-

209. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975).
210. *Id.* at 212.
211. *Id.* at 213 n.10.
212. *Id.* at 213–14.
213. FCC v. Pacifica, 438 U.S. 726, 750 (1978).
214. *See, e.g.*, *supra* note 108 and accompanying text.
215. *Id.*
216. *Id.*
217. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127–28 (1989); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983).
218. *C.f.* Richard P. Salgado, *Regulating a Video Revolution*, 7 YALE L. & POL'Y REV. 516, 520 (1989) (discussing these two cases in tandem as establishing the expanded scope of obscenity for children); Eric J. Segall, *In the Name of the Children: Government Regulation of Indecency on the Radio, Television, and the Internet—Let's Stop the Madness*, 47 U. LOUISVILLE L. REV. 697, 700 (2009) (showing *Ginsberg* to create a number of "infections" in the Court's First Amendment jurisprudence, and *Pacifica* to be one of the most serious of these "infections").

dren's access to speech. Were the Court to apply Justice Alito's rational basis test outside of its original context (where it was used to justify using children as a "circumstance" for *defining* obscenity) for the purpose of restructuring First Amendment analysis for speech toward children, it would extend past the limited applicability of these two cases. The fact that the Court emphatically limited the holdings in both *Ginsberg* and *Pacifica* opposes using them to establish such a distinctly separate protection for children, particularly since such a method contains a heavy presumption against the right-holder.

## IV. CONCLUSION

Despite the apparent clarity added by the *Stevens* opinion, differences of opinion still exist in the Court as to its applicability. This disagreement showed itself in *Entertainment Merchants* in the form of a dispute over whether the tradition analysis in *Stevens* applied regardless of the speech recipient—in this instance, minors. But while restrictions on speech toward children sometimes do receive more lenient First Amendment treatment, the Court has interpreted such flexibility narrowly and kept its analysis fairly closely tied to standard First Amendment analysis. Accordingly, the Court's majority steadied First Amendment analysis by maintaining the *Stevens* method of recognizing categories, reaffirming that courts do not create categories but merely recognize categories forged by tradition. More so, the Court's use of this framework, despite the added complication of an audience of children, clearly shows that such speech is indeed governed by the same underlying principles as with an adult audience.[219] In so doing, the Court did not reach greatly beyond existing case law. Instead, it added clarity and consistency to an often complicated First Amendment jurisprudence.

219. One might still debate the closeness of this treatment. Instead of asking, "Does violent expression have a history of exemption from the First Amendment?" the Court seemed to look at the question in terms of the relevant recipient: "Is there a history of exempting violent speech toward children?" Thus, despite retaining the same general analysis as *Stevens*, the Court appears to modify it to maintain *some* distinction between adult and child recipients. This, however, is an issue for another article.