Teens, Porn, and Video Games:
Is it Time to Rethink *Ginsberg*?

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The Supreme Court has granted certiorari in *Schwarzenegger v. Entertainment Merchants Association*,[2] a Ninth Circuit decision that struck down, on First Amendment grounds, a California statute prohibiting the sale or rental of certain "violent video games" to minors.[3] In finding the California statute unconstitutional, the Court of Appeals distinguished *Ginsberg v. New York*, the 1968 case in which the Supreme Court first suggested that First Amendment protections of speech may apply less strictly to minors.[4] The reason that the Ninth Circuit gave was that the *Ginsberg* Court had "placed the magazines at issue within a sub-category of obscenity--obscenity as to minors," noting that the "Supreme Court has carefully limited obscenity to sexual content."[5] However, this explanation does not provide any obvious policy reason for differentiating between allegedly harmful violent materials and allegedly harmful sex-themed materials. Because the case is highly problematic precedent, the Supreme Court should rethink *Ginsberg* when deciding *Entertainment Merchants*.

The issue in *Ginsberg* was whether a state could validly prohibit the sale of "girlie" magazines to persons under age seventeen.[6] The Court upheld the ban even though the magazines were "not obscene for adults,"[7] reasoning that "even where there is

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[2] Decided sub nom. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), *aff'g* 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

[3] CAL. CIV. CODE §§ 1746–1746.5 (West 2006). § 1746.1 provides that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor." § 1746(d)(1) defines "violent video game" as one in which players can engage on-screen in "killing, maiming, dismembering, or sexually assaulting an image of a human being" in a manner that:

> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors [and]
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors [and]
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

The statute also contained an alternative definition of "violent video game," but the state conceded its unconstitutionality, so it was not before the court. *Video Software*, 556 F.3d at 956.

[4] 390 U.S. 629 (1968).

[5] *Video Software*, 556 F.3d at 959. See *infra* text accompanying notes 12–13.

[6] *Ginsberg*, 390 U.S. at 631 (internal quotation marks omitted).

[7] *Id.* at 634.

an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'"[8] In other words, *Ginsberg* authorized states to punish the dissemination of constitutionally protected material[9] to adolescents and, inferentially, to deprive adolescents of the fundamental right to "view and observe" material of their own choosing.[10] Part of the Court's rationale was that state legislatures have the power to "adjust" the constitutional definition of obscenity in order to regulate material that would otherwise fall within the area of constitutionally protected expression.[11]

In *Entertainment Merchants*, the Ninth Circuit could have distinguished *Ginsberg* on the ground that California did not even purport to "adjust" the constitutional definition of obscenity. Instead, it said the *Ginsberg* holding was limited and concerned only with "'sex material' as it relates to the interests of minors."[12] It declined to extend the *Ginsberg* rationale to "materials depicting violence,"[13] although those materials potentially raise similar concerns about harm to minors.[14] The Ninth Circuit did not provide a rationale for curtailing First Amendment interests in one instance and protecting those interests in the other.

The opinion in *Ginsberg*, if not the result, is an odd duck in First Amendment jurisprudence. *Ginsberg* applied rational basis review in an area where the Supreme

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[8] *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (upholding application of a child labor state law prohibiting children from distributing religious literature in the streets)).

[9] Sexually-themed material is protected by the Constitution so long as it is not obscene. United States v. Playboy Entm't Group, 529 U.S. 803 (2000). Laws restricting such material on the basis of content are presumptively unconstitutional, and they can stand only if the governmental can show that they pass strict scrutiny. *Id.* at 815.

[10] Stanley v. Georgia, 394 U.S. 557, 567-68 (1969) (recognizing the individual's fundamental right to "read or observe what he pleases"). *Stanley* was decided a year after *Ginsberg* and the Court's language gave no hint that the fundamental right confirmed in *Stanley* was age-contingent. Assuming that *Stanley* did not implicitly overrule *Ginsberg*, then it seems still to be the law that minors do not have a fundamental right to view non-obscene materials of their own choosing. In other words, it seems that legislatures still are, per *Ginsberg*, fully empowered to determine and limit what minors have a right to read and view.

Stanley actually went further than merely confirming the fundamental right to view non-obscene materials and held that individuals have, in the privacy of their own homes, a constitutional right to read and observe non-protected speech. While the Court has made clear since *Stanley* that the First Amendment does not prevent laws to restrict the dissemination, as opposed to the possession, of obscene expression, it is not clear how these later holdings apply to the kind of expression suppressed in *Ginsberg*.

[11] *Ginsberg*, 390 U.S. at 638. This rationale of the Court is further examined and critiqued *infra* Part I.

[12] Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 960 (9th Cir. 2009).

[13] *Id.*

[14] *Ginsberg*, 390 U.S. at 637.

Court now insists on strict or at least intermediate scrutiny.[15] The Court's use of rational basis review in *Ginsberg* is sometimes explained by stressing the obscenity aspect of the case, since obscene expression is not entitled to protection under the First Amendment.[16] Nonetheless, the Supreme Court conceded that the material before it in *Ginsberg* was "not obscene for adults,"[17] and the Court never suggested that the material was unprotected speech.[18] Therefore, the crucial question in *Ginsberg* was whether a state could restrict the dissemination of *protected* speech because of its content.

Like the *Ginsberg* statute, the *Entertainment Merchants* statute imposes a content-based restriction on constitutionally protected speech, specifically "violent" video games. The purpose of the *Entertainment Merchants* statute is to prevent harm that the material might cause to children. If the Court decides to use *Entertainment Merchants* as an opportunity to rethink *Ginsberg*, it has several options.

The Court could confirm the basic *Ginsberg* holding and extend it by analogy to any material so long as a legislature "might rationally conclude" that exposure to the material constitutes an "abuse" of children that "might prevent their 'growth into free and independent well-developed [people] and citizens.'"[19] Another option would be to affirm the holding of the Ninth Circuit and several other federal courts that *Ginsberg* is essentially limited to its facts and does not apply to non-sexual materials such as violent

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[15] *Playboy*, 529 U.S. at 813. The more relaxed "intermediate" level of scrutiny (and its greater deference to the legislature) would not seem applicable in a *Ginsberg*-type case because, in order for intermediate scrutiny to apply, the legislative burden on expression must be "content-neutral." *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that restrictions must be "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." (quoting Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 293 (1984))) and Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). *See also* Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) (plurality opinion) ("[M]unicipal ordinances receive only intermediate scrutiny if they are content neutral."). However, the purported vice of the expression in *Ginsberg* was precisely the effect of the particular content upon those who were exposed to it. *See Playboy*, 529 U.S. at 811–12 (a law that "focuses only on the content of the speech and the direct impact that speech has on its listeners . . . is the essence of content-based regulation."). *See also infra* note 48.

[16] *See, e.g., Video Software*, 556 F.3d at 959 ("*Ginsberg* is specifically rooted in the Court's First Amendment obscenity jurisprudence, which relates to non-protected sex-based expression . . . .").

[17] *Ginsberg*, 390 U.S. at 634.

[18] The Court has since specifically recognized that its decision in *Ginsberg* approved the regulation of protected speech: "We held in *Ginsberg* . . . that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of *otherwise protected expression*." FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (emphasis added).

[19] *Ginsberg*, 390 U.S. at 640–41 (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1944)).

video games.[20] There is, however, no obvious policy basis for making such a distinction. A third option would be to revisit *Ginsberg*'s reasoning and recast its rationale and holding in order to place this area of law on a firmer analytical basis, one that better accords with the rest of twenty-first century First Amendment jurisprudence.

Whichever way the Supreme Court decides *Entertainment Merchants*, the case is an eminently suitable occasion to strengthen the footing of the First Amendment rights of minors. It is well established that the state's power to control children "reaches beyond the scope of its authority over adults."[21] However, *Ginsberg*, taken on its own terms, essentially leaves the First Amendment rights of children subject to any legislative impulse or whim that can survive rational basis review.[22] In other words, as it stands, *Ginsberg* denies minors any meaningful First Amendment rights.[23]

Part I of this article examines how *Ginsberg*'s reasoning is both circular and strikingly divergent from precedent in its view of legislative power. Part II will follow with a discussion of how the Court might analyze the problem and issues in *Ginsberg* if the case arose as a matter of first impression today. Finally, Part III will offer some thoughts on the basic policy issue underlying *Ginsberg* and *Entertainment Merchants*, namely, about the extent to which government should impose restrictions on the marketplace of ideas in an effort to shape teenage minds.

I.
Ginsberg on its own terms

The specific issue in *Ginsberg* was whether the operator of a stationery store could be punished for selling so-called "girlie" magazines to persons under seventeen years of age.[24] The magazines were not "obscene for adults" because they did not meet the Supreme Court's definition of obscenity.[25] However, the Court noted, the New York

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[20] *See, e.g.,* Interactive Digital Software Ass'n v. St. Louis, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

[21] *Ginsberg*, 390 U.S. at 638 (quoting Prince, 321 U.S at 165).

[22] *See infra* text accompanying notes 73–76.

[23] *See Ginsberg*, 390 U.S. at 673 (arguing that the majority's reasoning seems to say that "the States and cities and counties and villages have *unlimited power* to withhold anything and everything that is written or pictorial from younger people." (Fortas, J., dissenting) (emphasis added)).

[24] *Ginsberg*, 390 U.S. at 631. The prosecution was based on then N.Y. PENAL LAW § 484-h (McKinney 1965). The substance of this law is now covered by N.Y. PENAL LAW §§ 235.20–24 (McKinney 2008).

[25] *Id.* at 634–35. The Supreme Court's then-current formulation was drawn from *Roth v. United States*, 354 U.S. 476 (1957), and articulated in the 3-part *Memoirs* test for obscenity:

legislature had devised its own definition of obscenity for purposes of its ban on sales to underage persons, and the state's definition was significantly more restrictive than the definition of obscenity formulated by the Supreme Court.[26]

In appealing his conviction, the defendant's "primary attack" was "leveled at the power of the State to adapt" the Supreme Court's definition of obscenity by extending it to include additional material.[27] Although the *Ginsberg* Court used the word "adapt," the state was actually trying to *expand* the concept of obscenity to include a new class of material defined "on the basis of its appeal to minors," and "thus exclude material so defined from the area of protected expression."[28] The defendant argued that a state legislature does not have the power to expand an existing category of unprotected expression and thus withdraw constitutional protection from previously protected expression.[29] He asserted, in effect, that the states do not have the power to cut down the scope of a constitutional right by modifying a constitutional concept.

The Supreme Court disagreed. Although the Court could have rendered its *own* ruling that expanded the definition of obscenity to include the material proscribed in § 484-h of the New York Penal Law,[30] it instead declared that the statute itself accomplished the expansion. According to the Court, "§ 484-h . . . adjusts the definition of obscenity," adding that it "seems" clear that "the State has power to make that

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(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
(c) the material is utterly without redeeming social value.

Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). The Court's current definition of obscenity is defined in *Miller v. California*, 413 U.S. 15, 24 (1973).

[26] *Ginsberg*, 390 U.S. at 635. The state's definition added to the Supreme Court's definition by including any depiction of "nudity, sexual conduct or sado-masochistic abuse [that] is harmful to minors." § 484-h(2)(a). Although the statute's language seemed to define only what the statute prohibited, not the scope of a constitutional concept, the Supreme Court concluded that the state's statute had adjusted the "definition of obscenity." *Ginsberg*, 390 U.S. at 638.

[27] *Ginsberg*, 390 U.S. at 635.

[28] *Id*. This statement accepts the Court's assumption that New York's statute contained a provision "defining obscenity on the basis of its appeal to minors under 17 . . . ." *Id.* at 638. However, the New York statute did not explicitly contain any such provision. *See id.* at 645–47 (setting out the statute). That is to say, there was no language in the statute that purported to define obscenity or adjust its definition. However, the Court decided *Ginsberg* on the assumption that the statute did contain this language. This assumption by the Court is central to *Ginsberg*'s reasoning, and that assumption continues through the present discussion. .

[29] *Id.* at 635.

[30] *See supra* note 24.

adjustment . . . ."[31] The Court thus declared that a state legislature has the power to redefine and limit the scope of a constitutional right.

In support of this remarkable declaration, the Court cited *Mishkin v. New York*.[32] *Mishkin* held that, in recognition of "social realities," materials aimed at a "clearly defined deviant sexual group" could be considered obscene even if they do not appeal to the prurient interest of an "average" person.[33] Prior to *Mishkin*, only materials having prurient appeal to the average person were considered obscene.[34]

Ginsberg cannot, however, be regarded as an application of *Mishkin.* Unlike *Ginsberg*, *Mishkin* expressly stated that the Court itself was making the adjustment to the constitutional definition of obscenity.[35] *Mishkin* did not even hint that a state legislature could modify the scope of constitutional rights on its own. In *Ginsberg*, by contrast, the Court did not adjust the definition itself, but instead stated that the statute did the adjusting.

Another important distinction is that *Mishkin*'s redefinition of obscenity changed the status of a class of expression (*i.e.*, materials appealing to "deviant" sexual interests) from protected to unprotected; *Ginsberg* did not.[36] In other words, the question in *Mishkin* was the scope of the Court's own constitutional definition of obscenity.[37] The wholly different question in *Ginsberg* was whether, to serve a legitimate state interest, a statute can restrict *protected* speech on the basis of its content.

Today, the answer to this last question would be a conditional "yes" because states can restrict constitutionally protected speech based on content provided the restriction meets the Supreme Court's standard of strict scrutiny.[38] For a statute to pass strict

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[31] *Ginsberg*, 390 U.S. at 638 (emphasis added). Once again, the New York statute did not actually contain any language purporting to be a definition of "obscenity."

[32] 383 U.S. 502, 509 (1966).

[33] *Id.*. at 508–09.

[34] The requirement that there be prurient appeal to the average person came into constitutional jurisprudence in *Roth.* Roth v. United States, 354 U.S.476, 489 (1957). Though it was not strictly speaking a part of the *Memoirs* formulation, it apparently was brought along with it. *See* Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

[35] *Mishkin*, 383 U.S. at 509.

[36] The *Mishkin* Court withdrew protected status from "material [that] is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large." *Id.* at 508.

[37] *See supra* note 25 for the *Memoirs* formulation.

[38] United States v. Playboy Entertainment Group, 529 U.S. 803, 813 (2000); *see also* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 109, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). The Court in *Sable* did not use the expression "strict scrutiny," but the standard stated in the foregoing parenthetical is the strict scrutiny standard. *See infra* text accompanying next footnote.

scrutiny, the government must demonstrate, among other things, that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[39]

Ginsberg did not, however, employ strict scrutiny review. Instead, on the pivotal question of whether material targeted by the statute was in fact "harmful to minors,"[40] the Court used only highly deferential rational basis review.[41] Its theory for using the rational basis standard was that "obscenity is not protected expression" and therefore, to deny protection to "material defined as obscenity" by the state "requires only that we be able to say that it was *not irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors."[42]

Using the deferential rational basis standard, the Court had no trouble finding that a legislature "might rationally conclude . . . that exposure to the materials proscribed" might prevent minors from growing into "free and independent well-developed men and citizens."[43] Although the Court conceded that that the "studies all agree that a causal link

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[39] *See Playboy*, 529 U.S. at 817 (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (commercial speech case applying intermediate scrutiny)); United States v. Nat'l Treasury Emps.Union, 513 U.S. 454, 475 (1995). Note that *Playboy* was a strict-scrutiny case quoting, with approval, the evidentiary standard laid out in an intermediate-scrutiny case (*Edenfield*). Presumably, the evidentiary standard for strict scrutiny should, if anything, be even more rigorous than the one for intermediate scrutiny and, therefore, the language quoted in the text would show the minimum rigor of evidentiary review for a strict-scrutiny case. For a fuller discussion of strict scrutiny for content-based restrictions on speech, *see infra* notes 105–113 and accompanying text.

[40] According to the statute at issue in *Ginsberg*:

> 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
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> (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.

N.Y. PENAL LAW § 484-h(1)(f) (McKinney 1965).

[41] The Court stated, for example, that the limitations on expression would be justifiable as long as "it was *rational* for the legislature to find that the minors' exposure to such material might be harmful." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (emphasis added).

[42] *Ginsberg*, 390 U.S. at 641 (emphasis added).

[43] *Id.* at 640–41 (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1994)) (internal quotation marks omitted).

has not been demonstrated**,"**[44] the state was not required to substantiate its asserted interest by showing that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree," as it would be under today's strict scrutiny analysis.[45] Instead, the Court deemed it sufficient **"**that a causal link has *not been disproved* either."[46] "We . . . cannot say," it concluded, "that § 484-h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm."[47]

Considering that *Ginsberg* was decided in 1968, it is unsurprising that the Court used rational basis review. It would be years before the Court would delineate between the different levels of scrutiny (strict, intermediate and rational basis) in relation to First Amendment law[48] or specifically hold that strict scrutiny applies in cases of content-

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[44] *Id.* at 642 (quoting C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1996 SUP. CT. REV. 7, 52 (1996)) (internal quotation mark omitted).

[45] *See* United States v. Playboy Entm't Group, 529 U.S. 803, 817 (2000) (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (commercial speech case applying intermediate scrutiny) (sexually-themed speech requires strict scrutiny); United States v. Nat'l Treasury Emps.Union, 513 U.S. 454, 475 (1995) . *See supra* note 39.

[46] *Ginsberg*, 390 U.S. at 642 (quoting C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1996 SUP. CT. REV. 7, 52 (1996)) (internal quotation mark omitted).

[47] *Id.* at 643.

[48] The applicability of the heightened scrutiny to content-based regulations of expression did not begin to take shape until well after *Ginsberg*. The Court was still saying in 1972, four years after *Ginsberg*, that "the First Amendment means that government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (emphasis added). However, with a mind to the "discrimination" aspect of content-based restrictions, post-*Mosley* cases borrowed from equal protection doctrine (already mentioned in *Mosley*) and allowed content-based restrictions to be imposed provided that "the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." Carey v. Brown, 447 U.S. 455, 461–62 (1980). *See* Sable Commc'ns of Cal. v. FCC, 492 U.S. 119, 126 (1989) (applying the rule to restrictions on sexually-themed speech). However, the first instance I can find of the term "strict scrutiny" and its current formulation in a First Amendment case is in *Playboy*, 529 U.S. at 813. For an interesting and concise review of how strict scrutiny emerged as a First Amendment doctrine, see Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124–29 (1991) (Kennedy, J., concurring).

Intermediate scrutiny first appeared in a majority opinion in the First Amendment context in Turner Broad. Sys. v. FCC, 512 U.S. 622, 641–42 (1994). However, the elements of intermediate scrutiny go back to a case decided a month after *Ginsberg*, United States v O'Brien, 391 U.S. 367, 376 (1968), that applied what is now called intermediate scrutiny to a regulation of expressive conduct, viz. draft-card burning. Nothing in the *Ginsberg* opinion foreshadowed the soon-to-be-announced, but not named, intermediate standard of review. However, intermediate review would not apply

based restrictions on sexually themed speech.[49] According to the constitutional standards of the time, the only basis on which speech suppression was permissible was "a showing of the circumstances which lie behind the phrase 'clear and present danger.'"[50]

Although protected speech could not be suppressed absent a clear and present danger, the Court had held eleven years before *Ginsberg*, in *Roth v. United States*,[51] that the government may impose restrictions on *unprotected* speech, such as obscenity, without such a danger.[52] The only thing standing in the way of invoking the *Roth* exception as authority for using rational basis review in *Ginsberg* was that the magazines were not obscene under the Supreme Court's definition.[53] To get past this problem, the Court fit *Ginsberg* under the First Amendment's obscenity exception by reasoning that "material defined as obscenity by § 484-h" counts as obscene.[54] Therefore, the Court decided, a rational basis for restricting the material is all that is needed.[55]

This reasoning does not, however, work. In its effort to fit *Ginsberg* under the obscenity exception to First Amendment protection, the Court appeared to be playing a game of polysemy — deliberately labeling two different concepts with the same word as a way of gliding over the difference between them. The two different concepts are (i) the constitutional concept of "obscenity" as defined by the Court,[56] and (ii) the more capacious concept that results when the constitutional concept is expanded to include the "material defined as obscenity by § 484-h."[57] The problem with treating *Ginsberg* as a case of obscenity is that the material proscribed by the New York statute covered a substantial range of expression that is not obscenity as defined by the Court. The expression targeted by the New York statute included constitutionally *protected* speech.

There is only one way to regard *Ginsberg* as an obscenity case and, therefore, appropriate for lesser scrutiny, and that is to suppose that the constitutional definition of obscenity somehow came to include "material defined as obscenity by § 484-h."[58] The only way that inclusion could have occurred would be if the Court or the New York State Legislature had changed the constitutional definition of obscenity. Despite the Court's

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to a case like *Ginsberg* today because the regulation there was pure content-based discrimination.

[49] *Playboy*, 529 U.S. at 813.

[50] *Ginsberg*, 390 U.S. at 641 (quoting Roth v. United States, 354 U.S. 476, 486–87 (1957)). *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (rejecting use of the rational basis test for cases involving freedoms of speech and press).

[51] 354 U.S. 476 (1957). *Roth* was the first case to hold that there is an implicit exception for obscenity in the First Amendment.

[52] *Ginsberg*, 390 U.S. at 641, 642 n.9. *Roth* referred only to constitutionally excluded obscenity, and said nothing about variations on the obscenity concept that might be prescribed by statutes.

[53] *See supra* text accompanying notes 16–18.

[54] *Ginsberg*, 390 U.S. at 641.

[55] *See supra* text accompanying notes 40–42.

[56] *Memoirs v. Massachusetts*, 338 U.S. 413, 418 (1966).

[57] *Ginsberg*, 390 U.S. at 641.

[58] *Id*.

language,[59] it is practically inconceivable it really meant to recognize a power in the state legislature to modify the scope of a constitutional right. Accordingly, if a definitional change occurred the Court must have made the change itself. However, the *Ginsberg* opinion nowhere said that the Court was making any such change, nor did it say it was adopting the New York formulation. On the contrary, the Court unmistakably said "§ 484-h . . . adjusts the definition of obscenity."[60]

In sum, there is a problem with treating *Ginsberg* as an obscenity case and explaining its use of rational basis review. The problem is that materials like those at issue in *Ginsberg* remained non-obscene *protected* speech under the Supreme Court's operative definitions. The Supreme Court neither redefined the scope of the obscenity concept itself, nor did it say that it adopted the supposed redefinition[61] in the statute as a constitutional formulation.[62] Assuming that the state legislature lacked the power to modify the scope of constitutional right, the Court's use of the rational basis test would not have been appropriate under the prevailing requirement of strict scrutiny review.

Even accepting the Court's statement that the legislature had the power to adjust the definition of obscenity for constitutional purposes, there is still another problem with *Ginsberg*'s explanation for using rational basis review: the core line of reasoning is circular. The Court said that the § 484-h material was obscene because the legislature had power to redefine non-obscene material as obscene if it had a rational basis for doing so. But the reason it needed only a rational basis to do so is that the § 484-h material was obscene. In order to justify the use of rational basis review the Court had to assume the conclusion, that the § 484-h material was obscene.

In establishing the rational basis test as the one to use in cases involving the First Amendment rights of minors, *Ginsberg* produced an important constitutional rule by treating material as obscene based on the supposed power of a state legislature to "adjust" a constitutional concept. Unless the Court itself adjusted its obscenity formulation, the material at issue in *Ginsberg* was protected speech restricted on the basis of content without the application of strict scrutiny. This situation raises, at the very least, serious questions about *Ginsberg's* continued value as a precedent.

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[59] *Id.* at 638 (insisting that the legislature made the "adjustment" in the definition of obscenity).

[60] *Id*.

[61] As noted earlier, the New York statute did not actually contain any language purporting to be a definition of obscenity. However, since the Court decided *Ginsberg* on the assumption that it did, this assumption is continued in the present discussion.

[62] A footnote in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10 (1975), stated that "[i]n Ginsberg the Court *adopted* a variation of the adult obscenity standards enunciated in Roth . . . and Memoirs . . . ." (emphasis added) (citations omitted). However, the Court did not say that it had adopted the state's formulation in the *Ginsberg* opinion itself. Rather, all the opinion said was, in effect, that it could have been rational for the state to adopt it. *See supra* text accompanying notes 40–42. If the Court did indeed adopt a reformulation of its obscenity definition in either *Ginsberg* or *Erznoznick*, it did so implicitly.

II.
Could *Ginsberg* be Decided the Same Way Today?

Despite its serious analytical flaws, *Ginsberg* produced a core holding that has been fairly clear. First, the Court has said that *Ginsberg* approved the regulation of "otherwise protected expression"[63] if "the government's interest in the 'well-being of its youth' and in supporting parental authority" justifies the regulation.[64] In relation to minors' First Amendment rights to *receive* expressive material, *Ginsberg* established that "the scope of the constitutional freedom . . . to read or see material concerned with sex" can depend on the age of the person.[65]

This core meaning of *Ginsberg* does not, however, provide much guidance for future cases. In particular, *Ginsberg* neither tells us how watered down the First Amendment rights of minors actually are, nor does it offer any standards or principles other than the rational basis test for deciding that question..[66] What is more, First Amendment law has evolved considerably since *Ginsberg*.

The *Entertainment Merchants* case now before the Court freshly presents the same question as *Ginsberg*, namely, to what extent does the government's interest in protecting minors permit regulations that deny minors First Amendment rights to communicate and receive communications? If *Ginsberg* arose as a matter of first impression today, it is unlikely that it could be decided on the same reasoning. In light of now-prevailing First Amendment law, the *Entertainment Merchants* case should not be decided on that reasoning either.

Even if the reasoning of *Ginsberg* is flawed, however, there is still the question of what value its core meaning might retain as precedent. Part II considers whether there are alternative ways to support *Ginsberg*'s basic holding today.

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[63] FCC v. Pacifica Found. 438 U.S. 726, 749 (1978) (describing *Ginsberg*).

[64] *Id.* at 749–50 (quoting *Ginsburg,* 390 U.S. at 639–40). As the Court has elaborated, *Ginsberg* established that there are "limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children," and these limitations apply "even though the material in question was entitled to First Amendment protection with respect to adults." Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986).

[65] Reno v. ACLU, 521 U.S. 844, 864–65 (1997) (quoting *Ginsberg,* 390 U.S. at 636). Based on *Reno*, it appears that this aspect of *Ginsberg* has survived the landmark right-to-read case, Stanley v. Georgia, 394 U.S. 557 (1969), which was decided one year after *Ginsberg*.

[66] Indeed, it does not even tell us who holds the power to decide. Do the state legislatures have the power to modify the scope of minors' First Amendment rights by making adjustments in the controlling constitutional definitions, as the Court suggested? Or is that power held by the Supreme Court alone? *See Ginsberg,* 390 U.S. at 638 ("That the State has power to make that adjustment seems clear.").

a. Rational Basis Review as an "Independent" Rule?

The effort to justify the rational basis test in *Ginsberg* led to a most glaring deviation from modern First Amendment law, namely, letting a state legislature diminish the breadth of a constitutional right by expanding the definition of obscenity.[67] This is not, one would think, an aspect of *Ginsberg* that could continue to apply.

Perhaps, however, the *Ginsberg* opinion did not actually mean to say that state legislatures have the power to modify the scope of First Amendment rights. The Court might have instead meant to adopt a so-called "variable obscenity" standard, which would permit the states some flexibility in complying with First Amendment requirements.[68] Justice Brennan, who wrote for the Court in *Ginsberg*, later explained that the Court had done just that.[69] The trouble is that if, indeed, the Court adopted a "variable obscenity" standard, it did not mention that it adoption anywhere in the final version of its opinion.[70] No subsequent majority opinion has confirmed the existence of this novel, flexible standard and a correspondingly flexible constitutional right.

The rational basis standard for cases involving minors does not, however, necessarily have to depend on the dubious notion that states can modify the scope of constitutional definitions and rights. Instead, it is possible to read *Ginsberg* as establishing an independent rule that lesser scrutiny applies to laws aimed at preventing harm to minors.[71] Under this alternative reading of *Ginsberg*, regulations to protect minors would simply be carved out from the general run of First Amendment cases and,

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[67] *See supra* Part I.

[68] *Ginsberg*, 390 U.S. at 635–36. The opinion noted that the "New York Court of Appeals 'upheld the Legislature's power to employ variable concepts of obscenity'" in a prior case using the same law as was at issue in *Ginsberg*. *Id.* (citing People v. Tannenbaum, 220 N.E.2d 783, 785 (N.Y. 1966)).

[69] FCC v. Pacifica Found., 438 U.S. 726, 767 (Brennan, J., dissenting). Justice Fortas also mentions the "variable obscenity" concept in his *Ginsberg* dissent, making it sound very much as though it had been embraced in an earlier draft of the majority opinion but was later redacted. *Ginsberg*, 390 U.S. at 673. The Ninth Circuit apparently thought that the Court had adopted a variable obscenity standard as well. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 953, 957–58 (9th Cir. 2009).

[70] In a footnote, the Court quoted a law review article that argued that "[v]ariable obscenity . . . furnishes a useful analytical tool," *Ginsberg*, 390 U.S. at 636 n.4 (quoting William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 85 (1960–61)), but the references to variable obscenity in the majority opinion fall far short of even the most oblique adoption of a new constitutional standard.

[71] Indeed, this is exactly how Justice Brennan, the author of *Ginsberg*, appears later to have understood it. *See* Carey v. Population Serv. Int'l, 431 U.S. 678, 693 n.15 (1980) (citing *Ginsberg* and Prince v. Massachusetts, 321 U.S. 158 (1944)) ("lesser scrutiny is appropriate . . . because of the States' greater latitude to regulate the conduct of children").

as to them, the rational basis test would be deemed the applicable standard for reviewing abridgments of speech.

There are, however, several objections to reading *Ginsberg* as establishing an independent rule for using rational basis review for laws that affect minors' First Amendment rights. First of all, *Ginsberg* neither considered nor made any effort to justify such an independent rule. Although the Court gave good reasons why the First Amendment rights of minors may be less extensive than those of adults,[72] it gave no explanation (apart from its obscenity theory) why, as a matter of process, laws affecting minors should receive less rigorous scrutiny than restrictions on speech generally.

A stronger objection to a special low-scrutiny rule for minors is that its practical effect would be to place the First Amendment rights of young people almost totally at the pleasure of the legislature — meaning that minors would effectively have no real First Amendment rights at all.[73] By authorizing the use of highly deferential rational basis review, the Court would give legislatures a green light to move whole classes of expression into categorical exclusions such as obscenity.

Moving a class of expression into a categorical exclusion allows a legislature to bypass strict scrutiny.[74] It would undermine the integrity of the strict scrutiny requirement if new laws could remove classes of speech from its purview without themselves being subject to strict scrutiny.[75] As Justice Fortas wrote in his *Ginsberg* dissent, "[t]he Court certainly cannot mean that the States and cities and counties and villages have *unlimited power* to withhold anything and everything that is written or pictorial from younger people."[76] But if the deferential rational basis test of *Ginsberg* applies to cases involving minors, that "unlimited power" would be exactly the result. It would create a veritable road around First Amendment protection for persons under eighteen years of age.

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[72] For example, the court discussed *Prince*. *Ginsberg*, 390 U.S. at 638–39.

[73] *See* Landmark Commc'ns v. Virginia., 435 U.S. 829, 844 (1978) ("A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. *Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.*") (emphasis added).

[74] Strict scrutiny is not required for restrictions on expression that falls within a categorical exclusion from First Amendment protection. *Compare* United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) (A "content-based speech restriction . . . can stand only if it satisfies strict scrutiny.") *with* Roth v. United States, 354 U.S. 476, 486–87 (1957) (no justifications for restriction need be shown if a categorical exclusion applies). *See also* United States v. Williams, 553 U.S. 285, 298 (2008) (expressions of offers to provide child pornography); New York v. Ferber, 458 U.S. 747, 765 (1982) (child pornographic expression).

[75] *See supra* note 73.

[76] *Ginsberg*, 390 U.S. at 673 (Fortas, J. dissenting) (emphasis added).

Another objection to an independent rule applying rational-basis review is that it would be directly at odds with several post-*Ginsberg* decisions.[77] For example, in *Tinker v. Des Moines Independent Community School District*,[78] the Court showed no inclination to reverse the First Amendment presumption of invalidity because minors were involved.

> "Students in school . . . are 'persons' under our Constitution. . . . They may not be confined to the expression of those sentiments that are officially approved. In the absence of *a specific showing* of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[79]

True, the *Tinker* case dealt with communications *by* minors, not communications *to* minors (and, inferentially, their right to receive such communications), but the Supreme Court has never, at least yet, given any indication that the First Amendment interests in receiving expressive content are inferior to the interests in providing it. Only by dubiously regarding *Ginsberg* as an obscenity case was it possible for the Court to justify the use of rational basis review.

In the 1989 case of *Sable Communications v. FCC*, the Court held exactly the opposite as *Ginsberg* with respect to the applicable level of review. Like *Ginsberg*, *Sable* involved a law that was intended to prevent the dissemination of sexual material to minors, specifically "dial-a-porn." To do so, the law in *Sable* placed content-based restrictions on "indecent" telephone communications.[80] *Sable* followed *Ginsberg* in part, acknowledging that government has "a compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards."[81] However, the Court departed from *Ginsberg* by prescribing a test that amounts to what we now call strict scrutiny.[82] "[T]o withstand constitutional scrutiny," wrote the Court, government must use "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[83] Even more pertinently, the Court stated

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[77] *E.g.*, *Playboy*, 529 U.S. at 813 (2000) (requiring strict scrutiny review of content-based restrictions for the purpose of prevent access by minors to sexually-themed television programming); Reno v. ACLU, 521 U.S. 844, 868 (1997) (applying the "most stringent review" to a content-based restriction on speech); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 119, 126 (1989) (using today's strict scrutiny standards in reviewing regulation to prevent exposure of minors to sexually-themed speech).

[78] 393 U.S. 503 (1969).

[79] *Id.* at 511 (emphasis added).

[80] *Sable*, 492 U.S. at 117–18, 123. The Court at some points referred to the regulation as a "ban," but in fact only communications for *commercial* purposes were banned. *Id.* at 123.

[81] *Id.* at 126.

[82] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000). *See also infra* text accompanying note 105.

[83] *Sable*, 492 U.S. at 126 (quoting Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976)).

that "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law."[84] "Deference to a legislative finding," wrote the Court, "cannot limit judicial inquiry when First Amendment rights are at stake."[85] At least since 1989, to uphold a law cutting back free expression interests to protect minors it is not enough merely to be "able to say that it was *not irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors."[86]

The use of rational-basis review in First Amendment cases involving minors is also at odds with *United States v. Playboy Entertainment Group*,[87] where the Court left no doubt that "a content-based speech restriction . . . can stand only if it satisfies strict scrutiny."[88] Like *Sable* and *Ginsberg*, *Playboy* concerned a law intended to prevent sexual material, in this instance sexual cable television programming, from reaching minors.[89] While the Court in *Playboy* clearly focused on the law as a "restriction of communication between speakers and willing *adult* listeners"[90] its broad pronouncements about First Amendment policy and goals did not except minors. "[W]ere we to give the Government the benefit of the doubt when it attempted to restrict speech," wrote the Court, "we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas."[91] Thus, the Court stated flatly, "[c]ontent-based regulations are presumptively invalid," and that "the usual presumption of constitutionality . . . is reversed."[92]

Thus, the Supreme Court has made it clear since *Ginsberg*, if it was not already clear before,[93] that when laws restrict speech on the basis of content, strict scrutiny applies[94]—even if, as in *Sable*,[95] *Reno*,[96] and *Playboy*,[97] the purpose of the law is to

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[84] *Id.* at 129.
[85] *Id.* (quoting Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843 (1978)).
[86] *Ginsberg*, 390 U.S. at 641 (emphasis added). For more quotations stating the applicable standards for substantiating harm, see *infra* text accompanying notes 109–111.
[87] 529 U.S. 803 (2000).
[88] *Id.* at 813.
[89] *Id.* at 806.
[90] *Id.* at 812 ("To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection.") (emphasis added).
[91] *Id.* at 818.
[92] *Id.* at 817; *accord*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *cf. e.g.* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434, 449 (2002) (plurality opinion & Kennedy, J., concurring) (recognizing same rule); Renton v. Playtime Theatres, 475 U.S. 41, 46–47 (1986) (same).
[93] *See* Butler v. Michigan, 352 U.S. 380 (1957); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (rejecting use of the rational basis test for cases involving freedoms of speech and press).
[94] Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the

restrict access to sexual materials by minors. Use of the rational basis standard is also at odds with rule that content-based restrictions on speech and press are presumptively invalid.[98] Certainly, if *Ginsberg* were decided today, something more than its flawed and circular reasoning[99] should be required to overcome the holdings and strong statements of First Amendment goals and policies contained in cases that have since been decided.

Finally, a special rule of lesser scrutiny for cases involving minors is inconsistent with the principle that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials" to minors.[100] In fact, such a rule for minors would effectively defeat this principle in practice. It is one thing to say that "a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults,"[101] but it is impermissible to give the state or municipality the final say on such controls. Only if there is genuine scrutiny over governmental restrictions on expression by and to minors can the restrictions be confined to "relatively narrow and well-defined circumstances."[102]

In summary, it would be problematic to apply *Ginsberg* today as precedent for the proposition that lesser scrutiny is appropriate for First Amendment cases involving dissemination of expression to minors. No doubt the states have "greater latitude to regulate the conduct of children,"[103] but that broad truism says nothing about the standard to be used in deciding the limits on that latitude. *Ginsberg* regarded restrictions on expression to be justifiable as long as it was "*rational* for the legislature to find that the minors' exposure to such material might be harmful."[104] In that respect, *Ginsberg*'s reasoning is out of step with modern First Amendment jurisprudence, even as to minors, and should not be applied in the pending *Entertainment Merchants* case.

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same controlling force."). *See also Playboy*, 529 U.S. at 81; *R.A.V.*, 505 U.S. at 382; Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[95] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 119, 126 (1989) (applying strict scrutiny to a regulation to prevent exposure of minors to sexually-themed speech).

[96] *See* Reno v. ACLU, 521 U.S. 844, 868 (1997) (applying the "most stringent review" to a content-based restriction on speech in the Internet context).

[97] *See* United States v. Playboy Entm't Group, 529 U.S. 803 (2000).

[98] See *supra* note 92 and accompanying text. The rational-basis test of constitutional validity inherently embodies exactly the opposite presumption – specifically, the presumption that the statute is valid unless no "state of facts reasonably can be conceived that would sustain" it. Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

[99] *See supra* Part I.

[100] Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–13 (1975).

[101] *Id.* at 212.

[102] *Id.* at 212–13.

[103] Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1980).

[104] *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (emphasis added).

b. *Ginsberg* under the strict scrutiny standard.

The Court's explanation of *Ginsberg* as a rational basis case does not *per se* mean it could not come out the same way if analyzed under the modern "strict scrutiny" standard. Under strict scrutiny, a content-based restriction "must be narrowly tailored to promote a *compelling* Government interest," and there must be no "less restrictive alternative would serve the Government's purpose."[105]

In the *Ginsberg* context, the element of "compelling interest" should be easy to meet. Indeed, the *Ginsberg* Court identified two interests that could potentially serve as the "compelling" interests that, if substantiated, would satisfy strict scrutiny today.[106] They were: (1) the state's interest in supporting parents and others, such as teachers, who have primary responsibility for the well-being of children, and (2) the state's "independent interest in the well-being of its youth."[107]

The crucial question, however, is whether the alleged harm on which these two interests are predicated exists in fact. The *Ginsberg* Court admitted it was "very doubtful" that the crucial legislative finding of harm "expresses an accepted scientific fact."[108] Nonetheless, it accepted that finding anyway. Whatever else may be said of such reasoning, it is not "strict scrutiny."

Today, in order for a statute to pass strict scrutiny (or even intermediate scrutiny), "the Government . . . must 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."[109] Rather than simply defer to the legislature as it did in *Ginsberg,* the Court must use its "*independent judgment* of the facts bearing on an issue of constitutional law."[110] It must "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[111]

In short, the Court "*may not simply assume* that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity."[112] On the contrary,

> [A law that burdens free expression] requires a justification far stronger than mere speculation about serious harms. "Fear of serious injury cannot

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[105] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) (emphasis added) (citations omitted).
[106] *Ginsberg,* 390 U.S. at 639.
[107] *Id.*
[108] *Id.* at 641.
[109] United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 475 (1995) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994)) (internal quotation mark omitted).
[110] Sable Commc'ns v. FCC, 492 U.S. 115, 129 (1989) (emphasis added).
[111] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (Kennedy, J., plurality) (applying *O'Brien* test).
[112] Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 496 (1986) (quoting Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984)) (emphasis added).

> alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced."[113]

It is beyond the scope of this article to discuss whether there is adequate scientific evidence to support a conclusion that viewing erotic materials is harmful to minors, and to teens in particular. If there is not, then *Ginsberg* could not on its record be decided the same way today using the now-prevailing strict scrutiny standard for content-based regulations of speech. Likewise, the outcome of the *Entertainment Merchants* case should depend on whether there is adequate scientific evidence to support a conclusion that playing "violent" video games is harmful to teens.

III.
Ginsberg and Mind Control for Teens

Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[114]

Reduced to its basics, the central policy question in *Ginsberg* was whether and to what extent government should be able to control what minors see, read, and hear. While there is good reason to think that government control of teenage minds is a generally bad thing, there are undoubtedly many who see value in such control. Arguably, at least, government should not simply leave the development of teenagers' personalities, tastes, attitudes, and values to their families, parents and other people in their lives. Rather, one could argue, government exists not just to serve its citizens but to shape them as well. The idea that government has a legitimate role in shaping teenagers' personalities, tastes, attitudes and values by limiting what they see and hear is usually expressed with calls for restricting minors' access to certain kinds of expressive material and in legislation responding to those calls.[115]

While the Supreme Court has never found an "indoctrination exception" to the First Amendment, some of the reasoning in the public school cases inferentially suggests there might be.[116] Nonetheless, though the point will not be argued here, it is submitted

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[113] *Nat'l Treasury*, 513 U.S. at 475 (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

[114] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[115] For example, see the portion of the Communications Decency Act, codified in 47 U.S.C § 223, quoted in Reno v. ACLU, 521 U.S. 844, 859 (1997) (invalidating the provision as overbroad).

[116] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 408 (2007) (allowing school to ban advocacy of illegal drug use given the "special characteristics of the school environment"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988) (allowing school officials to regulate the contents of a school newspaper "in any reasonable manner"); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (upholding ban on

that the school cases, given their language and logic, neither expressly nor implicitly suggest the existence of some sort of "indoctrination exception" to the First Amendment. Their holdings are animated, rather, by a recognition of the "special characteristics of the school environment" and the need to prevent disruption of the schools' educational work.[117] So while it may be clear that the public schools have a legitimate role in educating as to values,[118] the cases do not do support the idea that government has an indoctrination interest that allows it to restrict expression as a way to suppress alternative values. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."[119]

Depending on how one comes out on questions like these, one may or may not be persuaded that *Ginsberg* represented a step in the right direction. Stated in First Amendment terms, one may or may not think that there is a compelling governmental interest in shielding teenagers from the social and cultural influences that might cause them to develop outlooks and viewpoints on sex or other topics that the government regards as "wrong."

Whether or not such a compelling interest exists, the problem with *Ginsberg* is that its rational basis test provides no vehicle for judicial examination of the issue or for assuring that such government interests, if they exist, are furthered in an appropriately speech-protective way. Instead, the present *Ginsberg* rule permits Congress, state and even local legislatures to impose wholesale embargoes on what young people may see, read and hear. It gives legislative bodies an essentially free hand to obstruct teens' access to essentially any kind of material the legislators might decide does "harm."

Wholesale embargoes on speech and expression for the purpose of shaping minds would, of course, never be tolerated for general audiences.[120] On the contrary, individuals have a fundamental right to view and observe material of their own choosing even if the government officials have concerns about the impact on the minds of those who see it.[121] Whether such embargoes should be permitted in the case of teens is a different question.[122] Consistently safeguarding First Amendment interests is not a duty

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sexually suggestive student speech that would "undermine the school's basic educational mission").

[117] *See Morse*, 551 U.S. at 394.

[118] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).

[119] *Id.* at 642.

[120] *See* Stanley v. Georgia, 394 U.S. 557, 567–68 (1969).

[121] *Id.* at 565 (denying that the state has "the right to protect the individual's mind from the effects" even of *unprotected* speech, *i.e.* obscenity). The Constitution exists precisely so that opinions and judgments, including aesthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. United States v. Playboy Entm't Group, 529 U.S. 803, 818 (2000).

[122] "[A] State may permissibly determine that, at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for

that the courts can leave exclusively to the legislative branch.[123] As the Court has stated, "[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."[124] As long as freedom of expression is a fundamental right, strict scrutiny should apply whenever legislatures regulate on the basis of content.

Presumably, the chief harm posed to teens by non-obscene sexual material might is that it might cause them to get "wrong" ideas, attitudes or values concerning sex. Assuming that the government has the "right" ideas, attitudes and values on sexual matters, this is a kind of harm that government could have an interest in trying to prevent. On the other hand, the reliability of government expertise on questions of sex is something a person may doubt. And it must not be forgotten that minors can also suffer harm by being *deprived* of access to free expression.[125] It is, after all, a presupposition of the First Amendment that reading and observing the expression of others is beneficial.[126] There is ordinarily a First Amendment interest in protecting that access, an interest that is strong enough to merit protection by the standard of strict scrutiny to protect the rights of minors.

IV.
Conclusion

In deciding *Schwarzenegger v. Entertainment Merchants Association*, the Supreme Court will have to grapple with how to apply *Ginsberg v. New York*.[127] Rather than gloss over or ignore the analytical flaws of *Ginsberg*, the Court should take the occasion to rethink *Ginsberg* and to place minors' constitutional rights on a sounder footing that is in harmony with the rest of First Amendment law.

Using the rational basis test, *Ginsberg* could not be decided on the same reasoning today nor could it have reached the same result. The Court's choice to use lesser scrutiny to review a law impinging on First Amendment interests is inconsistent with cases decided since *Ginsberg* and the requirement of strict scrutiny that they establish.[128] The only way its reasoning could hold is if the state legislature actually had the power (as *Ginsberg* asserted) to modify the scope of constitutional protections by redefining a key constitutional concept – namely, obscenity. Despite *Ginsberg*'s language, it is

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individual choice which is the presupposition of First Amendment guarantees." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) (quoting Justice Stewart's concurring opinion in *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968)).

[123] *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 119, 126, 129 (1989) and *supra* text accompanying notes 77–99.

[124] *Erznoznik*, 422 U.S. at 214.

[125] *See id.*

[126] *See Playboy*, 529 U.S. at 817 ("The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost.").

[127] 390 U.S. 629 (1968).

[128] *Supra* text accompanying notes 77–99.

inconceivable that the Supreme Court would recognize such a power in a state legislature today. Therefore, in the absence of some new, independent principle (of which the Court has not yet even hinted), the *Ginsberg* decision to use the rational basis test is without a sound foundation under modern First Amendment law.

Bringing this area of law into harmony with the rest of First Amendment law would mean that, in reviewing content-based restrictions intended to protect minors (such as those in *Entertainment Merchants*), the courts should apply the same presumption of invalidity and strict scrutiny that are applicable to content-based restrictions enacted for other purposes.[129] That is to say, content-based restrictions to protect minors must be "narrowly tailored" to promote a "compelling Government interest," with no "less restrictive alternative,"[130] and in substantiating that interest "the Government . . . must 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."[131]

Ultimately, the policy concern in cases like *Ginsberg* and *Entertainment Merchants* involves governmental efforts to imbue young people with attitudes, outlooks, and viewpoints toward sex and depictions of violence that fall within a certain officially approved range. Whether the youth of today will eventually conform to these officially fostered attitudes, outlooks and viewpoints as the adults of tomorrow is, of course, an open question but, if history is a guide, they probably will not.

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[129] *Id.*

[130] *Playboy*, 529 U.S. at 813 (citations omitted) (emphasis added). The more relaxed intermediate level of scrutiny (and its greater deference to the legislature) would not apply in the *Ginsberg* situation as such application requires the legislative burden on expression must be "content-neutral." *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (restrictions must be "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 41 (1986). *See also* Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) (plurality opinion) ("[M]unicipal ordinances receive only intermediate scrutiny if they are content neutral."). However, the purported vice of the expression in *Ginsberg* was precisely the effects of the particular content on those who were exposed to it.

[131] United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 475 (1995).