CHILD REARING AND THE FIRST AMENDMENT: EXAMINING THE GOVERNMENTAL AND PARENTAL INTERESTS IN PROTECTING MINORS FROM HARMFUL SPEECH

BY

EUGENE MINCHIN

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This thesis is dedicated to Suzanne Minchin and John Pemberton, my two favorite pharmacists, in that order.

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Eugene Minchin

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This work examines the First Amendment right of minors to receive speech within the context of parental rights and the ostensible governmental interest of protecting children from harmful materials. The thesis begins with an historical overview of the substantive due process rights of parents to raise their children; it then delves into relevant legal scholars' work in the field of child-protection censorship and draws on the theoretical free-speech justifications of the marketplace of ideas, democratic self-governance and human dignity to suggest that many governmental attempts to protect minors from speech are based upon cultural assumptions rather than scientific evidence. Examining the judicial standard of strict scrutiny in the post-*Brown v. Entertainment Merchants Association* landscape, this thesis finally contends that the harms foisted upon the free-speech rights of children and the parental rights of adults generally outweigh any benefits produced by state attempts to keep minors ignorant about potentially difficult or offensive ideas.

CHAPTER 1
INTRODUCTION

In August 2013, the U.S. Court of Appeals for the Ninth Circuit upheld, against a First Amendment[1] challenge, a California statute[2] that prohibits licensed health providers from engaging in sexual orientation change efforts (hereinafter SOCE) with minors.[3] The ruling, which came fewer than two weeks after New Jersey Gov. Chris Christie signed a similar bill[4] into law,[5] makes medical professionals subject "to discipline by the licensing entity"[6] if they attempt to use any means, including conversation, to dissuade minors from homosexual attraction or tendencies—regardless of the wishes of either the parents or the minors themselves. The sponsor of the California law, Sen. Ted Lieu, hailed the decision, stating that "[i]t means that the quackery of gay conversion therapy will not be able to rear its head in California (for minors)."[7]

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[1] The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[2] CAL. BUS. & PROF. CODE § 865.1 (2013).

[3] Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013). The 9th Circuit subsequently affirmed and slightly amended its ruling, a decision that that was, on the same day appealed by the plaintiffs. Pickup v. Brown, 2014 U.S. App. LEXIS 1878 (9th Cir. January 29, 2014). The court denied an en blanc rehearing, so the plaintiffs petitioned the U.S. Supreme Court for grant of certiorari. Press Release, Liberty Counsel, Ninth Circuit Stays Ruling on California Change Therapy Ban (Feb. 4, 2014) press release, (found online at http://www.lc.org/index.cfm?PID=14100&PRID=1403).

[4] A3371, Reg. Sess. (N.J. 2012-13). The bill "[p]rotects minors by prohibiting attempts to change sexual orientation."

[5] *See* Kate Zernike, *Christie Signs Gay 'Conversion Therapy' Ban*, N.Y. TIMES, Aug. 20, 2013, at A14 (reporting that Christie signed a bill "outlawing therapy that aims to convert gay children to heterosexuals, making New Jersey the second state to ban the controversial practice," and adding that during Christie previously had stated that "he believes that parents should be left alone to decide how to raise their children, but, as a spokesman later clarified, he does not believe in so-called conversion therapy, which claims to 'cure' gays and lesbians").

[6] CAL. BUS. & PROF. CODE § 865.2 (2013).

[7] Sam Stanton & Denny Walsh, *'Gay Conversion' Ban Upheld*, SACRAMENTO BEE, Aug. 30, 2013, at A3.

In an unrelated ruling two months earlier, the U.S. Supreme Court refused to touch the Colorado appellate court decision in *Saint John's Church in the Wilderness v. Scott*.[8] The high court's refusal to hear the case left in place an order prohibiting the display of "gruesome images of mutilated fetuses or dead bodies"[9] near a church when those images were "reasonably likely to be viewed by children under 12 years of age attending worship services and/or worship-related events."[10]

The stated objective in both of these seemingly disparate cases was the protection of minors from speech. In *Scott*, it was the "compelling interest in protecting children from exposure to certain images of aborted fetuses and dead bodies"[11] because of the potential for psychological distress.[12] In the case of California's *Pickup v. Brown*, it was to "protect the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect its minors against exposure to the serious harms caused by sexual orientation change efforts."[13]

These decisions were met with hisses and boos from some proponents of free speech, who widely perceived them to be deleterious to an open, robust exchange of ideas.[14] Yet an

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[8] 296 P.3d 273 (Colo. App. 2012), *cert. denied*, 2013 U.S. LEXIS 4402 (June 10, 2013). In July of 2013, counsel for Kenneth Tyler Scott and Clifton Powell filed a petition with U.S. Supreme Court requesting a rehearing of the Court's June 2013 denial of certiorari. Petition for Rehearing, Scott v. Saint John's Church in the Wilderness, No. 12-1077, 2013 U.S. S. Ct. Briefs LEXIS 2831 (U.S. July 3, 2013).

[9] *Scott*, 296 P.3d at 281.

[10] *Id.*

[11] *Id.* at 284.

[12] *Id.*

[13] *Pickup*, 2013 U.S. App. LEXIS 18068, at 13.

[14] Eugene Volokh, *Supreme Court Denies Hearing in "Gruesome Images" Case* (Scott v. Saint John's Church in the Wilderness), VOLOKH CONSPIRACY, June 10, 2013, http://www.volokh.com/category/freespeech/scott-v-saint-johns-church-in-the-wilderness/.

inextricably conjoined but less noted concern with these decisions is the potentially deleterious effects to parental rights.

As the *San Francisco Chronicle* observed, "conservative Christian legal organizations, representing individual parents, children and therapists, said the law violates therapists' free expression and parents' rights to make important medical decisions for their children."[15] Gov. Christie captured the crux of the parental rights/free speech conflict when he stated of the bill's signing:

> At the outset of this debate, I expressed my concerns about government limiting parental choice on the care and treatment of their own children. I still have those concerns. Government should tread carefully into this area and I do so here reluctantly. . . . However, on issues of medical treatment for children we must look to experts in the field to determine the relative risks and rewards.[16]

The opinions in these two cases, just months apart, shed light on what may be a trend toward increased governmental interest in protecting minors from allegedly harmful speech. Governments within the United States often claim a broad, compelling interest in protecting children.[17] But such protection is fraught with potential pitfalls, related to both the First Amendment and parental rights.

Bob Unruh, *Court Gags Licensed California Therapists – Upholds Ban on Help for Minors Who Want to Overcome Same-Sex Attraction*, WORLDNETDAILY, Aug. 29, 2013, http://www.wnd.com/2013/08/court-censors-licensed-california-therapists/.

[15] Bob Egelko, *Antigay Therapy Ban OKd*, S.F. CHRON., Aug. 30, 2013, at D1.

[16] Ruthann Robson, *New Jersey's Prohibition of Sexual Orientation Conversion Challenged*, LAW PROFESSOR BLOGS NETWORK, Aug. 26, 2013, at http://lawprofessors.typepad.com/conlaw/2013/08/new-jerseys-prohibition-of-sexual-orientation-conversion-challenged.html.

[17] Alan Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565 (2005). In this lengthy, comprehensive article regarding the First Amendment rights of minors, Garfield briefly discusses the evolution of the concept of governmental positions on children's free speech, finishing with, "The tension between free speech and protecting children may have simmered for centuries, but only in recent years, with the advent of pervasive media technologies, has it risen to a boil." *Id.* at 568. He further discusses the different rationales used by governments—from the federal to local levels—to justify censorship of minors' ability to receive speech, citing apparent psychological harm as one of the primary reasons.

Some governmental protection from allegedly harmful expression is apparently needed, but at what cost? Referring to the difficulty lawmakers and judges have in maintaining a reasonable balance when it comes to governmental protection of children, U.S. District Court Judge Stewart Dalzell famously proclaimed that it is "as dangerous as it is compelling."[18]

In light, then, of the two cases mentioned above, this thesis considers the following questions:

- What are the state's interests in protecting minors from distasteful and/or potentially harmful speech?
- How much proof of actual harm to minors from speech is required before the state should be allowed to intervene and offer protection?
- What legal standards should be employed in determining when speech is harmful to minors?

Much of the existing jurisprudence and law review literature on the topic focuses on the "help" the government can provide parents in raising their children by offering protection from such expression. Such a paradigm commands a *prima facie* logic that has enabled it to become entrenched in speech-related jurisprudence for decades.[19] Yet a reasonable consideration into the underside of that logic may suggest that, in some cases, it may be misguided or even logically backward. Why? Because a government that wields the ability to *help* parents by intervening to

[18] ACLU v. Reno, 929 F. Supp. 824, 882 (E.D. Pa. 1996) (Dallzell, J., concurring). In *Reno*, Stewart Dalzell of the District Court for the Eastern District of Pennsylvania was a member of a three-judge panel to review the Communications Decency Act, which was a legislative attempt to protect minors from accessing indecent material online by criminalizing the transmission of obscene material to anyone under the age of eighteen. Following the panel's decision in favor of the ACLU, Attorney General Janet Reno appealed to the U.S. Supreme Court, where all nine Justices struck down the law as unconstitutional. The quote above, in relevant part, states, "This rationale, however, is as dangerous as it is compelling. Laws regulating speech for the protection of children have no limiting principle, and a well-intentioned law restricting protected speech on the basis of its content is, nevertheless, state-sponsored censorship."

[19] Garfield, *supra* note 17, at 568 (stating that the "Supreme Court first wrestled with the issue in the 1950s and '60s").

protect their children also possesses the power through the same mechanism to produce the exact opposite result.

Free speech and parental rights are linked tightly together, and even well-intentioned governmental attempts to place content-based restrictions on distasteful and allegedly harmful speech may, in fact, cause harm to minors, their parents and society as a whole by weakening the relationship between the two. This thesis responds to the arguments of others who assert—either explicitly or implicitly—that the state has broad power to intervene in the parental relationship when distasteful speech is in question, and instead asserts that the state's interest in protecting children from speech may not be as compelling as some commentators imply or insist.

This thesis does not contend that the state possesses no interest whatsoever in the protection of children. What it attempts to do, however, is shed light on the points at which governmental and parental interests conflict, and advocate the position that when such conflicts arise, parental authority and free speech should be treated as compelling interests in and of themselves. That is, a baseline of governmental protection should exist, but it should be minimal, serving only the narrowest of interests.

Ultimately, this thesis argues that Gov. Christie's earlier-quoted statement, however well intended, may be an unfortunate sign of the times, and that if there is to be censorship regarding what minors are allowed to see, parental censorship is generally superior to governmental.

To address these topics, the thesis breaks down into four Parts. Part I concentrates on the historical development in American courts and legislative bodies of parental rights in child rearing. For nearly ninety years, the U.S. Supreme Court has recognized a constitutional right of parents to raise their children in the way they deem prudent, with most of this doctrine arising

from a series of cases that approach parental rights in an education context.[20] Although most existing parental rights jurisprudence is rooted in the parents' right to educate their children, this thesis does not examine this already heavily researched perspective, nor does it discuss the First Amendment rights of students within the schoolhouse gate. Although the thesis begins by tracing the history of the doctrine from its roots in state-run education,[21] it does not address parental rights in that context except as a necessary jumping-off point to deal with the amorphous, murky matter of prior restraint on expression and content-based regulation.

Part II then provides a literature review, condensing the arguments, findings and contentions of scholars who have analyzed issues of free speech, parental rights and the protection of children. The shootings at Columbine High School in Colorado in April 1999 spurred both popular and academic interest in the protection of children from speech[22] (in particular, violent video games), resulting in a modest amount of scholarship regarding minors' free speech rights. In the post-Columbine era, several books on the matter were published, the most notable of which are Marjorie Heins' *Not in Front of the Children*,[23] Roger Levesque's *Adolescents, Media, and the Law*[24] and Kevin Saunders' *Saving Our Children From the First Amendment*.[25] Although some scholarship exists on this topic, a relatively small amount of it attempts to bridge—as this thesis does—the concepts of freedom of speech and parental rights in

[20] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

[21] Beyond education, most other parental rights jurisprudence deals with adoption and custody issues, both of which are also beyond the scope of this thesis.

[22] Garfield, *supra* note 17, at 570 – 71.

[23] MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: INDECENCY, CENSORSHIP AND THE INNOCENCE OF YOUTH (2002).

[24] ROGER LEVESQUE, ADOLESCENTS, MEDIA, AND THE LAW: WHAT DEVELOPMENTAL SCIENCE REVEALS AND FREE SPEECH REQUIRES (2007).

[25] KEVIN SAUNDERS, SAVING OUR CHILDREN FROM THE FRIST AMENDMENT (2003).

the context of content-based restrictions. This makes this thesis, especially in light of the recent cases mentioned above, ripe.

Part III then takes the cases, laws and ideas of the previous Parts and attempts to tether them to a congruent philosophical base, drawing on free-speech theories to demonstrate the three distinct types of injurious effects brought about by content-based censorship in the name of protecting minors:

- harm to the children;
- harm to parents and other adults;
- and harm to the relationship between children and their parents.

Three free speech theories are particularly applicable in tying these three harms to philosophical bases: the marketplace of ideas theory,[26] the self-fulfillment theory[27] and the democratic self-governance theory.[28] All three are employed liberally. Part III also addresses exceptions and legitimate compelling interests of the state in protecting minors, while attempting to support the adoption of a narrowly tailored set of ideals that affords the broadest First Amendment and parental rights protections.

Part IV briefly concludes by attempting to reconcile the previously discussed philosophies, history, jurisprudence, laws and empirical data into a tenable, easily understood framework—one hopefully accessible to lawmakers and academics alike—that unambiguously

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[26] The theory was first imported into First Amendment jurisprudence by Supreme Court Justice Oliver Wendell Holmes, Jr., who wrote nearly a century ago that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[27] Unlike the marketplace theory, which views free expression as a means to an end (the attainment of truth), the self-fulfillment theory sees self-expression as an end in and of itself. As Professor Rodney Smolla writes, "It is a right to defiantly, robustly, and irreverently to speak one's mind *just because it is one's mind*" (emphasis original). RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 9 (1992).

[28] The theory is generally associated with scholar Alexander Meiklejohn, who said that the primary point of the First Amendment is that it creates an atmosphere conducive to people governing themselves in an orderly, democratic fashion. He wrote that "the principle of the freedom of speech springs from the necessities of the program of self-government." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

details the rights most reasonably and necessarily afforded to minors, their parents and society as a whole.

CHAPTER 2
SUBSTANTIVE DUE PROCESS AND THE RIGHTS OF PARENTS

This Part has two sections. Because much of contemporary parental rights jurisprudence is rooted in the Due Process Clause of the Fourteenth Amendment, it is first necessary to briefly explain the substantive due process doctrine (hereinafter SDP) and how the U.S. Supreme Court historically has interpreted the Due Process Clause. With this background, the second section then focuses on how courts and legislative bodies understand parental rights in child rearing, taking special note of cases in the early twentieth century that significantly altered parental rights jurisprudence. Furthermore, the second section draws from contemporary scholarship to discuss the judicial and historical strengths and weaknesses of parental rights placed in a Fourteenth Amendment context.

Substantive Due Process

The Fourteenth Amendment to the U.S. Constitution contains five sections, the majority of which are jurisprudentially univocal and rarely litigated. The first section, however, is a source of continual consternation. In relevant part, it provides that a state cannot "deprive any person of life, liberty, or property, without due process of law."[1] Known as the Due Process Clause,[2] the specific intention of this section is to set limits on state governments, ensuring they follow proper legal channels before depriving citizens of life, liberty or property.[3]

The Fourteenth Amendment was a product of post-Civil War Reconstruction and was, even at its ratification, a point of tremendous controversy—though not for the reasons it would later become

[1] U.S. CONST. amend. XIV, § 1.

[2] A Due Process clause also is found in the Fifth Amendment, although unlike the Fourth Amendment, which refers to individual states, the Fifth Amendment applies to the federal government. Nestled between clauses referring to eminent domain and testifying against oneself, the following phrase is found: "nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[3] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICES 545 (3rd ed. 2006).

contentious.[4] Originally intended to ensure that recently freed slaves would not be denied the basic civil liberties of U.S. citizenship, the amendment was hotly contested by Southern states, which were unwillingly forced to ratify it for re-unionization.[5] The original controversy, however, has long since subsided, leaving in its stead an ideological battle about what the amendment actually means. As scholar Jason Crook aptly wrote, "Few phrases in American jurisprudence have created more of a stir or inspired greater controversy than the seventeen words that comprise the due process clause of the Fourteenth Amendment."[6] In particular, those seventeen words have been interpreted to support two different types of governmental limits: *procedural* due process and *substantive* due process. The heart of the contention lies in the use—or even the legitimacy—of the latter.

Procedural due process refers to the government following proper legal *procedures* before inhibiting or infringing upon the life, liberty or property of an individual.[7] It addresses the justness and legality of the process through which an individual's rights may be abridged. In contrast, SDP "asks whether the government has an adequate reason for taking away a person's life, liberty, or property."[8] It is more concerned with state policies that may reach beyond the bounds of governmental authority, sometimes addressing issues not explicitly mentioned in the

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[4] *See* Randy E. Barnett, *Whence Comes Section One: The Abolitionist Origins of the Fourteenth Amendment,* 3 J. OF LEGAL ANALYSIS 165, 166 (2011) (describing how some of the original language of the Fourteenth Amendment referred specifically to "race, color, or previous condition of servitude").

[5] *See* Xi Wang, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography: Emancipation and the New Conception of Freedom: Black Suffrage and the Redefinition of American Freedom, 1860-1870,* 17 CARDOZO L. REV. 2153, 2206 (1996) (stating that "none of the Southern states was willing to ratify the Amendment.")

[6] Jason A. Crook , *Exposing the Contradiction: An Originalist's Approach to Understanding Why Substantive Due Process is a Constitutional Misinterpretation,* 10 NEV. L.J. 1, 1 (2010).

[7] CHEMERINSKY, *supra* note II, 3, at 545.

[8] *Id.* at 546.

U.S. Constitution.[9] Regardless of majority vote[10] or the fairness of the means through which a law is created, courts applying SDP may strike down state laws based upon "whether there is a sufficient justification for the government's action."[11]

The application of these two concepts has been a point of hot judicial debate since SDP's inception more than a century ago.[12] Constitutional scholar Erwin Chemerinsky notes at least three major criticisms of SDP. The first is that the Due Process Clause is the incorrect provision to protect the substantive rights of life, liberty, property and pursuit of happiness, and that some other provision, such as the Privileges and Immunities Clause,[13] is more applicable.[14]

A second, and more popular, objection is that "the Court acts illegitimately when it protects rights that are not explicitly stated in the Constitution or intended by its framers."[15] SDP has been used to strike down state laws in several landmark decisions regarding matters not constitutionally dealt with. Most notable among these include the federal interest in the "safety,

[9] *Id.* at 547.

[10] TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 91 (2010).

[11] CHEMERINSKY, *supra* note II, 3, at 546.

[12] Although the first mention of SDP as such did not occur until the twentieth century, the history of the concept's application is less agreed-upon. Some scholars trace the concept that would later become SDP as having arisen from business-related *ante bellum* cases such as *Murray's Lessee v. Hoboken Land & Improv. Co.* (59 U.S. 272 (1856)), while others suggest it originated in *Scott v. Sanford* (60 U.S. 393 (1857)). Either way, by the late nineteenth century, cases such as *Mugler v. Kansas* (123 U.S. 623 (1887)) had helped solidify the general concept in Supreme Court jurisprudence. *See* Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reason for its Recent Decline*, 55, AM. U. L. REV. 457, 504 (2005) (quoting Robert Bork, who wrote that "Dred Scott was perhaps 'the first application of substantive due process in the Supreme Court'").

[13] U.S. CONST. amend. XIV, § 1 (stating that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

[14] CHEMERINSKY, *supra* note II, 3, at 547.

[15] *Id.*

health, morals and general welfare of the public"[16] in *Lochner v. New York* and the right to privacy in *Roe v. Wade.*[17]

In examining these non-constitutionally-granted rights, Judge Richard Posner's reference to SDP as a "ubiquitous oxymoron"[18] is ideationally representative of a wide swath of judges, scholars and pundits who mercilessly question SDP's validity. In comparing SDP to its less controversial counterpart, John Hart Ely wrote, "There is simply no avoiding the fact that the word that follows 'due' is 'process.' We apparently need periodic reminding that 'substantive due process' is a contradiction in terms sort of like 'green pastel redness.'"[19]

A third objection, according to Chemerinsky, is that SDP "cannot be separated from attacks on how the Supreme Court has used the doctrine over the course of American history."[20] As Crook pointedly questioned, "How did an amendment designed to protect the rights of freed slaves acquire the power to invalidate state education statutes and abortion regulations?"[21] Current Supreme Court Justices Antonin Scalia and Clarence Thomas would likely agree[22] with this statement, as would have Oliver Wendell Holmes, Jr., who, nearing the end of his career, expressed "more than anxiety that I feel at the ever increasing scope given to the Fourteenth

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[16] Lochner v. New York, 198 U.S. 45, 54 (1905). In *Lochner,* the Supreme Court used the SDP rationale to strike down a New York law that capped the number of hours that bakers could work each day and week. This case is popularly understood to connote a liberty of contract or a "safeguard of economic liberties." CHEMERINSKY, *supra* note 31, at 547.

[17] Roe v. Wade, 410 U.S. 113 (1973). In this decision, the high court recognized the right to privacy as justification for granting women access to abortion.

[18] Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982).

[19] JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

[20] CHEMERINSKY, *supra* note II, 3, at 547.

[21] Crook, *supra* note II, 6, at 2.

[22] Katherine Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis,* 62 DUKE L.J. 535, 540 (2012).

Amendment in cutting down what I believe to be the constitutional rights of the States."[23] Holmes further described the spread of SDP doctrine as an "artificial signification"[24] of the Fourteenth Amendment that unduly subsumes legislative responsibility by granting the Supreme Court "*carte blanche* to embody our economic or moral beliefs in its prohibitions."[25]

For all its detractors, however, the fact that SDP has become standard constitutional doctrine is testament to its many supporters. As Chemerinsky attests, SDP is a convenient way to "incorporate provisions of the Bill of Rights that are deemed fundamental and to protect these rights from state and local interference,"[26] thereby safeguarding basic freedoms. He also asserted that it is, at times, "desirable for the Supreme Court to identify and safeguard unenumerated rights,"[27] thus giving explicit legal recognition to normative cultural elements.

Yet even for those who embrace SDP doctrine, the branding of any right that is not found in the Constitution as "fundamental" can be dicey. Writing for the majority in *Washington v. Glucksberg*,[28] Chief Justice William Rehnquist outlined the traditional method used to determine whether a nonenumerated right can be considered fundamental. Citing *Snyder v. Massachusetts*[29] and *Palko v. Connecticut*,[30] he opined that

> we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," ("so rooted in the traditions and conscience of our

[23] Baldwin v. Missouri, 281 U.S. 586, 595 (1930).

[24] *Id.*

[25] *Id.*

[26] CHEMERINSKY, *supra* note II, 3, at 548.

[27] *Id.*

[28] 521 U.S. 702 (1997).

[29] 291 U.S. 97 (1934).

[30] 302 U.S. 319 (1937).

> people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[31]

The significance between fundamental and non-fundamental rights is more than semantic. Professor Tanya Washington succinctly explains:

> Rights derived from liberty interests that fall within the scope of due process protection are characterized as either fundamental or non-fundamental and are granted different degrees of constitutional protection according to their status. State infringement of a fundamental right is subject to strict scrutiny, the most exacting constitutional evaluation. Strict scrutiny challenges the State with proving that its action is necessary to achieve a compelling interest. State impairment of a non-fundamental right is subject to the most relaxed constitutional scrutiny, rational basis, which presumes that the state action is rationally related to a legitimate governmental interest[32]

If a right is enumerated in the Constitution, such as the First Amendment guarantee of free speech, it is invariably fundamental and subject to strict scrutiny. If, however, a right is not enumerated, it may be either.[33] The difficulty lies in ascertaining which rights *are* "implicit in the concept of ordered liberty."[34] The unenumerated right to privacy is such an example. Referring to the case that first recognized the SDP right to privacy, *Griswold v. Connecticut,*[35] professors Allan Ides and Christopher May write that

> the newly recognized right of marital privacy, though nowhere mentioned in the Constitution's text, was found to lie "within the zone of privacy created by several

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[31] *Glucksberg*, 521 U.S. at 720 – 721.

[32] Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans,* WHITTIER J. CHILD & FAM. ADVOC. 12, 16 – 17 (2012).

[33] *See* ALLAN IDES & CHRISTOPHER MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 85 (6th ed. 2013) (suggesting that, at times, the "Court may avoid the strict scrutiny model entirely by finding that a challenged law or practice does not pass muster even under a rational basis standard of review, thereby making it unnecessary to decide whether the liberty interest in question is a fundamental one." Ides and May continue to say that "the Court appears to have taken this route in *Lawrence v. Texas,* (539 U.S. 558 (2003)), where it struck down a Texas statute that made it a crime for two adults of the same sex to engage in intimate sexual conduct").

[34] *Palko,* 302 U.S. at 325.

[35] 381 U.S. 479 (1965). Finding "emanations" and "penumbras" of enumerated constitutional rights, the Court in this landmark case recognized the right of marital privacy in striking down a Nutmeg State law that forbade the use of contraceptives. *Id.*

> fundamental constitutional guarantees."[36] The Court applied an extremely strict standard of review and invalidated the statute without any consideration of the state's possible justifications for it.[37]

Ides and May further explain the differing rationales the justices used by asserting that "while the seven members of the *Griswold* majority offered a variety of bases for finding a fundamental right of marital privacy, they all agreed that the Court may give protection to liberty interests that are nowhere specifically mentioned in the Constitution."[38]

Because parental rights are unenumerated, judges for decades have found difficulty tethering them to a stable categorical base, even within SDP doctrine. Yet regardless of the ongoing ideological battle over due process, SDP doctrine is nonetheless an influential aspect of constitutional law and, as further explained in the next section, has been a primary historical locus of parental rights.

Parental Rights under the U.S. Constitution

The U.S. Supreme Court's recognition of parents' rights to control the upbringing of their children first emerged in a pair of education-related cases in the 1920s. The first, *Meyer v. Nebraska*,[39] hinged upon the constitutionality of a Cornhusker State statute that forbade the teaching of any language other than English in public schools. Writing the opinion for the majority, Justice James McReynolds wrote that Nebraska, in its endeavor to promote Americanization, had "attempted materially to interfere with . . . the power of parents to control the education of their own"[40] by outlawing the teaching of foreign languages to any child who

[36] *Id.* at 485.

[37] ALLAN IDES & CHRISTOPHER MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 78 (6th ed. 2013).

[38] *Id.* at 81.

[39] 262 U.S. 390 (1923).

[40] *Id.* at 401.

was not yet in high school.[41] With its holding, the Court affirmed "the natural duty of the parent to give his children education suitable to their station in life,"[42] and established the SDP-engendered parental "right of control . . . to instruct their children . . . within the liberty of the [Fourteenth] Amendment."[43]

Two years later in *Pierce v. Society of Sisters*,[44] the Supreme Court used *Meyer* to strike down an Oregon statute that required parents to send all children between eight and sixteen years of age to a public school. Writing once again for the majority, Justice McReynolds held that "under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Perhaps most memorably, Justice McReynolds wrote that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for his additional obligations."[45] In summing up *Meyer* and *Pierce*, McReynolds held that the contested statutes in both instances illicitly curtailed the fundamental right of parents to raise their children, opining that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."[46]

[41] *Id.* at 397. Exceptions to the rule were Classic Greek and Latin and Hebrew. *Id.* at 400.

[42] *Id.* at 400

[43] *Id.*

[44] 268 U.S. 510 (1925).

[45] *Id.* at 535.

[46] *Id.*

This principle was expounded upon further in *Wisconsin v. Yoder,*[47] a 1972 case wherein the Court ruled that Amish parents had the right to control the upbringing of their children in exempting them from state compulsory education laws. The Court wrote that

> a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.[48]

In the several decades following its initial emergence in the 1920s, the scales of this balancing process tipped to and fro between the ostensibly at-odds parental rights regarding religion and education and the state's interest in a child's well-being.[49] Counterbalancing the principles set forth in the two cases described above, the Court in *Prince v. Massachusetts*,[50] for instance, used the state's child labor laws to prevent a nine-year-old girl from soliciting Jehovah's Witness material at the instruction of her guardian. "Acting to guard the general interest in youth's well being [*sic*]," the Court wrote, "the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[51] As Chemerinsky analyzed, "[t]he Court said that the need to protect children from being exploited and harmed justified upholding laws prohibiting child labor, even if the work was at the direction of the parents and even if it was undertaken for religious purposes."[52]

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[47] 406 U.S. 205 (1972).

[48] *Id.* at 247.

[49] Susan Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville,* 8 J. L. FAM. STUD. 71, 80 (2006).

[50] 321 U.S. 158 (1944).

[51] *Id.* at 166.

[52] CHEMERINSKY, *supra* note II, 3, at 809.

For nearly three-decades following the *Yoder* decision, however, the Supreme Court began slowly drifting away from applying SDP to parental rights cases.[53] Such an example was the Court's abandonment of SDP in 1981 to assert that parental rights were so well-entrenched in natural law that elaboration into the whys and wherefores was a waste of time.[54] Ignoring both *Meyer* and *Pierce* and citing *Stanley v. Illinois*,[55] the Court in *Lassiter v. Department of Social Services*[56] employed procedural due process rationale to say that "[t]his Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[57]

In the closing years of the twentieth century, this jurisprudential shift created confusion among legal commentators. As one scholar in 1988 noted in a poignantly named article, "The Confused Constitutional Status and Meaning of Parental Rights":[58]

> [T]he central question . . . has been why parental rights should be entitled to a special, constitutional status, [and] there has been enormous difficulty in answering the question. . . . The question that may really need to be addressed is whether continued talk about fundamental rights in this area is productive at all, or whether it would simply be better to recognize that parents have a constitutional right in their children, albeit an ordinary liberty interest.[59]

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[53] Lawrence, *supra* note II, 49, at 80.

[54] *Id.* at 89 – 90.

[55] 405 U.S. 645 (1972).

[56] *See* 452 U.S. 18 (1981) (determining whether or not the Fourteenth Amendment required the appointment of counsel in a parental status termination proceeding to a woman whose child was taken from her after abuse and neglect; the Court found, following the arrest of the woman for murder, that the state trial court was not wrong under the Due Process Clause to not appoint counsel for the mother).

[57] *Id.* at 27.

[58] Francis Barry McCarthy, *Parents, Children, and the Courts: The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988).

[59] *Id.* at 1030 – 1031.

This confusion was further enhanced in 2000 in *Troxel v. Granville.*[60] After years of moving away from placing parental rights in a SDP context, the Supreme Court inexplicably returned to *Meyer*-esque doctrine when it struck down a Washington state law that granted third parties the right to petition for child visitation rights, regardless of parental objections. The Court stated:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."[61]

The opinion continued at length along the same vein, applying both *Meyer* and *Pierce* to explain the illegitimacy of the Evergreen State statute.

In the wake of *Troxel*, some scholars have suggested that the simplest solution to the confusion regarding the source of parental rights would be for the Supreme Court to admit it made a one-time mistake and to continue on its 40-year course of drifting away from applying parental rights in an SDP context. Professor Susan Lawrence, for one, argues that the SDP moorings of parental rights are slowly loosening and shall soon find a more constitutionally tenable harbor.[62] Suggesting the emergence of a new parental rights paradigm, she argues that "[l]ike substantive due process more generally, *Meyer* has largely been displaced by appeals to specific Bill of Rights guarantees, particularly First Amendment speech and religion clauses."[63]

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[60] 530 U.S. 57 (2000).

[61] *Id.* at 65.

[62] Lawrence, *supra* note II, 49, at 84.

[63] *Id.*

Justice Clarence Thomas' separate concurrence in *Troxel* made the same insinuation. He agreed with the plurality's judgment of the "Court's recognition of a fundamental right of parents to direct the upbringing of the children."[64] However, he rejected the application of SDP, suggesting that the Fourteenth Amendment does not authorize judicial enforcement of unemumerated rights and that an "appl[ication of] strict scrutiny to infringements of fundamental rights"[65] would be a more responsible method of adjudication.[66] Thomas' distinction strikes to the heart of the current debate and confusion about the appropriate locus of parental rights.

The *Troxel* Court fractured badly, with six of the justices each writing their own opinions.[67] Justice Sandra Day O'Connor delivered the majority opinion and was joined by Chief Justice William Rehnquist and Justices Ruth Bader Ginsburg and Stephen Breyer. Justices David Souter and Clarence Thomas filed opinions concurring with the majority, and Justices John Paul Stevens, Antonin Scalia and Anthony Kennedy each filed dissenting opinions.[68]

Citing *Glucksberg*, Justice Kennedy wrote, "on the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, 'our Nation's history, legal traditions, and practices' do not give us clear or definitive answers."[69]

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[64] *Troxel*, 530 U.S. at 80.

[65] *Id.*

[66] *See* Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 187 (2003) (writing that Thomas was not alone in his application of the law, and that "Justice Scalia's dissent concluded the right of parents to direct the upbringing of their children was an unalienable right proclaimed in the Declaration of Independence and an unenumerated right under the Ninth Amendment"). Justice Arthur Goldberg perhaps would have agreed with Scalia's contention. In *Griswold*, he wrote that "the language and history of the Ninth Amendment reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight amendments." Griswold v. Connecticut, 381 U.S. 479, 488 (1965).

[67] *See generally Troxel*, 530 U.S.

[68] *Id.*

[69] *Id.* at 96.

Justice Scalia, meanwhile, stated that the Ninth Amendment—not the Fourteenth—should be used to uphold the fundamental rights of parents,[70] and Justice Stevens wrote that the majority opinion was misguided because it did not take enough account of the well being of the children involved, instead focusing on the rights of the parents and role of the state.[71]

Following their less-than-conclusive handling of the matter more than a decade ago, the Court has yet to face again the subject of parental rights as squarely as it did in *Troxel.* And it seems that the confusion that spurred Professor Francis McCarthy's lament in the 1980s is just as prevalent today as it was a quarter-century ago:

> Unfortunately, there is only one way out of this problem and that is through clearer statements from the Supreme Court. While this may look like a *deus ex machina* resolution . . . the fact is that it is through the Court's characterization of parental rights as fundamental rights and then the Court's apparent retreat from an application of the principles of such a characterization that the present dilemma has been created.[72]

The post-*Troxel* confusion has led to calls for the U.S. legislature to give clarity to the matter by ratifying a constitutional amendment that would make an unenumerated right an enumerated—*ergo*, fundamental—one. As of March 2014, according to Parentalrights.org, seventy members of congress were listed as co-sponsors of a "Parental Rights Amendment" to the U.S. Constitution, a law that would expressly make the "upbringing, education, and care of . . . children . . . a fundamental right" of parents.[73]

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[70] Schmidt, *supra* note II, 66, at 187.

[71] *See Troxel*, 530 U.S. at 86 (writing that "[i]t has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the 'fundamental' liberty interests implicated by the challenged state action." Stevens also contended that "cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child."

[72] McCarthy, *supra* note II, 58, at 1033.

[73] *See generally* http://www.parentalrights.org/ (proposing, in full, that an amendment be ratified that states the following:

SECTION 1: The liberty of parents to direct the upbringing, education, and care of their children is a fundamental right. SECTION 2: The parental right to direct education includes the right to choose public, private, religious, or

Whether the proposed amendment acquires any further traction remains to be seen. But aside from such enumeration, the present squabble about whether parental rights deserve strict scrutiny will likely continue until the high court *deus* emerges from the jurisprudential *machina* and provides further elaboration.

In light, then, of the judicial fracturing and widely varied opinions surrounding parental rights and the role of parents in protecting their children, the next part of the thesis problematizes the rights of minors to receive speech by briefly summarizing relevant, scholarly books and articles that have been written on the subject.

home schools, and the right to make reasonable choices within public schools for one's child. SECTION 3: Neither the United States nor any State shall infringe these rights without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served. SECTION 4: This article shall not be construed to apply to a parental action or decision that would end life. SECTION 5: No treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article (accessed March 7, 2013).

CHAPTER 3
LITERATURE REVIEW

The decade following the April 1999 shooting at Columbine High School drew increased academic interest at the intersection of media effects, minors' free-speech rights and the parental and governmental interests in protecting children from harm allegedly caused by exposure to objectionable content. This part of the thesis provides a brief overview of some of the more prominent and important books and journal articles—most written between 2000 and 2009—dealing with these issues. Many of the concepts cursorily or summarily mentioned without extended explanation in this part are dealt with in greater detail in subsequent parts.

Books

Adolescents, Media, and the Law

Indiana University Professor Roger Levesque's comprehensive treatment of the issue in his 2007 book, *Adolescents, Media, and the Law*,[1] is best summed up by his assertion that "free speech . . . serves as the center point of rights necessary for healthy adolescent development in modern civil society."[2] Presuming that the unenumerated First Amendment right to receive speech is equal in importance with the right to speak,[3] Levesque asserts that both parents and "[g]overnments have an interest in raising healthy, well-rounded young people into mature citizens. Despite these interests, the current approach to adolescents' media rights [that] seeks to

[1] ROGER LEVESQUE, ADOLESCENTS, MEDIA, AND THE LAW: WHAT DEVELOPMENTAL SCIENCE REVEALS AND FREE SPEECH REQUIRES (2007).

[2] *Id.* at 284.

[3] *See id.* at 232 (citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), for the proposition that "the Court relied heavily on its long history of holdings recognizing the right to receive information 'is an inherent corollary of the rights of free speech,' that the right 'follows ineluctably from the sender's First Amendment right to send'").

limit adolescents' access to media, flatly fails to do so, and does not offer adolescents ways to protect themselves from potential harms."[4]

Levesque, who holds a J.D. from Columbia University and a Ph.D. in cultural psychology from the University of Chicago,[5] contends that one of the primary potential harms to adolescents is ignorance fostered by lack of access to information. Drawing heavily on three traditional and philosophical justifications for free speech—self-expression, marketplace of ideas and democratic self-governance—he argues that the current political and legal structure stifles adolescent development and contributes to a generation of ill-prepared cultural and civic illiterates.[6]

Because adolescence is marked by explosive personal development, Levesque asserts that the state should grant minors the opportunity to acquire every possible item available within the metaphorical marketplace of ideas.[7] He writes that "from the perspective of free speech principles, then, speech retains a special value to adolescents as a relative safe practice ground for choice, the essence of the market-of-ideas rationale for protecting speech."[8]

Writing from a Meiklejohnian perspective,[9] Levesque suggests that "[i]f governments must protect free speech to ensure self-governance and foster civic participation, then adolescents own a strong claim to free speech. . . . The first developmental component essential

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[4] *Id.* at 285.

[5] Indiana University Faculty Webpage, Roger Levesque, http://www.indiana.edu/~crimjust/faculty_levesque.php?nav=people (last visited Jan. 31, 2014).

[6] LEVESQUE, *supra* note III, 1, at 251.

[7] *See infra* note IV, 6 and accompanying text (describing this theory of free expression, which often is associated with former Supreme Court Justice Oliver Wendell Holmes, Jr.).

[8] LEVESQUE, *supra* note III, 1, at 254.

[9] *See infra* note IV, 16 and accompanying text (describing the theory of free expression associated with philosopher-educator Alexander Meiklejohn).

to responsible citizenship and civic participation directly centers on information and accumulation of civic knowledge."[10] He furthermore declares that free speech, whether for adults or adolescents, is critical to the American governmental structure because it "promotes the formation and structuring of political will, which directs the scope and purposes of democracy and civil society."[11]

From the self-realization view of free speech,[12] Levesque argues that the "[a]utonomy to think, listen, and speak for oneself is essential to a free and self-determining personhood, the true foundation of liberty,"[13] a liberty that is especially poignant to a demographic at its most formative stage of self-identity. The accumulation of information that occurs in adolescence, he writes, creates "webs [that] constitute the necessary building blocks of human development."[14] Tying the three concepts together, he asserts:

> Research indicates that [the trio of] rationales may actually have greater relevance for adolescents than they do for adults: adolescents thirst for ideas and readily engage the marketplace of information, seek to develop their sense of self through engaging with ideas, and shape their sense of civic responsibility that will guide their further participation in society and families.[15]

Levesque concludes his book by emphasizing the importance of robust First Amendment protection for all citizens, regardless of age. He suggests the best course of action is to broaden

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[10] LEVESQUE, *supra* note III, 1, at 254 – 255.

[11] *Id.* at 239.

[12] *See infra* note IV, 23 and accompanying text (describing the free speech theories of self-realization and self-fulfillment in greater detail).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 283.

the application of existing adult-oriented free speech jurisprudence to adolescents and give them many of the freedoms currently afforded to those above eighteen years of age.[16]

Saving Our Children from the First Amendment

In *Saving Our Children From the First Amendment*,[17] Michigan State University professor Kevin Saunders advocates that society has a role to protect children—and that it is failing to do so. The primary role of child rearing, he writes, rests with parents; but parents both want and need government assistance in order to pass along societally beneficial values to their offspring.[18]

"That this is the parents' job does not mean that the state has no role," writes Saunders, who holds a J.D. from the University of Michigan and a Ph.D. in philosophy from the University of Miami.[19] "It only means that the governmental role should be a supportive role rather than one that supplants the parents as the determiner of the values to which children are exposed."[20] He uses the example of smoking to illustrate his point: "It should be the parents' job," he writes, "to teach children not to smoke. But from that premise, no one would argue that the state should not be allowed to prohibit sales of tobacco to minors. Parents need the support of the state in their efforts."[21]

To bolster his position, Saunders spends a substantial portion of his tome discussing several areas in which children's rights are more abridged than their adult counterparts and

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[16] *Id.* at 285.

[17] KEVIN SAUNDERS, SAVING OUR CHILDREN FROM THE FRIST AMENDMENT (2003).

[18] *Id*. at 84.

[19] Michigan State University Faculty Webpage, Kevin W. Saunders, http://www.law.msu.edu/faculty_staff/profile.php?prof=61 (last visited Jan. 31, 2014).

[20] SAUNDERS, *supra* note III, 17, at 7.

[21] *Id.* at 8.

argues that application of the First Amendment should be similarly unequal.[22] After contending that First Amendment liberties are "the most important freedom"[23] afforded in the U.S. Constitution and repeatedly reiterating their significance for adults, he makes the case that "children, rather than miniature [adults], are projects under construction . . . [and] are less than complete as moral agents."[24] Because minors are less than fully complete moral agents, he argues, they are less deserving of First Amendment freedoms, especially the freedom to receive speech.

Since children have been given access to too much information at too young an age, Saunders writes, American society is going to hell in a hand basket: minors are impregnating and getting pregnant and are smoking and drinking "at unacceptable rates."[25]

The solution, he suggests, is increased governmental regulation of the information minors may access. He proposes that the federal government should possess the ability to restrict "materials that foster hatred on the basis of race, color, ethnicity, gender, sexual orientation, religion or handicap"[26] and be given leeway to ban the sale of violent video games and movies. He further advocates for extensive use of Internet filtering software to block minors from online smut and calls for tighter television broadcast restrictions.[27]

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[22] *See id* at 119, (calling attention to cases such as *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), in which school administrators' search of a drug-possessing Garden State schoolgirl's purse did not in violate of the Fourth Amendment because the search was reasonable).

[23] *Id.* at 19.

[24] *Id.* at 86.

[25] *Id.* at 1.

[26] *Id.* at 257.

[27] *Id.*

Contrary to the ideas espoused by Levesque,[28] Saunders argues that the marketplace of ideas and democratic self-governance justifications for free speech, while valid for adults, are *not* applicable to minors because children are volatile, impressionable and not directly involved in the political process.[29] Such a limiting of minors' rights may sometimes create the undesired consequence of inhibiting adult access to certain speech; but as Saunders notes, "free speech, despite the essential role it serves in a politically free society, does have its costs."

Ultimately, Saunders asserts that when faced with deciding the materials minors should not be allowed to see, legislatures and courts should strike a "reasonable balance"[30] between freedom and what he refers to as "common sense."[31]

Not in Front of the Children

The views of New York University Professor and *Reno v. ACLU*[32] attorney Marjorie Heins, who received her bachelor's degree from Cornell and her J.D. from Harvard,[33] stand in stark contrast to those of Kevin Saunders.[34] In *Not in Front of the Children*,[35] Heins takes a decidedly relativistic approach to right and wrong, devoting the majority of her attention to questioning the very assumption that children need protection at all. Her basic thesis is that

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[28] *Supra* Part III, Section A. 1.

[29] SAUNDERS, *supra* note III, 17, at 4.

[30] *Id.* at 43.

[31] *Id.* at 10.

[32] *See supra* note 18 and accompanying text (elaborating on the particulars of the series of cases, including *Reno v. ACLU*, 521 U.S. 844 (1997), wherein the Supreme Court struck down part of the Communications Decency Act).

[33] The Free Expression Policy Project Webpage, Marjorie Heins, http://fepproject.org/fepp/heinsbio.html (last visited Jan. 31, 2014).

[34] *Supra* Part III, Section A. 2.

[35] MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: INDECENCY, CENSORSHIP AND THE INNOCENCE OF YOUTH (2002).

children in the United States are unnecessarily coddled and that claims of emotional distress and imitation of wrongdoing due to media exposure are vastly overblown.[36]

Heins asserts that scant evidence exists linking exposure to ostensibly harmful material—including sexual or excretal content, swearing or violence—and behavior detrimental to society. She further writes that America's sexually repressive culture harms both minors and adults and that widely available access to pornography, in some cases, can be beneficial.[37]

She attacks the arguments of child-censorship proponents that children are substantially more impressionable than adults,[38] and employs multiple international examples to rebuff the idea that exposure to sexual expression is harmful to youth. "Comparing U.S. harm-to-minors ideology with that in other countries," she writes, "suggests how widely perceptions differ. The standards are relative, culturally driven, and often employed rhetorically for political ends that may have little to do with any objective showing of harm to children."[39]

Heins speaks highly of Western European models of government-funded sexual education and derides the U.S. for assuming a *de facto* abstinence-until-marriage policy.[40] She further contends that shielding minors from certain ideas only intensifies youthful cravings for the forbidden fruit.

"Minors' First Amendment rights," she reasons, are "not some fuzzy, ivory-tower abstraction. Youngsters need access to information and ideas, not indoctrination and ignorance

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[36] *See id*. at 243 (suggesting that the work of media effects scientists such Albert Bandura is perhaps invalid due to its "nonnaturalistic setting").

[37] *See id*. at 203 (describing how a proliferation of pornography in Japan coincided with a significant decline in rape and sexual assault).

[38] *Id*. at 201.

[39] *Id*. at 200.

[40] *Id*. at 149.

of controversy, precisely because they are in the process of identity formation."[41] Like Levesque, she suggests that, legally speaking, parents are better arbiters than the government in determining the speech to which children ought to be exposed.[42] Providing counterbalance to this concept, however, she quotes children's author Judy Blume to assert that overprotectionism, whether it be governmental or parental, squelches the creativity, intellectual activity and overall well being of youth:

> Children are inexperienced, but they are not innocent. They need help from adults to figure out how to act in the face of life's realities . . . We cannot restore a "lost innocence" that may never have existed, but we can offer perspectives from our experience and help interpret the world, flaws and all.[43]

Fundamentally, Heins argues, the restriction of minors' ability to receive information is little more than an "avoidance technique"[44] employed by anxious adults who, while winning symbolic battles, are losing their children to frustration and stunted intellectual growth.

Journal Articles

Parents, Children, and the Courts: The Confused Constitutional Status and Meaning of Parental Rights

University of Pittsburgh Professor Francis McCarthy's 1988 exploration of parental rights[45] raises many poignant questions about the constitutional status of such rights yet answers almost none of them—except to point out that the queries merit consideration. McCarthy, who states that parental rights are an important aspect of civil society, sums up the lack of resolution, writing: "This Article attempts throughout to determine whether parental rights should be

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[41] *Id*. at 258.

[42] *Id*. at 262.

[43] *Id*. at 257.

[44] *Id.*

[45] Francis Barry McCarthy, *Parents, Children, and the Courts: The Confused Constitutional Status and Meaning of Parental Rights,* 22 GA. L. REV. 975 (1988).

entitled to special heightened protection above and beyond 'ordinary' rights, but no definite answer is achieved."[46]

McCarthy, who received his J.D. from Boston College and his LL.M. from Columbia University,[47] begins by asserting that the rationale for why parents should have a right to control their child's upbringing rests on tenuous jurisprudential and philosophical ground. He systematically outlines several ethical and cultural justifications for parental rights before admitting that "most often, however, when philosophical reasons are offered by writers on the subject, hard-headed practical justifications are seen as being more persuasive."[48]

Unfortunately for the sake of clarity, however, the hard-headed practical justifications he offers are, by his own admission, no more compelling than their more abstract counterparts. For instance, when applying the pragmatic justification of fulfilling the child's best interests, he writes that "if parental rights exist because recognizing them comports with the interests of children, then the opposite becomes true and whenever the child's interests are not being furthered by the parents, then by definition, the child's interests would not support recognition of an independent parental right." Therefore, he argues, because parental rights *ought to be* independent—at least to a large degree—then a purely child-centered justification is neither philosophically nor jurisprudentially suitable.

He continues that "the 'right' that is being claimed in many instances is not a claim of a substantive right in due process sense, but rather a claim that some benefit [such as access to certain speech] is available to one group yet denied to another."[49] Because the best interests of

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[46] *Id.* at 1030.

[47] University of Pittsburgh Faculty Webpage, Francis Barry McCarthy, http://www.law.pitt.edu/people/emeritus-faculty/francis-barry-mccarthy (last visited Jan. 1, 2014).

[48] McCarthy, *supra* note III, 35, at 1017.

[49] *Id.* at 1012.

the child and parent may not necessarily coincide, he surmises that "to the extent that parental decisions limit the freedom of children, obviously there is considerable tension between the ideas of children's rights and parental rights."[50]

In order to uphold parental and children's rights within a consistent framework of jurisprudential precedent, McCarthy suggests that the parental rights paradigm may need to be changed. "Perhaps the wrong question has been posed," he writes. "The question that may really need to be addressed is whether continued talk about fundamental rights in this area is productive at all, or whether it would simply be better to recognize that parents have a constitutional right in their children, albeit an ordinary liberty interest."[51]

To resolve the muddle, McCarthy calls on the high court to do what he himself could not: take a definitive stance on the issue. "There is only one way out of this problem," he writes, "and that is through clearer statements from the Supreme Court."[52] McCarthy certainly recognizes the importance of the question being asked, explaining that "whether something is a fundamental right or only an ordinary right . . . can have dramatic consequences."[53] Yet in the case of the question at hand, he more or less comes to the conclusion that while parental rights are societally, philosophically and legally important, he cannot comprehensively explain why.

[50] *Id.* at 1011.

[51] *Id.* at 1031.

[52] *Id.* at 1033.

[53] *Id.* at 1030.

Protecting Children from Speech

In *Protecting Children from Speech,*[54] Widener University Professor Alan Garfield, who earned his bachelor's degree from Brandeis University and his J.D. from UCLA,[55] takes a relatively moderate approach to age-based censorship. As a starting point, Garfield argues that courts should apply a strict scrutiny analysis in applicable cases "[b]ecause child-protection censorship regulates speech based upon content."[56] Under strict scrutiny, the state must demonstrate that the law in question is "justified by a compelling government interest and is narrowly drawn to serve that interest."[57]

He apparently believes that well-thought-out, narrowly tailored laws can satisfy the strict scrutiny standard. Unfortunately, he argues, recent legislative efforts to protect children from speech generally have been neither narrowly tailored nor well-thought-out. With a metaphorical flourish, he describes recent attempts to protect minors from online harm, in particular, as "legislatures . . . placing fish in a barrel for judges to shoot."[58]

One factor that can help guide lawmakers, he writes, is the common-sense use of social science evidence regarding harm to minors. He suggests that compelling scientific evidence can, at times, be helpful in both lawmaking and jurisprudence, but that insistence or reliance upon it can be detrimental. To further his point, he quotes influential attorney Edmond Cahn,[59] who

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[54] Alan Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565 (2005).

[55] Widener University Faculty Webpage, Alan E. Garfield, http://law.widener.edu/Academics/Faculty/ProfilesDe/GarfieldAlanE.aspx (last visited Jan. 1, 2014).

[56] Garfield, *supra* note III, 54, at 577.

[57] Brown v. Entertainment Merchants Association, 131 S Ct. 2729, 2738 (2011).

[58] Garfield, *supra* note III, 54, at 584.

[59] Edmond Cahn was a twentieth-century legal philosopher and professor and was author of numerous publications, including *The Sense of Injustice* in 1949 and *The Moral Decision* in 1955. His 1955 article *Jurisprudence* (30 N.Y.U. L. REV. 150, 167 (1955)) was ascribed by the law faculty at New York University's *Seventy-Fifth Anniversary Retrospective: Most Influential Articles* (75 N.Y.U. L. REV. 1517, (2000)) as being one of the most significant law journal pieces ever written.

"questioned whether fundamental rights should 'rise, fall or change along with the latest fashions of psychological literature.'"[60]

Roughly six years before *Brown v. Entertainment Merchants Association,* Garfield wrote that "the difficulty of proving a definitive causal connection between speech and harm should give courts pause before invalidating child-protection censorship legislation for lack of empirical proof."[61] And even if such empirical proof is found, "proof of 'harmfulness to minors' cannot, by itself, justify a First Amendment exception for child protection censorship. Social scientists, after all, might be able to show that minors would be upset by a wide range of information, including information about AIDS, abortion, the Holocaust, or other controversial topics."[62]

Unlike Heins, however, Garfield stops short of suggesting that some children do not need protection from certain controversial topics, and he tepidly accepts the idea that minors' First Amendment rights are less robust than their parents'.[63] Yet "the fact that children are treated differently does not explain *why* they are treated differently,"[64] and perhaps a more equitable, age-based recognition of the right to receive speech is necessary. Similar to some of Levesque's contentions, Garfield writes that "[t]he notion of children as being less mature than adults is based upon crude generalizations. To say that children make fewer 'mature' decisions than adults ignores the multitude of adults who routinely make immature decisions, whether about drug or alcohol consumption, gambling, or the assumption of debt."[65]

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[60] Garfield, *supra* note III, 54, at 590 (quoting Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955)).

[61] *Id.* at 610.

[62] *Id.* at 615.

[63] *Id.* at 600.

[64] *Id.* at 599 (emphasis in original).

[65] *Id.* at 603.

In summary, Garfield opines that governments do possess an interest in protecting children, but not at the risk of abridging legitimate speech. "Censorship should not be allowed," he writes, "unless judges are convinced that the speech is harmful and that the parents support its suppression. Direct suppression should not be allowed when a less speech-restrictive means exists to accomplish the government's objective (i.e., Can parents protect their children without government help?)."

In many cases, he argues, parents can and should handle any protection necessary. But if compelling social science evidence, for instance, suggests that military-training video games substantially harm to children, then legislatures can—and perhaps should—carefully craft laws to minimize minors' exposure to such materials.[66]

Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech

George Washington University Professor Catherine Ross, who earned her bachelor's and Ph.D. (both in history) and J.D. from Yale,[67] could have made the title of her article[68] more accurate if she had changed the word "Examining" to the phrase "Forcefully Questioning the Validity of."

The piece, which was published in 2000 in response to the Supreme Court's striking down of the Child Online Protection Act, takes a step back from the question of where to draw child-protection lines and addresses the more fundamental issue of whether the government

[66] *Id.* at 650.

[67] George Washington University Faculty Webpage, Catherine J. Ross, http://www.law.gwu.edu/Faculty/profile.aspx?id=1713 (last visited Jan. 31, 2014).

[68] Catherine Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000).

should have any stake whatsoever in regulating speech available to children. "In case after case," she writes, "courts at all levels have taken, at most, a cursory glance at the government's asserted interest before accepting the government's position that the interest is 'compelling' or 'significant.'"[69]

Because this issue largely has been glossed over by both courts and scholars, she contends, "[s]erious consequences flow from this lack of attention to the nature of the interest served by regulating speech in the name of children."[70] She argues that this manifests itself in three ways: The first is the "tacit assumption that government's proclaimed interests are virtually immune from scrutiny once the state invokes the protection of children."[71] The second is the suggestion "that the boundaries of the speech from which children must be protected are virtually limitless . . . [resulting in] broad regulations impinging on protected speech."[72] The third problem is that "when courts beg the question of the nature of the state's interest in regulating speech to shield the young, they inhibit the development of First Amendment jurisprudence and lead emerging doctrine astray."[73] Taken together, the "cumulative effect of this analytic sloppiness is that courts have glossed over the foundation[al] question of whether a compelling state interest in regulating protected speech to shield the young exists at all."[74]

Ross's misgivings are, in part, derived from what she calls the impracticality of child censorship. Citing then-prevalent, mainstream news stories to illustrate her point, she argues the

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[69] *Id.* at 432

[70] *Id.* at 433.

[71] *Id.*

[72] *Id.* at 433 – 434.

[73] *Id.* at 434.

[74] *Id.*

world itself is immune to sanitization—making the whitewashing of speech impossible without sacrificing truth:

> The highest elected official admits to marital infidelity involving fellatio; high school students use guns to murder their teachers and/or classmates; a prominent musician, accused of child molestation, reportedly pays millions of dollars to avoid legal penalties; international news includes coverage of so-called 'ethnic cleansing' in the Balkans and ethnic slaughter in Africa. None of these news stories could be barred consistent with the First Amendment[75]

Because the ubiquity of potentially disconcerting news stories makes child protection untenable, she asserts, lawmakers would be better off letting parents determine what is best for their own children, "even if the vast majority of parents were to demand that they wanted controversial speech blocked."[76] Because the state cannot please everyone, she contends, the best course of action is for it to provide only the scantest baseline of protection, one which would give parents the greatest amount of leeway: "Some want their children to hear everything, others virtually nothing. These disparities make it nearly impossible for the government to establish criteria that will not favor one family to the detriment of others."[77]

Finally, Ross admonishes that "legislatures, regulators, and judges must use a fine brush rather than a paint roller when they try to shield children."[78] But if a roller continues to be used, she warns, then the free-speech rights of both adults and children, as well as the right to family autonomy, will be compromised.

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[75] *Id.* at 439 – 440.

[76] *Id.* at 480.

[77] *Id.* at 481.

[78] *Id.* at 523.

Playing Games with the First Amendment

Samford University Professor Gregory Laughlin, who earned his J.D. from the University of Missouri and his master's degree in library and information science from the University of Illinois,[79] applies the concept of minors' First Amendment speech access specifically to video games.[80]

Although Laughlin agrees in part with the work of scholars Marjorie Heins and Catherine Ross as it pertains to the inconclusiveness of social science proving harm to minors, he nonetheless suggests that the two professors' rationale "fails to make the common sense distinction between Brutus slaying Julius Caesar in Shakespeare's play, whether read or viewed as acted on stage or in a movie, and being a virtual assassin in an interactive video game."[81]

Although he states that strict scrutiny should be applied in content-based speech cases, he uses the rationale from the Supreme Court's ruling in *Ginsberg v. New York*[82]—that children are too sensitive and irrational to be faced with sexual speech—to suggest that minors' rights to access potentially disturbing speech can be easily and simply abridged without sacrificing constitutional integrity.

Inconclusive social science evidence regarding harm to minors is of little concern for would-be censors, he writes, because the Supreme Court "has not required a showing of a high degree of scientific certainty of psychological or other measurable harm to justify such

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[79] Samford University Faculty Webpage, Gregory K. Laughlin, http://cumberland.samford.edu/faculty/gregory-k-laughlin (last visited Jan. 1, 2014).

[80] Gregory Laughlin, *Playing Games with the First Amendment: Are Video Games Speech and May Minors' Access to Graphically Violent Video Games be Restricted?* 40 U. RICH. L. REV. 481 (2006).

[81] *Id.* at 531 – 532.

[82] *See* 390 U.S. 629 (1968) in which the Court upheld a New York law that forbade the selling of "girlie" magazines to minors, even if the materials were suitable for adult consumption because they were merely indecent and not obscene.

restrictions. It has, instead, recognized that 'the ethical and moral developments of . . . youth' provide sufficient justification for such restrictions."[83] As of 2006, when this article was published, he was correct in asserting this point. With the subsequent decision of *Brown v. Entertainment Merchants Association,* however, Justice Scalia's demand for a "direct causal link" between violent video games and actual harm arguably renders Laughlin's argument obsolete. Since *Brown* in 2011, an unverified, presumed correlation between speech and harm are no longer sufficient to permit the abridgment of video game access to minors.

Applying the government-helping-the-parents concept from *Ginsberg*, Laughlin also argues that "[so] long as parents have the right and ability to introduce their minor children to such expressive content when they deem appropriate, such restrictions are permissible."[84] Not only are they permissible, he writes; they are a moral imperative. Laughlin contends that "[p]arental and societal interest in rearing minors to value and respect their fellow humans, rather than debase the value of others by participating in games in which they commit brutal acts of violence against very human-looking characters as a form of entertainment, is sufficient to support restrictions."[85]

To that end, he advocates an extension of *Ginsberg* and *Federal Communications Commission v. Pacifica Foundation*[86] to other areas of speech, including violent video games.[87] "It would be an odd conception of the First Amendment," he writes ". . . that would allow a state

[83] Laughlin, *supra* note III, 80, at 533 (quoting *Ginsberg*, at 641).

[84] *Id.* at 533.

[85] *Id.* at 538.

[86] *See id* at 543 (extoling the virtues of *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), a case in which the Supreme Court upheld the FCC's censure of a New York radio station for airing comedian George Carlin's "Seven Words You Can Never Say on Television" monologue because it was considered indecent).

[87] Laughlin, *supra* note III, 80, at 543.

to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses, as in *Ginsberg*, but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission."[88]

Quoting extensively from Kevin Saunders,[89] Laughlin makes the case that the government has a compelling interest to help parents rear their children. "All government can do," he supplicates, "is provide some aid in giving parents more control over when, not whether, their children will be exposed to such material. Government can, consistent with the First Amendment, and should provide that assistance."[90]

This assistance is necessary, his writes, because social science evidence suggests that minors have less developed senses of responsibility than adults and are more vulnerable to negative influences. Society as a whole has an obligation, therefore, to keep minors from accessing information that could potentially harm them or cause them to harm others.

In the Name of Children: Government Regulation of Indecency on the Radio, Television and the Internet—Let's Stop the Madness

Georgia State University Professor Eric Segall, who obtained his bachelor's degree from Emory University and his J.D. from Vanderbilt,[91] begins his piece[92] simply, clearly and definitively. "The thesis of this Article," he writes, "is that all governmental efforts to censor

[88] *Id.*

[89] *Supra* Part III, Section A. 2.

[90] *Id.* at 545.

[91] Georgia State University Faculty Webpage, Eric J. Segall, https://law.gsu.edu/directory/segall (last visited Jan. 1, 2014).

[92] Eric Segall, *In the Name of Children: Government Regulation of Indecency on the Radio, Television and the Internet—Let's Stop the Madness,* 47 U. LOUISVILLE L. REV. 697 (2009).

non-obscene, indecent speech on radio, television and the Internet should stop."[93] Not one, apparently, to mince words, Segall's position is summed up concisely in the following statement:

> Parents, teachers, and community leaders should shoulder the responsibility for protecting children from harmful materials, and they do not need the government's help (or censorship) to succeed in that task. Government censorship, more often than not, impedes the ability of those groups to take serious responsibility for the well-being of our children.[94]

To bolster his contention, Segall presents five reasons why almost any governmental attempt to shield minors from indecency is generally a harmful enterprise:

- Censoring unsavory speech only makes it more desirable and tempting to youth.
- Minor-specific censorship laws usually make no age discrimination—meaning a seven-year-old boy is treated the same as a seventeen-year-old boy.
- Minors should not be denied speech that may be relevant to them, regardless of its potential unsavoriness.
- No cultural or social science consensus exists about what speech actually harms minors.
- It is exceptionally difficult "to draft laws regulating indecent speech that are not unconstitutionally vague, and are both under-inclusive and over-inclusive."[95]

Furthermore, Segall decries the fact that radio and television content receives less First Amendment protection than other forms of media. To rectify the situation, he proposes overruling *Pacifica Foundation* and loosening the FCC's control over broadcast to make it more comparable to print. "[T]he overturning of the rule established in *FCC v. Pacifica*," he writes, "would lead to a regime where the government would get out of the business of deciding what our children should and should not see and leave that important responsibility to parents, teachers, and other influential people in our children's lives, where it rightfully belongs."

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[93] *Id.* at 698.

[94] *Id.*

[95] *Id.* at 716.

He bases this rationale on the premise that such governmental involvement violates parental rights and "preempts parental discretion."[96] Although some parents may welcome the FCC's help in shielding their children from certain content, he writes, others may deem the ostensible help as an intrusion. Either way, he contends, "government should not be taking sides in this debate" [97] because such partiality inevitably leads to house-burning pig roasting[98] and the dilution of parental rights.

Overview

Although the positions taken by each of the eight authors described in Sections A and B fall disparately along a lengthy, nuanced continuum of jurisprudential philosophy, they can more or less be neatly categorized into three ideational groupings. In the first grouping, Roger Levesque, Marjorie Heins, Catherine Ross and Eric Segall are highly critical of the state's interest in protecting children from speech. They each seem to believe that the rationales used in *Pacifica Foundation* and *Ginsberg* are historical relics with little practical bearing on today's world because "the Internet [is] as available to our children as traditional broadcasting [or magazines]."[99]

Although Levesque is a bit more tempered in his approach than the other three, each of these four authors contends that legally and scientifically, "there are too many unanswered questions over whether [sexual/violent] material harms children to allow the government to

[96] *Id.* at 717.

[97] *Id.*

[98] *See infra* note IV, 104 and accompanying text.

[99] *Id.* at 719.

censor speech based on its content."[100] With courts' rationale and application of child-protection censorship situated on *terra shifta*, "the compromises to free speech and family autonomy are great, and the rights affected lie at the heart of constitutional liberties."[101] The solution, according to the anti-government-involvement camp, is to re-evaluate the state's interest in protecting children from speech, renounce *Pacifica Foundation* and *Ginsberg* and "place the responsibility for making these difficult decisions back squarely where it belongs—in the hands of parents and teachers who are responsible for the upbringing of our nation's children, not in the halls of Congress, the state legislatures, or the state and federal courts."[102]

On the other end of the spectrum, Gregory Laughlin and Kevin Saunders take a more favorable perspective of government involvement in protecting minors from information that could potentially harm both themselves and others. Citing much social science evidence, Saunders—and, to a lesser degree, Laughlin—bolster their arguments by pointing out correlations between minors' access to speech about certain topics and detrimental social problems related to the topics, as well as the fact that "our nation also has a long history of restricting minors access to speech which is or may be harmful to them."[103]

It is worth noting that all six authors on opposite ends of the spectrum seem to find incongruence between how the Internet is regulated and how *Ginsberg's* girlie magazines and *Pacifica Foundation's* indecent broadcasts are regulated; they simply propose different approaches to harmonize the dissonance. Whereas the first four want to make broadcast and

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[100] *Id.*

[101] Catherine Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 523 (2000).

[102] Segall, *supra* note III, 92, at 719.

[103] Gregory Laughlin, *Playing Games with the First Amendment: Are Video Games Speech and May Minors' Access to Graphically Violent Video Games be Restricted?* 40 U. RICH. L. REV. 481, 544 (2006).

magazines (as they pertain to minors' access rights) more like the Internet, Saunders and Laughlin want to make the Internet more like broadcast and magazines.

Unlike Levesque, Heins, Ross and Segall, however, Saunders and Laughlin talk much about a societal responsibility to raise children up responsibly. Neither of the pair denies the role of parental involvement, yet each insists that parents alone cannot fulfill their roles adequately without extensive government aid and that together, "parents and society have the responsibility to provide value training to make it more likely that they will become responsible adults."[104]

The final pair of authors, Garfield and McCarthy, arguably fall somewhere in the middle. Although at times Garfield's cautiously anti-government-involvement leanings find their way into the text, these two pieces each possess decidedly less contentious tones than do the other six. Explaining and synthesizing rather than arguing, these exceptionally informative authors discuss the pros and cons of both sides and attempt to chronicle what the courts have said without advocating much one way or the other. Although McCarthy concerns himself more with the parental rights aspect of the issue, both nonetheless add a healthy dose of tepidity to a controversial yet fundamental subject.

In all, these eight pieces, spanning the course of twenty-one chronological years and light years of ideology, comprise a comprehensive scholarly look at many facets to the issues of children's access to speech and parental rights—at least as they stood when the last of the articles was published in 2009. Since then, two Supreme Court decisions—*Brown v. Entertainment Merchants Association*, as well as *United States v. Alvarez*[105]—have added new layers of both complication and clarity that make these issues once again ripe for review. Descriptions of these

[104] KEVIN SAUNDERS, SAVING OUR CHILDREN FROM THE FRIST AMENDMENT, 86 (2003).

[105] 132 S. Ct. 2537 (2012).

cases, as well as how they affect the parental and children's rights landscape, are further explained in the ensuing part.

CHAPTER 4
MOORING THEORY TO PRACTICE

This part synthesizes the cases, laws and ideas examined in the previous parts and attempts to demonstrate three distinct types of injuries caused by content-based censorship in the name of protecting minors: 1) harm to the children; 2) harm to parents and other adults; 3) and harm to the relationship between children and their parents. In order to better understand these harms, it is first necessary to discuss three free-speech theories that are particularly applicable in tethering these three harms to philosophical bases. The three theories are the marketplace of ideas, democratic self-governance, and self-fulfillment. This part also addresses the apparently increased standard of proof of causation in content-based speech regulations, as well as exceptions and legitimate compelling interests of the state in protecting minors from speech. Ultimately, this part supports the adoption of a narrowly tailored set of ideals that affords a broad set of protections for parental rights and the First Amendment. This part begins with a brief primer on three of the most well-established justifications for freedom of speech in the United States.

Free Speech Theories

Truth Attainment through the Marketplace of Ideas

Freedom of speech as a means to test and attain the truth has a lengthy historical tradition. Its seeds were first widely spread in seventeenth-century philosopher John Milton's *Areopagitica.*[1] Milton, who argued for the freedom to publish minority views without first

[1] JOHN MILTON, AREOPAGITICA—A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, reprinted in COMPLETE POEMS AND MAJOR PROSE 716 (Merritt Y. Hughes ed., 1957) (1644).

applying for government licensing, famously wrote, "Let [truth] and falsehood grapple: who ever knew Truth put to the worse, in a free and open encounter."[2]

Although not quite as optimistic about the inevitable triumph of truth over falsehood in every encounter, nineteenth-century philosopher John Stuart Mill elaborated upon Milton's notion in his classic philosophical treatise, *On Liberty*.[3] According to Mill, open and free discussion was the best means of obtaining the truth. "[O]nly through diversity of opinion," Mill wrote, "is there, in the existing state of human intellect, a chance of fair play to all sides of the truth."[4]

Professor Matthew Bunker writes that "Mill purported to show that whether an unpopular view is true, partially true or entirely false, it should not be suppressed."[5] Regardless of an idea's veracity, Mill theorized, the right to discuss it should be protected because the integrity of the process eventually ensures the highest integrity of speech—and subsequently, truth. The dual Millian goals of the marketplace of ideas, then, are the attainment of truth and the testing process by which truth is ascertained.

The theory was first imported into First Amendment jurisprudence by Supreme Court Justice Oliver Wendell Holmes, Jr. He wrote in 1919 that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[6] In the nearly 100 years since this concept was attached to the First Amendment, "[t]he marketplace of ideas theory [has] consistently dominate[d] the Supreme Court's discussions of freedom of speech"[7] and, the Court

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[2] *Id.* at 739.

[3] JOHN STUART MILL, ON LIBERTY (Penguin Books 1974) (1869).

[4] *Id.* at 111.

[5] MATTHEW BUNKER, CRITIQUING FREE SPEECH 6 (2001).

[6] Abrams v. United States, 240 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[7] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989).

has often since suggested that the remedy for "bad" speech is adding more speech to the marketplace, not the squelching of it.[8] As the late First Amendment scholar Thomas Emerson maintained, a person "who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds."[9]

Just as Mill was more cautious about the ultimate triumph of truth over lies than was Milton, many contemporary scholars have been driven to less-than-optimistic views of the struggle. Professor Vincent Blasi is an example of such a scholar who, as he observes the widespread acceptance of bad ideas throughout Western democracies, has become somewhat cynical about the "unconvincing"[10] marketplace metaphor because "ideas cannot properly be treated as consumer goods [and] discussion and persuasion cannot be analogized to competitive exchange."[11] Blasi and others have heavily critiqued the theory, highlighting the dubious assumption of the average market-goer's rationality, as well as the potential of market failure resulting from unequal access to means of effective communication.[12] "Marketplace theory can also be criticized," Bunker writes, "because of its tendency to elevate communal values over individual ones."[13] Nevertheless, the marketplace metaphor, "while flawed, has great value as one justification of free speech"[14] and remains a staple within Supreme Court opinions and scholarly works.

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[8] *Id.* at 8.

[9] THOMAS EMERSON, THE SYSTEM OF FREE EXPRESSION, 6 – 7 (1970).

[10] Vincent Blasi, *Holmes and the Marketplace of Ideas,* 2004 SUP. CT. REV. 2004, 1, 1.

[11] *Id.* at 8.

[12] *Id.*

[13] BUNKER, *supra* note IV, 5, at 8.

[14] *Id.*

Democratic Self-Government and the Voting of Wise Decisions

For philosopher and educator Alexander Meiklejohn, the First Amendment acts not necessarily as a means to protect speech in and of itself, but to act as the "positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends."[15] Put simply, Meiklejohn theorized that the principle purpose of free speech is "the voting of wise decisions"[16] by protecting speech related to issues of public importance or concern and to ensure that "that everything worth saying shall be said."[17]

Unlike the marketplace of ideas theory, which can arguably encapsulate the full extent of human expression, protection under the democratic-self-government theory is narrowly confined to a town-hall context, sheltering only speech that serves a political or public good. Other speech, Meiklejohn argued, was less important and demands less protection. He wrote:

> The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which the voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interests in speech on the other hand, has no claim whatever to the protection of the First Amendment.[18]

Meiklejohn's contentions about the importance of political speech drew criticism from many scholars. Professor Rodney Smolla, for example, panned Meiklejohn's claim that ideas, rather than speakers, are the primary concern of free speech when he wrote that "the state lacks the moral entitlement to presume to dictate what is 'worth saying' and when 'everything worth saying' has been said."[19]

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[15] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 17 (1948).

[16] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

[17] *Id.*

[18] *Id.* at 94.

[19] RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 16 (1992).

Acknowledging that the scope of political expression may be broader than he originally suggested, Meiklejohn later expanded his theory, adding that "there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."[20]

Since the theory's revision to include a broader range of tangentially political speech, many scholars have accepted, adapted and appropriated Meiklejohn's ideas. Thomas Emerson observed that "freedom of expression is essential to provide for participation in decision making by all members of society."[21] For Emerson, free expression not only covered political matters; it also "embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge."[22] Under such a broad definition, therefore, little expression exists that cannot, in some way, be related to a political concern—or at least to "all areas of human learning and knowledge."

Human Dignity: Self-Fulfillment and Individual Autonomy through Freedom of Speech

Unlike either the marketplace or democratic self-governance theories, which view free expression as a means to an end (attainment of truth and furtherance of a body politic, respectively), the self-fulfillment theory sees self-expression as an end in and of itself. As Professor Smolla writes, "It is a right to defiantly, robustly, and irreverently to speak one's mind

[20] Alexander Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245, 256.

[21] EMERSON, *supra* note IV, 9, at 7.

[22] *Id*.

just because it is one's mind" (emphasis original).[23] As Emerson puts it, "[t]he proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization, the mind must be free."[24] Emerson argues that restrictions on speech violate human dignity and "elevate society and the state to a despotic command over him and [places] him under the arbitrary control of others."[25] Given the close relationship between thought and speech, Smolla argues, governmental censorship violates man's dignity as an autonomous, cognitive being.[26]

The late C. Edwin Baker contended that regulations that try to protect people from speech violated the listener's dignity and integrity, even if the listener does not want to hear it.[27] To protect a listener's autonomy and dignity, Professor Baker argued, individuals should be treated "as agents who can either reject or accept views that they hear."[28]

Especially relevant to the context of this discussion, Baker stressed that a law attempting to ban or regulate speech "to protect people from harms that result because the listener adopts certain perceptions or attitudes disrespects the responsibility and freedom of the listener."[29] In short, individuals should have the autonomy to make up their own minds about the speech they hear and the information they receive; any paternalistic attempt to protect listeners from hearing such speech disrespects a listener's dignity as a rational human being.

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[23] SMOLLA, *supra* note IV, 19, at 9.

[24] EMERSON, *supra* note IV, 9, at 6.

[25] *Id*.

[26] SMOLLA, *supra* note IV, 19, at 10-11.

[27] BAKER, *supra* note IV, 7, at 59.

[28] *Id*.

[29] *Id*. at 56.

For Baker, respect for human dignity and autonomy meant giving people the ability "to use their bodies and minds to develop and express themselves."[30] This theory furthermore implies that every individual "has the right to use speech to . . . influence or interact with others in a manner that corresponds to her values."[31]

In order for any of these three theories to extend legal and constitutional protections for speech, courts must bridge the gap between First Amendment theory and doctrine. Robert Post, in his discussion of this very issue, suggests that "the purpose of doctrine is to institutionalize constitutional objectives."[32] But while Post argues that the courts' reliance on multiple theories creates doctrinal conflicts, Smolla believes that "[t]here is no logical reason . . . why the preferred position of freedom of speech might not be buttressed by multiple rationales."[33] With this in mind, there is little reason to believe that a critical examination of current child-protection censorship cannot be supported by all three of these theories simultaneously.

Why Now? Strict Scrutiny and Censorship of Minors in a Contemporary Context

The relationship between parental rights and the governmental interest in protecting minors from speech is primed for jurisprudential revisitation. Although even the youngest of the three free-speech theories outlined above has been entrenched in scholarly literature and judicial opinions for decades, the need for a theoretical reapplication was catalyzed in the last three years

[30] *Id*. at 59.

[31] *Id*. at 60.

[32] ROBERT POST, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 153 (Lee C. Bollinger & Geoffrey R. Stone eds. 2002).

[33] SMOLLA, *supra* note IV, 19, at 5.

by an apparent judicial shift toward a heightened evidentiary standard of scrutiny placed on legislative attempts to regulate speech because of its content.[34]

Unlike the rational basis test[35] and intermediate scrutiny[36]—the first and second levels of judicial scrutiny—the burden of strict scrutiny is difficult for the government to satisfy. In order to pass constitutional muster under strict scrutiny, the law in question must not only support a compelling governmental interest, but as Chemerinsky writes, it "must be shown to be necessary as a means to accomplishing the end."[37] This means that if there are any other less speech-restrictive alternatives of accomplishing the compelling interest, then the law is neither necessary nor constitutional.

To uphold the free-speech guarantees of the First Amendment, the Supreme Court historically has applied the strict scrutiny standard to review content-based regulations of speech—at least when those regulations concern adults. Yet, even as high as the strict scrutiny demands traditionally have been, two recent Supreme Court cases elevated the standard another notch.

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[34] Content-based speech restrictions—which demand the application of strict scrutiny—stand in contrast to "time/place/manner"-based speech restrictions, which generally incur intermediate scrutiny; the regulations in these cases are considered "content neutral" because "the government has adopted the regulation to control something other than the message conveyed by expressive activities . . . such as preserving park property or keeping streets clean." KENT MIDDLETON & WILLIAM LEE, THE LAW OF PUBLIC COMMUNICATION 91 (9th ed. 2014).

[35] The rational basis test places the burden of proof on the challenger of the law to demonstrate the law's unconstitutionality. *See* CHEMERINSKY, *supra* note II, 3, at 540 (writing that a law "will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose or that it is not a reasonable way to accomplish the objective").

[36] The intermediate scrutiny standard, like strict scrutiny, places the burden of proof on the government to show that its law is constitutional. Yet unlike strict scrutiny, which demands the law be narrowly tailored to fit a compelling interest, it is more deferential to lawmakers in that the law under consideration needs to only pertain to an important (not necessarily "compelling") interest and that it is "substantially related to achieving the goal." CHEMERINSKY, *supra* note II, 3, at 540.

[37] CHEMERINSKY, *supra* note II, 3, at 541.

The first case, *Brown v. Entertainment Merchants Association*,[38] considered a California statute that banned the sale or rental of violent video games to minors. In a particularly pithy opinion, Justice Antonin Scalia wrote for the majority that California "cannot show a direct causal link between violent video games and harm to minors."[39] The Court opined that "the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies . . . [but] because it bears the risk of uncertainty, ambiguous proof will not suffice."[40] Therefore, the Court ruled, there was no compelling governmental interest.

Given that the state was attempting to regulate the content of speech, the Court determined that an application of strict scrutiny was necessary. Because California could not meet this high standard, the Court deemed the statute unconstitutional and struck it down. Although the justices fractured badly in their exact rationale for why the Golden State law violated the First Amendment, they nonetheless decisively concluded—in 7-2 fashion—that the right of minors to receive speech supersedes the presumed government interest in protecting youth from that which may or may not harm them.

The second case, *United States v. Alvarez*[41] in 2012, apparently extended *Brown's* rigorous standard of proof of harm to other areas of speech. In considering whether non-commercial, false claims are protected under the First Amendment, the high court in *Alvarez* invalidated the federal Stolen Valor Act,[42] which criminalized false statements about winning

[38] 131 S. Ct. 2729 (2011).

[39] *Id.* at 2738.

[40] *Id.* at 2738 – 2739.

[41] 132 S. Ct. 2537 (2012).

[42] 18 U.S.C. § 704 (b), (c) (2010).

military medals. "There must be a direct causal link," wrote Justice Anthony Kennedy for the plurality, "between the restriction imposed and the injury to be prevented."[43] Kennedy continued to opine that "the link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown."[44] With this ruling, the Court again determined that in content-regulation cases, if the link between the regulation and the government interest is either nonexistent or dubitably weak, then the law fails strict scrutiny.

Yet beyond the introduction of a heightened standard of scrutiny to content-regulation cases, *Brown* raises a more specific, but no less profound, question: When the Supreme Court is balancing the interests of free speech and the protection of children, how egregious must the harm from the speech be in order to tip the scales toward regulation? Furthermore, how much proof of that harm must be demonstrated by the government? Historically, the high court was decidedly deferential to lawmakers' attempts to block minors' access to sexually offensive speech. Prior to *Brown*, the two seminal cases on this issue were *Ginsberg v. New York*[45] and *Federal Communications Commission v. Pacifica Foundation.*[46] In *Ginsberg*, the Supreme Court upheld a New York law that forbade selling pornographic, "girlie" magazines to minors, even though the magazines were suitable for adult consumption. In *Pacifica*, the Court upheld the Federal Communication Commission's censure of a New York radio station for airing comedian George Carlin's "Seven Words You Can Never Say on Television" monologue in the afternoon because the broadcast was considered indecent and might be heard by children.

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[43] *Alvarez,* 132 S. Ct. at 2549.

[44] *Id.*

[45] 390 U.S. 629 (1968).

[46] 438 U.S. 726 (1978).

This pair of cases judicially confirmed the cultural assumption—in both print and broadcast media—that children should be shielded from sexual speech that their elders had a constitutional right to hear and see. The rulings in both cases were based on the assumption, as Justice William Brennan wrote for the majority in *Ginsberg*, that minors possess certain vulnerabilities that inhibit their ability to make informed, mature decisions. He therefore reasoned that in order to uphold laws such as New York's, the Court simply must consider whether it was "*rational* for the legislature to find that the minors' exposure to ['girlie'] material might be harmful"[47]—which was a postulation in this case the Court found reasonable.

In a concurring opinion, Justice Potter Stewart underscored this assumption of immaturity by likening the diminution of speech access to "other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults."[48]

Although *Pacifica* further entrenched the supposition of immaturity and the governmental interest in protecting youth, the implicit assumptions of *Ginsberg* proceeded relatively unchallenged judicially over the last several decades. They have continued, writes Professor Alan Garfield, despite the fact that the ostensible harms to be prevented rarely warrant First Amendment exceptions because they "result from a listener's reaction to a message: that the message either will be psychologically disturbing to a listener or will encourage a listener to engage in inappropriate behavior."[49] At least among adults, he continues, such reactive harms are almost never tenable reasons to curtail speech because "the majority could suppress speech it

[47] *Ginsberg*, 390 U.S. *supra* note IV, 45, at at 639 (emphasis added).

[48] *Id.* at 650.

[49] Garfield, *supra* note III, 54, at 607.

found offensive, or the government could engage in 'thought control' by denying the public access to ideas that the government thought were harmful."[50]

The constitutional flashpoint, then, is determining the reasonableness of the assumption of vulnerability—and beyond that, the importance of any governmental interest upon which constitutionally responsible policy can be founded. Unfortunately for the sake of clarity, existing social science data on the subject offer little firm evidence that children are harmed either by exposure to violent or sexually explicit material.[51] Although the courts lack scientific guidance for both types of potentially offensive speech, judges are generally more tolerant of sexual speech restrictions than suppression of violent content.[52] Even as Justice Brennan admitted in *Ginsberg* regarding sexual speech:

> The legislat[ure] find[s] that the material condemned by [New York law] is "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." It is very doubtful that this finding expresses an accepted scientific fact. . . . [T]he growing consensus of commentators is that while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.[53]

The nearly half-century since *Ginsberg* has yielded few compelling scientific links—and there is little hope that more will be made any time soon.[54] Regarding violence, recent aggregate

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[50] *Id.*

[51] *See id.* at 608 (suggesting that "even when social science is plentiful, it can be inconclusive").

[52] *See* Ross, *supra* note III, 68, at 504 – 505 (relating that the distinction between sexual speech and violent speech remains confusing and problematic for both social scientists and would-be censors; Ross writes that "The design and results of empirical studies about the effects of speech make it important to distinguish speech about sexuality from speech about violence. Although it is nearly impossible to find an iota of evidence that controversial speech about sex harms children, speech concerned with sexuality is the content most commonly subject to regulation on their behalf, in contrast to speech with violent content. For example, during one debate, five of the eight articles cited on the Senate floor in support of regulating indecent speech expressly examined the impact of material about violence or suicide rather than the indecency targeted by the legislation. The FCC, in turn, relied on the same evidence about violent speech in defending its abridgement of sexually explicit speech that it did not dispute was protected under the First Amendment").

[53] *Ginsberg*, 390 U.S. *supra* note IV, 45, at 642.

[54] *See* Segall, *supra* note III, 92, at 714 (writing that "there is little or no empirical evidence supporting a claim that such material harms children, and the Supreme Court has never required such evidence").

surveys of empirical analyses suggest that for every contemporary study that suggests "[n]either video game violence exposure, nor television violence exposure, were prospective predictors of serious acts of youth aggression or violence,"[55] there is another that posits a "causal link between violent game exposure and aggression."[56]

Garnering scientific evidence may be even more problematic for sexually explicit speech. While upholding the Federal Communications Commission's censure of "fleeting expletives" on television broadcasts in *Federal Communications Commission v. Fox Television Stations, Inc.*,[57] Justice Scalia elaborated on the problems with requiring scientific evidence of harm. He wrote that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts . . . and others are shielded from all indecency."[58] In light of his opinion in *Brown* that elevated the strict scrutiny standard in content-regulation cases, Scalia's words in *Fox* two years prior are indicative of how constitutionally difficult the issue of child-based speech regulation has become.[59] The ostensible harms of speech to minors cannot be tested; as Justice Scalia suggests, what institutional review board would permit the systematic exposure of minors to offensive speech for the sake of scientific inquiry?

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[55] Christopher Ferguson, *Video Games and Youth Violence: A Prospective Analysis in Adolescents*, JOU. OF YOUTH AND ADOLESCENCE (online ed.), Dec. 14, 2010, at 1.

[56] Christopher Engelhardt, et al., *This is your Brain on Violent Video Games: Neural Desensitization to Violence Predicts Increased Aggression Following Violent Video Game Exposure*, 47, 5 JOU. OF EXPERIMENTAL SOCIAL PSYCHOLOGY, 1033, 1033 (2011).

[57] 556 U.S. 502 (2009).

[58] *Id.* at 519.

[59] *See id.* (continuing that "[h]ere it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate").

Further complicating science's role in the matter is the degree of actual harm scientifically suggested in order for government intervention to take place. Unlike many of the so-called hard sciences, in which specific variables and factors can be shown to directly and predictably contribute to certain phenomena, social sciences, by their nature, can rarely ever "prove" anything beyond correlation. Human behavior is subject to millions of unpredictable variables, which makes the link between exposure to content and long-term ill effect virtually impossible to prove, even if a strong correlation could be made. Semantically, then, Justice Scalia's demand for proof of a direct causal link (at least as it pertains to violent speech) may be an untenable standard. At some point, then, assumptions based upon correlation alone—rather than "proof"—may be necessary in order to create coherent, constitutionally tenable policies.

As lawmakers craft such policies, it seems natural to assume that the government possesses an independent interest in the upbringing of non-violent, non-deviant, moral youth who will contribute to society rather than burden it.[60] The link between this interest and the blocking of minors' access to speech regarding sex and violence is anything but conclusive,[61] yet despite this lack of definitive causal proof, the assumption remains culturally, legislatively and judicially embedded. "Indeed," Garfield comments about indecency, "the proposition that the

[60] *See* Alfred L. Snapp & Son v. P. R., 458 U.S. 592, 600 (1982) (explaining that "[p]arens patriae means literally 'parent of the country.' The parens patriae action has its roots in the common-law concept of the royal prerogative. The royal prerogative included the right or responsibility to take care of persons who are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property. At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: 'This prerogative of parens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves'").

[61] *See* Garfield, *supra* note III, 54, at 609 (asking the question of "how should courts deal with the paucity of social science evidence in some contexts (sexual speech) and the inconclusiveness of it in others (violent speech)?").

government has a compelling interest in protecting minors from sexual speech is so established that it is usually a perfunctory aspect of the Court's analysis."[62]

Just as legitimate as the governmental interest in non-deviant youth, it would seem, is the interest in well-educated, knowledgeable youth who can likewise contribute to society rather than burden it. Yet unlike the link between non-deviancy and child censorship, the connection between an educated populace and access to information is a chain fortified with a heavily reinforced social science alloy.[63]

Of course, the two interests, while not mutually exclusive, sometimes find themselves in a competition that necessitates a balancing test to determine which interest is more compelling. In light of *Brown* and *Alvarez,* there has never been a better time than now, even as Professor Catherine Ross suggested fourteen years ago,[64] to re-examine the state's interest in protecting youth from potentially objectionable speech.

Doctrinal Application of Theory

As outlined in the Literature Review, multiple scholars have attempted to demonstrate—even before the *Brown* and *Alvarez* decisions—that the assumption of harm (and the governmental interest based on the assumption) is premised neither on sound constitutional jurisprudence nor common sense.[65] This section analyzes some of these assumptions and looks

[62] *Id.* at 614.

[63] *See* Roy Balleste, *The Internet Governance Forum & Technology: A Matter of Human Development,* 7 LOY. LAW & TECH. ANN. 37, 69 (2007) (summarizing that "adequate access to information is a prerequisite for the enjoyment of human rights in the Information Society").

[64] Ross, *supra* note III, 68.

[65] *Supra* Part III.

at how they affect the well-being of minors, parents and the relationships between adults and their children.

Effect on Children

The constitutional right of free speech is accompanied by the implicit corollary right to receive speech. As the Supreme Court noted in 1943, the freedom to speak "necessarily protects the right to receive it."[66] This concept was emphatically reaffirmed a quarter century later when Justice Thurgood Marshall declared, "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society."[67]

Yet as *Ginsberg* and *Pacifica* illustrate, what is fundamental for the goose is not necessarily fundamental for the gander. Professor Roger Levesque rued this fact when he wrote, "No commentators and no courts overtly argue that the Constitution should be set aside when they determine the rights of adolescents. Yet in practice and implicitly, they pervasively do set aside the Constitution when they fashion the rights of adolescents."[68]

This practice is not only judicially irresponsible, he contends, but is also stifling to minors' social and intellectual development by limiting their exposure to certain ideas. Levesque further asserts that "[i]f speech must be free to ensure the pursuit of truth, then adolescents' claim to free speech appears remarkably strong. The adolescent period is marked by the manner youths actively devote their time to the pursuit and meaning of truth."[69]

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[66] Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

[67] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[68] LEVESQUE, *supra* note III, 1, at 250.

[69] *Id.* at 252.

As described earlier in this part,[70] the dual purposes of the marketplace of ideas are attainment of truth and the testing process through which truth is ascertained. The marketplace metaphor does not connote a panoptically benevolent bazaar that assumes all ideas are of equal value and worth. Any physical market will temporarily house goods both that fly off the shelves and those that collect dust due to lack of consumer interest; many products will be discontinued altogether.

So, too, is the market of ideas. The problem is not whether an idea is not accepted or embraced. The rejection of bad ideas is part of the Millian vetting process of determining truth. The problem in this case, then, is not that an idea has been considered and rejected; it is that for minors, certain ideas are not even permitted in the marketplace at all, so there is no way to tell if the merchandise is good or bad. The ostensibly offensive ideas are simply presumed corrupt and banished to the ideational black market without the chance to legitimately prove themselves. This forced removal of certain types of speech from the marketplace of ideas, then, seems to undermine the theory's very point.

This troublesome tendency is compounded because, as Professor Eric Segall points out, "there is no societal consensus about what constitutes harmful speech even as to minors."[71] The resulting lack of definition and evidence of injury gives both judges and lawmakers—however well-intentioned—dangerously broad latitude to censor speech that could presumably harm children.

Even if definitions were laid out and empirical evidence of harm were found, however, "proof of harmfulness to minors cannot, by itself, justify a First Amendment exception for child

[70] *Supra* Part IV, Section A. 1.

[71] Segall, *supra* note III, 92, at 715.

protection censorship," Garfield writes. "Social scientists, after all, might be able to show that minors would be upset by a wide range of information, including information about AIDS, abortion, the Holocaust, or other controversial topics."[72]

Levesque concedes that minors are certainly likely—as are adults—to mishandle ideas and run roughshod through the marketplace. "But, from a market perspective," he writes, "this potential for mistakes does not, by itself, devalue adolescents' market participation. Healthy adolescent development actually depends on opportunities to practice and engage in processes of trial and error. Those experiences facilitate the development of self-knowledge, a better sense of the world, and greater moral understanding."[73]

This concept can be directly applied to the controversial and currently litigated laws recently passed in California and New Jersey that restrict doctors and counselors from engaging in SOCE with minors, regardless of the wishes of either parents or the minors themselves.[74] Even though, as Columbia University psychology Professor Paul Appelbaum pointed out, no scientific evidence was found supporting either SOCE's efficacy or potential for harm,[75] the states of California and New Jersey nonetheless removed speech related to sexual orientation from the marketplace of ideas for a large portion of the population by criminalizing its very utterance.

Restricting minors' access to controversial/ostensibly harmful topics is problematic not only within the marketplace of ideas metaphor, but it is also troubling from the democratic self-governance position as well. Levesque unequivocally states that "If governments must protect

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[72] Garfield, *supra* note III, 54, at 615.

[73] LEVESQUE, *supra* note III, 1, at 254.

[74] *See supra* notes 2 – 4 (describing CAL. BUS. & PROF. CODE § 865.1 (2013) and A3371, Reg. Sess. (N.J. 2012-13)).

[75] Paul Appelbaum, *Regulating Psychotherapy or Restricting Freedom of Speech? California's Ban on Sexual Orientation Change Efforts*, PSYCHIATRIC SERVICES, AM. PSYCHOL. ASS'N, Jan 1, 2014.

free speech to ensure self-governance and foster civic participation, then adolescents own a strong claim to free speech."[76]

If the application of self-governance theory were limited strictly to the "voting of wise decisions,"[77] then this justification would do little to support the speech access rights of minors. Yet as illustrated above, this is a spurious conception because the realm of speech applicable to politics, "religion, literature, art, science, and all areas of human learning and knowledge"[78] is vast and certainly encompasses speech applicable to minors.

But even if wise voting alone encompassed the scope of democratic self-governance and expression, the view would nonetheless be shortsighted because the non-voters of today are the voters of tomorrow. Levesque makes the Meiklejohnian connection to minors this way:

> Democracy thrives when it makes information available and helps citizens develop the ability to process information thoughtfully. When democracy thrives, thoughtful citizens foster respect for the dignity and worth of every human being and a tolerance of difference, a willingness to engage in public policy issues beyond the act of voting, a readiness to exercise civil rights when they are threatened, a commitment to civil and rational discourse, and concern for the common good. This readiness emerges only with deep commitments, and such commitments only arise after fully engaging ideas.[79]

Levesque further suggests that "[h]ealthy, responsible development arises from an active choice-making process and from the necessity to confront, evaluate, and make choices based on available information and resources."[80] When information and resources are restricted, therefore, society runs the risk of raising generations of dullards who posses little ability to make decisions or parse through difficult ideas—factors that are directly deleterious to the democratic

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[76] LEVESQUE, *supra* note III, 1, at 254.

[77] MEIKLEJOHN, *supra* notes IV, 16, at 26.

[78] EMERSON, *supra* note IV, 9, at 7.

[79] LEVESQUE, *supra* note III, 1, at 256.

[80] *Id*. at 253.

process. Judge Richard Posner expounded further upon this concept while writing for the Seventh Circuit Court of Appeals regarding the rights of minors to access controversial video game content:

> Children have First Amendment rights. This is not merely a matter of pressing the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend,[81] illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.[82]

The Supreme Court's (perhaps implicit) recognition of the democratic self-governance theory is manifested within the tiered value system of First Amendment protections. "Speech on political subjects," writes University of Chicago Professor David Strauss, receives "extensive and powerful protections. . . . The Supreme Court has, accordingly, recognized a distinction between high-value and low-value speech,"[83] with speech of political importance at the top. In its controversial 2010 ruling in *Citizens United v. Federal Election Commission*,[84] the Supreme Court made it clear that "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[85] It also added that "the First Amendment stands against

[81] *See* Gabriel Teninbaum, *Reductio ad Hitlerum: Trumping the Judicial Nazi Card*, 2009 MICH. ST. L. REV. 541, 573 (discussing the popular blog The Volokh Conspiracy's invoking of the tongue-in-cheek "'Godwin's Law,' a rule that proposes that as an online discussion grows longer, it becomes a near certainty that someone will support their point by making a comparison to Nazis or Hitler;" this law may or may not also apply to other forms of communication, such as appelate court opinions or master's theses).

[82] Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 577 (2001).

[83] DAVID STRAUSS, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 37 (Lee C. Bollinger & Geoffrey R. Stone eds. 2002).

[84] 558 U.S. 310 (2010).

[85] *Id.* at 340.

attempts to disfavor certain subjects or viewpoints."[86] Justice John Paul Stevens further described the Court's long-standing tradition when he wrote that "political speech occupies the highest, most protected position"[87] within free-speech jurisprudence. As this concept concerns minors, Garfield makes the following application:

> The fact that the Court has repeatedly acknowledged that "political speech" goes to the core of the First Amendment values suggests that child-protection censorship denying minors access to political speech clearly would be unconstitutional. This principle ensures that efforts to deny minors access to information about socialism or the Vietnam War, for example, would be promptly invalidated.

Despite this seemingly clear constitutional directive, legislatures and judges often experience difficulty resisting the apparently tantalizing temptation to preserve children's presumed innocence at the expense of freedom of speech and thought. Few issues, for instance, are more embroiled in contemporary United States politics than abortion.[88] Yet in the summer of 2013, the Supreme Court declined to hear a Colorado case in which abortion protestors were banned from demonstrating near a church because their larger-than-life-sized photographs of aborted fetuses were presumed detrimental to children's psychological wellbeing.[89] The Colorado appellate court that made the ruling based its decision principally on the premise that the images were "gruesome," as evidenced when, upon sight of the pictures, the pastor's daughter "buried her face in her hymnal."[90] Despite the fact that the speech was of direct

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[86] *Id.*

[87] R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992).

[88] *See* Operation Save Am. v. City of Jackson, 275 P.3d 438, 450 (Wyo. 2012) (containing Justice Michael Golden's assertion that "Among the issues in the United States today that are divisive and inflammatory, none is so hotly debated as that of abortion. On the national stage, the issue is front and center in the halls of Congress, on the political campaign trail, and in many state legislatures. Indeed, contending that the abortion issue is not one of great public interest and importance is as unsupportable as contending that the Earth is flat or the sun rises in the west and sets in the east").

[89] St. John's Church in the Wilderness v. Scott, 194 P.3d 475 (2008).

[90] *Id.* at 484.

political concern and took place peaceably in a traditional public forum (the street and sidewalk across the street from the church),[91] the unsubstantiated assumption of harm to minors was somehow enough to silence the speech. This type of heckler's veto,[92] according to Ninth Circuit Court of Appeals Judge Harry Pregerson, represents a "departure from bedrock First Amendment principles [that] allow[s] the government to restrict speech based on listener reaction simply because the listeners are children.[93]

In cases such as this, the so-called intellectual bubble and the voting of wise decisions are arguably not even the most pressing concerns. Because minor-based speech regulations generally do not differentiate between seven-year-olds and seventeen-year-olds,[94] certain minors can be categorically denied material directly relevant to them. In the case of the abortion-related speech, for instance, it seems ludicrous to suggest that a teenaged boy old enough to impregnate a girl or a teenaged girl old enough to become pregnant should be isolated from information that could very well pertain directly to their lives.

The transitional teenage years, Levesque writes, are critically important for personal growth and development, both physically and mentally. As youth increasingly discover new truths and form new opinions, the resulting "webs constitute the necessary building blocks of human development."[95] Such webs are significant, he writes, because

> [i]ntrinsically, free speech promotes and reflects human personality and fosters the essence of human dignity. Autonomy to think, listen, and speak for oneself is essential to a free and self-determining personhood, the true foundation of liberty. .

[91] *Id.* at 478.

[92] The concept of the heckler's veto, which first appeared in Harry Kalven's book, THE NEGRO AND THE FIRST AMENDMENT (1965), describes speech censorship that comes from listeners' reactions to a particular message.

[93] Center for Bio-Ethical Reform v. Los Angeles County Sheriff Dept., 533 F.3d 780, 790 (2008).

[94] *See* HEINS, *supra* note III, 35, at 259 (describing how "[h]arm-to-minors censorship frequently fails to make these age- and maturity-based distinctions. Too often, it merges toddlers, grade-schoolers, and teenagers into one vast pool of vulnerable youth").

[95] LEVESQUE, *supra* note III, 1, at 239.

> . . No longer limited to championing free speech's role in furthering our political democracy, First Amendment law now recognizes the role free expression plays in private as well as broader public spheres, including the search for truth, self-realization, [and] self-fulfillment.[96]

But self-realization and self-fulfillment are abridged, C. Edwin Baker asserted, when citizens (including minors, presumably) are barred from hearing about certain ideas.[97] Minor-based censorship, though, may not only be an affront to personal dignity, self-realization and autonomy. When youth are denied access to certain ideas, they may also be placed in an intellectual bubble, barred from information that may be important to their wellbeing, denied access to the full marketplace of ideas and rendered developmentally stunted. As concerning as this may be, however, minors, themselves, may not the only demographic harmed by regulations aimed at youngsters' speech access.

Effect on Parents and Other Adults

The primary difficulty of speech regulations in general is determining what, exactly, to censor. For "[w]hat is one man's amusement," the Supreme Court has ruled, "teaches another's doctrine,"[98] and "one man's vulgarity is another's lyric."[99] Considering the dearth of evidence as to what is actually harmful, censors are left to personal intuition and anecdotal accounts to select certain words, phrases or ideas that could be construed detrimental. One oft-cited example to illustrate this tension is Shakespeare's Romeo and Juliet. "After all," Catherine Ross relates concerning the classic play, the two Veronan lovers "defied their families, engaged in ardent

[96] *Id.*

[97] BAKER, *supra* note IV, 7, at 59.

[98] Winters v. New York, 333 U.S. 507, 510 (1948).

[99] Cohen v. California, 403 U.S. 15, 25 (1971).

teenage sex, and committed suicide."[100] Are such depictions fit for minors' consumption? What about adults?

The presumption upon which child-protection censorship is founded is that children are different than adults. Garfield explains the regulators' thought process this way: "Because children's 'peculiar vulnerabilities' and their inability to make 'informed, mature decisions,' the government should be permitted to intervene and protect them from noxious ideas."[101]

Although scientific evidence firmly supports the concept that minors typically tend to act less rationally than adults,[102] the enormous number of exceptions to this generality renders attempts to apply it to policy potentially questionable. For if the state were granted the authority to shield information from any demographic based solely upon presumed maturity or lack thereof, then it is likely that—in terms of absolute quantity, not percent—more speech would be barred from adults than children. As Garfield points out, "[t]he notion of children as being less mature than adults is based upon crude generalizations. To say that children make fewer 'mature' decisions than adults ignores the multitude of adults who routinely make immature decisions, whether about drug or alcohol consumption, gambling, or the assumption of debt."[103]

If the notion of the state blocking the speech access of millions of immature adults seems unconstitutionally intrusive, why does it seem any less intrusive for minors? The potential danger of this line of reasoning is perhaps better illustrated by turning the rationale on its head.

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[100] Ross, *supra* note III, 68, at 456.

[101] Garfield, *supra* note III, 54, at 607.

[102] *See* Laurence Steinberg, et al., *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,*" AM. PSYCHOLOGIST, 64 (7), 583, 594 (2009) (asserting that intellectual and emotional maturity can develop more slowly in some people than others and that "[j]urists, politicians, advocates, and journalists seeking a uniform answer to questions about where we should draw the line between adolescence and adulthood for different purposes under the law need to consider the asynchronous nature of psychological maturation").

[103] LEVESQUE, *supra* note III, 1, at 603.

A enterprising, well-meaning legislator may, for instance, ask himself the question another way: "If we can block harmful materials from children based upon their immaturity, why don't we, for the betterment of our democracy, also construct legislation to prevent certain ideas entering the minds of immature adults?"

But even if the potentially artificial distinction of maturity remains intact and adults are legislatively permitted to access that which is intended for them, then minor-protection regulations still pose problems for adults' First Amendment rights. For when courts attempt to make all speech agreeable for the lowest common threshold of tolerance, then the result, as the Supreme Court ruled in *Butler v. Michigan*,[104] is the "reduc[tion of] the adult population to reading only what is fit for children."[105]

In *Butler*, the defendant was charged with selling a police officer a book that was considered by the trial court to be potentially harmful to the morals of youth—were it to fall into the hands of youth. "The State insists that," the Supreme Court wrote, "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."[106] With this decision, the Court determined that depriving adults of speech merely to shield minors is an excessive reaction to a relatively small problem.

Such concerns of vagueness and overbreadth have plagued child-censorship for decades. More than ten years ago, Professor Charles Lugosi wrote that "a prior restraint on First Amendment rights, which attempts to lessen the psychological harm that might be inflicted on an

[104] 352 U.S. 380 (1957).

[105] *Id.* at 383.

[106] *Id.*

intended class of persons, may be unlawful."[107] In the early days of the Internet, for example, the high court struck down two federal laws intended to keep minors from accessing potentially offensive speech online because enforcing the laws would have created the unintended consequence of barring adults from content access.[108] But similarly overbroad statutes—such as the Colorado abortion protest ban that was permitted to stand last year[109]—have remained on the books. In such cases, the governmental attempts to protect minors from emotional or psychological distress effectively blocks both children and adults in a specific location from exposure to the speech, thus igniting the domiciliary edifice with a regulatory Zippo.

When adults' free-speech rights are caught up in regulations intended for those under eighteen years of age, all the theoretical problems discussed in the previous section—regarding the marketplace of ideas, democratic self-governance and personal autonomy—also come into play. For in such cases, not only are minors subject to injuries of dignity, self-realization, knowledge and personal development, but their elders are as well.

Effect on the Relationship between Children and their Parents

Much of the *Ginsberg* opinion, as well as the subsequent discussion of the child-speech access issue, revolves around the assumption that parents need governmental help raising their offspring. "While the supervision of children's reading may best be left to their parents," Justice William Brennan scribed for the *Ginsberg* majority, "the knowledge that parental control or

[107] Charles Lugosi, *The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand*, 79 DENV. U. L. REV. 91, 98 (2001).

[108] *See supra* note I, 18 regarding the Communications Decency Act and its legislative kin, the Child Online Protection Act.

[109] *See supra* note IV, 89 and accompanying text (concerning the particulars of St. John's Church in the Wilderness v. Scott).

guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them." But is this aiding of parents a legitimate government interest—and if so, how compelling is it?

As explained in detail in an earlier part, the substantive due process rights of parents rarely face serious judicial opposition.[110] Individual and familial autonomy rests at the heart of the Constitution. As the high court first expressed in *Meyer v. Nebraska* and then carried over to a plethora of subsequent cases, "it is cardinal with us that the custody, care and nurture of the child reside first in his parents."[111] In *Meyer*, the Court constitutionally contextualized the concept of the singular eminence of the family unit by discussing Plato's ideal as described in his *Republic*:

> Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent." . . . Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[112]

Violence is wrought, however, when the state unduly intervenes with the parent-child relationship by acting on the supposition that it knows how to raise a child better than his or her parents do. Ross contends that this is the precise effect of most child censorship efforts. She writes: "Scrutiny of the various arguments put forth in support of the notion that state regulations on speech actually empower any family reveals that regulations on speech adopted to protect children in fact threaten to undermine parental authority instead of reinforcing it."[113] Garfield

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[110] *Supra* Part II.

[111] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[112] *Meyer*, 262 U.S. *supra* note II, 39, at 401 – 402.

[113] Ross, *supra* note III, 68, at 477.

also weighs in, writing that "[t]he state's interest in regulating speech to facilitate parental control, therefore, rests on shaky ground. The fact that parents have a constitutional right to control their children's upbringing does not necessarily imply that they have a right to state censorship.[114]

Regarding such censorship, it is worth noting the important distinction between government regulations intended to help parents raise their children and governmental regulations intended to help children, regardless of their parents. In the latter type of situations, parents may be either unable or unwilling (or nonexistent in the case of orphans) to determine appropriate times to expose their children to certain ideas. To allow for such cases, the government does have an obligation to protect minors from harm—physical harm in particular.

Yet the *Ginsberg* rationale that parents need governmental help raising their children is based on at least three dubious assumptions, the first of which, as Garfield queries, is "whether helping parents deny their children access to ideas is a legitimate use of the state's power."[115] The second notion is that all minors require protection. The third is that all parents actually need or want help in the first place.

Reconsidering these fundamental assumptions may reveal that the presumed government interest of helping parents raise their children by blocking their access to certain ideas may be counterproductive. Instead of helping the relationship between parent and child, the well-meaning government efforts may, in fact, "tacitly discount the capacity of parents in all types of families to raise their children without the government's intervention."[116] And when the state

[114] Garfield, *supra* note III, 54, at 617.

[115] *Id.*

[116] Ross, *supra* note III, 68, at 483.

does intervene by making "controversial material entirely unavailable, it preempts critical parental discretion about what children can see or do."[117]

Not every family is alike, and the unequivocal precedents of *Meyer, Pierce* and other cases ensure that the government cannot constitutionally construct laws that attempt to homogenize families or children. While discussing the different types of parenting styles, Ross remarks that "[s]ome want their children to hear everything, others virtually nothing. These disparities make it nearly impossible for the government to establish criteria that will not favor one family to the detriment of others."[118]

Even if that vast majority of parents desired the government's help in keeping their progeny from learning too much too quickly, Garfield suggests, "there still must be limits on which types of speech the government could ban. Otherwise, the government could deny minors access to information about atheism or the Cuban revolution simply because parents supported it."[119]

It bears pointing out that if some parents wish to withhold information about the Cuban revolution—or anything else—from their own youngsters until the parents think their children can understand what it means, it is within their constitutional rights to do so. *Who* is withholding information is of primary importance, although ideally, as the marketplace of ideas, democratic self-governance and individual autonomy theories suggest, minors should have access to as wide a range of information as they can intellectually handle, especially in their teenage years as their cognitive abilities are in full bloom.[120] As Garfield writes, "If the Court believes that the

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[117] *Id.* at 477.

[118] *Id.* at 481.

[119] Garfield, *supra* note III, 54, at 621.

[120] In some European countries, age-based considerations for both emotional and cognitive maturity are more stratified than in the U.S.; some European film "niche filtering" proxies, for instance, use year-by-year (such as

government has a compelling interest in censoring speech to assist parents, it must explain why parents should not be forced to compete with an uncensored marketplace of ideas."[121] But unfortunately for the sake of wide-ranging governmental regulatory attempts that generally block information to six-year-olds and sixteen-year-olds alike, every human matures at a different rate. This contributes to the unfortunate tendency of many regulatory attempts to be clumsy, counterproductive and, far too often, unconstitutionally overbroad.[122]

Instead of silencing constitutionally protected speech, then, a much more constitutionally responsible solution would be for minors, when confronted with offensive language, to perform the same action that the Supreme Court suggested to their elders: avert their eyes to avoid further sensory bombardment[123]—or even bury their faces in their hymnals.[124]

The key to this concept is not that keeping any idea from any child is always wrong. Some children most assuredly need sheltering from certain ideas until they are mature enough to handle them reasonably. But who is better suited to make such determinations if and when they need to be made? Parents, rather than the government, certainly possess a clearer, more individualized and nuanced understanding of what information, if any, should be shielded from their children. "Parental autonomy values are at issue," Ross argues, "when the state substitutes

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"suitable for seven years old and up"), sliding gradients for many different types of ostensible harms beyond sex and violence (such as "tolerance") which allow for highly specified age- and content-specific regulations. HEINS, *supra* note III, 35, at 217 – 219.

[121] *Id.* at 617.

[122] Courts have applied this concept on several occasions, including the Seventh Circuit Court of Appeals in American Amusement Machine Association v. Kendrick (244 F.3d 572 (2001). In *Kendrick*, the court opined that "since an eighteen-year-old's right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either." *Id.* at 577.

[123] Cohen v. California, 403 U.S. 15, 21 (1971).

[124] *See supra* note IV, 89 (describing how in St. John's Church in the Wilderness v. Scott, (194 P.3d 475 (2008)), protestors were banned from appearing near a church because the pictures they held were deemed disturbing to minors).

its own value preference and judgments for parental discretion regarding otherwise legal activities."[125] Policies based upon a *carte blanche* assumption of speech-catalyzed, universal corruptibility for all minors not only incur the homogenization of values but also insult parents' abilities to provide each child an individually tailored approach handling mature subject matter.

But beyond these problems, such regulations also hint at an even more insidious threat to parental rights. Ross explains that "[o]nce the state regulates communications in order to protect children from the 'harm' such communication would allegedly inflict, it is but a short step to label parents who disagree with majoritarian views and the government's content choices as inadequate in their role as parents."[126] This type of scenario, platonically ideal though it may be, doubtless denotes "violence to both letter and spirit of the Constitution."

[125] Ross, *supra* note III, 68, at 486.

[126] *Id.* at 482.

CHAPTER 5
CONCLUSION

The introduction proffered three basic questions to be analyzed over the course of this thesis. The condensed evaluations of each are concisely summarized below.

What Are the State's Interests in Protecting Minors from Distasteful and/or Potentially Harmful Speech?

The ambiguity and lack of explanation from the *Ginsberg* court regarding *why* minors need more speech regulations than adults denote how firmly established the presumed state interest in child censorship has become.[1] Scientific evidence concerning minors and violent speech is inconclusive; and evidence about minors and sexual speech is difficult or unethical to obtain. So if the interest is not open to empirical criticism, what type of analysis is appropriate when considering the interest's efficacy? Levesque explains the paradox created by the *Ginsberg* mentality this way:

> Ethical and moral questions are by their nature not susceptible to empirical proof. . . . Empirical attacks on the government's purported independent interest miss the point. They challenge an unmade assertion and fail to address the law's true concern: whether the State has a legitimate or compelling interest in inculcating moral and ethical values in children by controlling their access to indecent materials as a step towards creating a morally virtuous citizenry.[2]

The more relevant question may become, then, is the government the most suitable vehicle through which values can be inculcated? Ross, Heins, Segall, Garfield and Levesque tend to think it likely is not. As Ross writes, "The government's claim of an independent interest often reflects concerns about social anxieties and personal morality rather than any demonstrable

[1] Garfield, *supra* note III, 54, at 614.

[2] LEVESQUE, *supra* note III, 1, at 195.

harm precisely linked to speech."[3] In fact, Garfield suggests, the interest in protecting minors has historically been a family matter anyway, beyond the scope of state concern:

> The concept of sheltering children from speech is largely a modern conceit. . . . Children of the Middle Ages, who slept in their parents' beds and were married off as close to puberty as possible, [*sic*] did not need sheltering from sexually explicit speech. Similarly, contemporary children living in war-torn countries. . . need more than limited access to violent video games to learn peaceful conflict resolution.[4]

This is not to make the flippant contention that some sense of childhood naivety is not a pleasant luxury suitable for certain families who choose to indulge in the propagation of juvenile obliviousness for the sake of social and parental expediency. But the furthering of such a model is hardly a compelling interest. It would be nice for no child to ever be emotionally scarred. It would also be nice for no child to ever mimic evil speech or replicate wickedness they observe on a television screen. But "it would be nice" is rarely a good rationale for sound policymaking, especially when it may be at odds with a quality education, personal development, parental rights or the First Amendment.

This line of reasoning indicates, then, that a government interest is scant, and ought to be judicially treated as such. Surely the government possesses a strong *parens patriae*, independent interest in protecting children from physical abuse or neglect, no matter who the abuser or neglector may be. But the line between abuse and access to speech is a thick one, and until the line is crossed, the government may be better off remaining a neutral, disinterested party when it comes to what children may see or hear.

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[3] Ross, *supra* note III, 68, at 522.

[4] Garfield, *supra* note III, 54, at 567.

How Much Proof of Actual Harm to Minors from Speech is Required before the State Should be Allowed to Intervene and Offer Protection?

The fact that little evidence exists linking actual harms to speech access is troublesome. Yet even if discernible harms were determined, laws intended to curb the effects of such speech would still need to be handled delicately in order to best balance all interests involved. For instance, if scientifically valid studies linked a correlation between exposure to SOCE and a propensity to suicide, or between playing first-person shooter video games and a tendency to get into fights, or between viewing photographs of aborted fetuses and a proclivity toward delinquency, then *ad hoc* balancing tests would likely be necessary to determine if the amount of harm caused would justify the abridgment of fundamental liberty interests. For if such balancing tests are handled rashly, the cry of "it's for the children!" can become an all-too-convenient guise for the governmental constriction of both children's and adults' rights,[5] a phenomenon illustrated by a recent example from the United Kingdom.

In February 2014, the Scottish Parliament passed (with 103 yeas and fifteen abstentions) the Children and Young People Bill, which attempts to preemptively control potential child abuse by specifically assigning a government-sponsored social worker to care for every single person in Scotland under the age of eighteen.[6] Appalled by the law, a pair of commentators wrote in *The Scotsman*:

> No doubt those who voted for the imposition of a "Named Person," otherwise called a "guardian", for every child in Scotland up to the age of 18, did so because they thought it would save lives, or intervene in cases of child abuse or child neglect etc. However, there is already a social work structure for such matters and people whose entire energies are devoted to the care and protection of children. . . . These terrific people are called parents and their role in life is to bring up their own

[5] *See* Andrew Kramer, *Russians Selectively Blocking Internet,* NY TIMES, March 31, 2013, at B2 (describing how the Russian government began in spring 2013 blocking all citizens' access to social media "content that it deems illegal or harmful to children").

[6] Children and Young People (Scotland) Bill, 2014, (SP 27B) Session 4.

> children without extra busybodies sticking their noses into their lives. For every family that has abused their children, there must be at least one public servant who has taken children away from their family, often in instances that take the breath away. . . . You could never imagine such a law standing up to the scrutiny of the U.S. Supreme Court.[7]

Yet Catherine Ross imagined it fourteen years ago, when she stated that these kinds of laws were but a "short step"[8] away from child-protection censorship, because even well-intended "child neglect statutes frequently have been used in an effort to legitimize government intervention in culturally nonconformist families."[9]

What constitutes parental nonconformity becomes the dicey issue. As Garfield explained regarding the Supreme Court's upholding of the FCC's censorship of George Carlin's "Seven Dirty Words" routine: "liberal parents might complain that the government's ban teaches children that the language in Carlin's routine is taboo, but the conservative parents would respond that the absence of a ban would teach children that the words are socially acceptable."[10] Hypothetically, then, if scientific evidence were discovered suggesting that exposure to these words were harbingers of deviancy or societally detrimental activity, would liberal fathers and mothers be governmentally construed as unfit parents for desiring their children to hear Carlin's language?

In the absence of scientific evidence illuminating these issues, such contemplations are somewhat heuristic. Vague statistical correlations add little to the discussion. Yet if strong correlational indications do become available, courts would need to critically weigh several factors to determine whether the harm caused by allowing minors to access *potentially* harmful

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[7] Andrew Gray & Otto Inglis, *'Guardians' – or Orwellian Busybodies?*, THE SCOTSMAN, Feb. 22, 2014, accessed online at http://www.scotsman.com/news/opinion/letters/guardians-or-orwellian-busybodies-1-3314166 .

[8] Ross, *supra* note III, 68, at 482.

[9] *Id.*

[10] Garfield, *supra* note III, 54, at 621.

speech is the lesser of two evils—the other being the *guaranteed* abridgment of constitutional freedoms.

What Legal Standards Should be Employed in Determining when Speech is Harmful to Minors?

While writing for the 8-1 majority in *Snyder v. Phelps,*[11] a decision that upheld the right of a fringe political faction to protest at a U.S. military funeral, Chief Justice John Roberts pronounced, "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course."[12]

As exceptional as this chosen course is, however, it is not devoid of the occasional speaker-punishing speed bump—such as the frequent mishandling of minors' speech access. Basic First Amendment jurisprudence insists that regulations of speech based upon content—or listeners' reaction to content—are presumptively unconstitutional. In order to be upheld, such laws must pass strict scrutiny rather than a simple rational basis test—as was used in *Ginsberg*—which merely determines whether the legislative body that enacted the statute acted rationally.

Considerations regarding how to apply standards of review are necessary now more than ever, especially in the wake of *Brown v. Entertainment Merchants Association*, which raised the bar lawmakers must hurdle in order to censor speech based on content. Based on the lack of scientific support to adjudicate otherwise, courts would do well to simply take the two-pronged test of strict scrutiny and apply it directly to content-regulation cases regarding minors:

- First, is the protection of minors a compelling government interest?

[11] 131 S. Ct. 1207 (2011).

[12] *Id.* at 1220.

- Second, is the law narrowly tailored to meet the interest while abridging the least amount of speech possible?

The general answer to the first question can vary, but is often no. Because there was no link between the speech and presumed harm in *Brown*, for instance, there *was* no harm and, therefore, no interest. Assuming an actual interest exists, however, the answer to the second prong is also often no, because less intrusive means available to achieve the interest usually exist.[13] As the commentators for *The Scotsman* pointed out in Scotland's relatively extreme example of government infringement, less intrusive means of protecting children are palpably evident: the children's parents.

Furthermore, the accompanying, unintended harms of some regulations not only render such efforts constitutionally questionable, but all too often they are also tangibly detrimental to the wellbeings of both minors and adults. As Justice Scalia wrote, "[t]he vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."[14]

The first layer of those purposes can come from limited access to the marketplace of ideas, intellectual and civic impedance and developmental retardation. Also, vagueness and overbreadth of such laws are often problematic for both children[15] and their parents, because

[13] The non-govenemtnal means to help parents in their efforts to block their children's access to speech, although far from perfect, are rapidly expanding. Even as technology increases the amount of potential speech available to minors, so, too, is the advancement of technology better equipping parents to monitor and censor what their children can see and hear. *See* Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online,* 2007 B.Y.U.L. REV. 1417, 1467 (discussing how a "simple change in technology can open new possibilities for addressing the problem of Internet pornography").

[14] Hill v. Colorado, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting).

[15] For example, the outlandishly vague legislative standard in *St. John's Church in the Wilderness v. Scott* of censoring that which is "disturbing to . . . children," would generate, if universally and honestly applied, massive regulatory overhaul for everything from Discovery Chanel documentaries about tarantulas to the celebration of Halloween. *See Scott,* 296 P.3d, *supra* note IV, 89, at 278.

adults' speech access is often caught up in laws targeted at minors. In many cases, parental rights are also usurped because an ersatz governmental paternalism can replace the genuine article; as Segall articulates, "Not only is government regulation of indecency unlikely to help parents raise their children as they see fit, it actually makes it more difficult."[16]

This is not to say that the state possesses no interest in the physical (if not the psychological) protection of children. It is certainly an important—or even a compelling—interest. But if, as the opinion in *Ginsberg* asserts, the interest's primary goal is to foster "growth into . . . well developed men and citizens,"[17] then perhaps it is high time to reconsider how to best accomplish this goal. "Banning speech with the goal of reinforcing parental preferences," Ross states, "is the height of irony,"[18] for neither the parent-child relationship nor the child himself is generally better off on account of it.

When there is an apparent conflict between protecting the presumed innocence of youth and other—fundamental—liberties, it is important for courts to remember that the free-speech rights of minors and adults, as well as parental rights, are compelling governmental interests in and of themselves. So ultimately, therefore, if there is to be suppression regarding what minors are allowed to access, courts should adjudicate under the presumption that, both practically and constitutionally, parental guidance is generally superior to governmental censorship.

[16] Segall, *supra* note III, 92, at 715.

[17] *Ginsberg*, 390 U.S. *supra* note IV, 45, at 640 – 641.

[18] Ross, *supra* note III, 68, at 482.

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BIOGRAPHICAL SKETCH

Eugene (Minch) Minchin is a ninth-generation Floridian who received his undergraduate degree from the University of Florida College of Journalism and Communications. He also received his M.A.M.C. from U.F. in the spring of 2014 and currently resides with his wife, Suzanne, in Gainesville. He is slated to begin doctoral work in media law at U.F. in fall 2014.