

**THIS BOOK IS NOT YET RATED:
AGE RATINGS IN THE LITERARY MARKET VS.
MINORS’ FIRST AMENDMENT RIGHT TO
RECEIVE INFORMATION[♦]**

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“Let there be wicked kings and beheadings, battles and dungeons, giants and dragons, and let villains be soundly killed at the end of the book. Nothing will persuade me that this causes an ordinary child any kind or degree of fear beyond what it wants, and needs, to feel. For, of course, it wants to be a little frightened.”

- C.S. Lewis¹

INTRODUCTION

The First Amendment of the United States Constitution guarantees not only the right to disseminate information, but also the right to

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¹ C.S. LEWIS, *On Three Ways of Writing for Children*, OF OTHER WORLDS: ESSAYS AND STORIES 22, 31 (1966).

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receive it.² Like adults, minors also have a First Amendment right to receive information, but this right is more limited in scope.³ However, while the government can exercise broader discretion in censoring information as to minors, this discretion is not often exercised without considerable controversy. The Supreme Court has stated that “minors are entitled to a significant measure of First Amendment protection, and only in *relatively narrow* and *well-defined* circumstances may government bar public dissemination of protected materials to them.”⁴

In the absence of widespread government intervention into child protection censorship, many private organizations have stepped in to fill the void. Although not enforced by law, the age rating systems of the Motion Picture Association of America (“MPAA”) and the Entertainment Software Review Board (“ESRB”) have become *de facto* standards of classification—adhered to by their respective industries as if imposed by law.⁵ Large chain movie theaters and video game retailers use these age rating systems to limit minors’ access to movies and video games.⁶ The widespread acceptance of age rating guidelines for visual media has in turn led to the discussion of whether books—especially those geared towards minors—should be subject to a similar scheme.

In 2008, a group of leading book publishers announced a plan for children’s books to feature “age band” graphics containing age ratings similar to those popularized by the MPAA to rate films.⁷ Publishers championed age banding in children’s books in the belief that parents would welcome additional guidance when deciding what books to purchase for their children.⁸ Soon thereafter, however, notable children’s authors, such as Phillip Pullman, author of *His Dark Materials*, and J.K. Rowling, author of the best-selling *Harry Potter* series, raised protests to the age banding plan.⁹ Pullman spearheaded the “No to Age Banding” campaign, which attracted over 4,000 signatures

² *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *See also* *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (“It would be a barren marketplace of ideas that had only sellers and no buyers.”).

³ *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975).

⁴ *Id.*

⁵ Roy Eugene Bates, Note, *Private Censorship of Movies*, 22 STAN. L. REV. 618, 637 (1970); William Cross, Note and Recent Development, *Hot Coffee and Freeze-Dried First Amendment Analysis: The Dubious Constitutionality of Using Private Ratings for Public Regulation of Video Games*, 4 FIRST AMEND. L. REV. 299, 311 (2006).

⁶ Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 CARDOZO ARTS & ENT. L.J. 135, 138 (1997).

⁷ Lindsay Irvine, *Publishers Give New Pledge on Age Banding*, THE GUARDIAN (July 9, 2008), <http://www.theguardian.com/books/2008/jul/09/news.lindsayirvine>. The age guidelines were 5+, 7+, 9+, 11+ and 13+/teen. *Id.*

⁸ Julia Eccleshare, *Publisher Admits Errors in ‘Damaging’ Age Banding Row*, THE GUARDIAN (Sept. 1, 2008) (internal quotation marks omitted) <http://www.theguardian.com/books/2008/sep/01/age.banding.philip.pullman>.

⁹ *Id.*

and led to the age banding plan's demise.¹⁰ The arguments behind the No to Age Banding campaign were that (1) young readers would not read books that had been branded appropriate for an age group lower than their own, and (2) a book that was branded as appropriate for older minors did not take into account the maturity levels of younger minors, who may attempt to read "mature" subject matter.¹¹

In 2010, Barnes & Noble ("B&N") teamed up with Common Sense Media to implement a color coding system on B&N's website that would flag books with sexual content, mature language, and violence.¹² This system was proposed with hopes of "empower[ing] parents with the tools and information they need to help kids get the best—and avoid the worst—of media and entertainment."¹³ Although opposing views to this B&N and Common Sense Media partnership did not gain the traction of the No to Age Banding campaign, there were concerns that certain aspects of this color coding system would take a book's plot out of context and "break[] a book down into these pieces that don't do justice to the whole."¹⁴ Four years later, as of the publication of this Note, the plan for color coded guidelines has yet to be implemented.

Although sneaking into movie theaters to watch the next highly anticipated R-rated film has long been a rite of passage for minors (16 and below), there is no such analogous experience for minors who "go into their local bookshop and buy Anais Nin's short stories, Bret Easton Ellis's *American Psycho* or Vladimir Nabokov's *Lolita*—all of which involve either explicit sex or violence . . ."¹⁵ Today, commercial successes such as *Fifty Shades of Grey* sell millions of copies and are prominently displayed in the windows of major booksellers.¹⁶ *New York Times* Bestsellers such as *The Hunger Games* and *Divergent* trilogies, are prime examples of young adult novels that thoroughly explore concepts of violence and death, while others, such as *Thirteen Reasons Why* and *Crank*, deal heavily with themes of suicide and drug abuse.

This Note proposes that while private self-regulatory associations such as the MPAA and the ESRB have established highly successful age rating systems for their respective mediums, it does not necessarily

¹⁰ NO TO AGE BANDING, <http://notoagebanding.org/> (last visited Oct. 17, 2015).

¹¹ *Id.*

¹² Judith Rosen, *Common Sense Raises Issues at B&N*, PUBLISHER'S WEEKLY (Feb. 23, 2010), <http://www.publishersweekly.com/pw/by-topic/childrens/childrens-book-news/article/42190-common-sense-raises-issues-at-b-amp-n.html>

¹³ Press Release, Barnes and Noble, Barnes & Noble and Common Sense Media Team Up to Help Parents Choose Kid-Friendly Books, Movies, Games and Music (Feb. 2, 2010), available at http://pickmeup.bn.com/press_releases/2010_february_5_common_sense.html (emphasis added).

¹⁴ Rosen, *supra* note 12.

¹⁵ Tom de Castella, *Fifty Shades of Grey: Are Children Able to Buy It?*, BBC NEWS (Aug. 30, 2012), <http://www.bbc.co.uk/news/magazine-19395813>.

¹⁶ *Id.*

follow that books should be subject to the same treatment. Age ratings are censorship which impinge on minors' First Amendment rights to receive information, and *parental control* is the better medium for limiting minors to reading age appropriate content. Furthermore, age rating systems do not take into account the varying levels of maturity in minors, and the visual nature of movies and video games—unlike books—leaves less room for minors to self-edit the “mature” content presented.

Part I of this Note explores the case law that has delineated the limits to the First Amendment—mainly it explores whether obscene, indecent, and violent speech are protected under the First Amendment. Part I also attempts to illustrate how—unlike the ratings process of private organizations like the MPAA and ESRB—the courts' threshold for restricting obscene, indecent, or violent speech is a high one. Part II.A and B discuss the workings of the motion picture and video game self-regulatory associations, as well as the criticisms launched at their respective age-rating systems. Part II.C provides an introduction into the debate of age rating for books. Finally, Part III extrapolates why books should not be subject to an age rating scheme.

I. LIMITS OF FIRST AMENDMENT

While the bedrock principle of the First Amendment is that “the government may not prohibit the expression of an idea simply because society finds the idea . . . offensive or disagreeable,”¹⁷ the United States Supreme Court has designated certain categories of speech as either protected or unprotected under the First Amendment. Among these categories are obscene, indecent, and violent speech.

Nonetheless, in restricting speech, the Supreme Court has specified the scope and limits of those very restrictions. As the cases below will illustrate, the Supreme Court has delineated how restrictions on speech affect minors' First Amendment right to receive information, as well as how it affects parents' role in limiting the types of materials to which minors are exposed.

A. *Obscene Speech*

In 1957, the Supreme Court in *Roth v. United States* held that obscenity is not a type of expression constitutionally protected by the First Amendment.¹⁸ As such, a federal obscenity statute that prohibited the mailing and delivery of “obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an

¹⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹⁸ *Roth v. United States*, 354 U.S. 476, 481 (1957).

indecent character,¹⁹ through the post office, did not impinge upon the First Amendment freedom of expression guarantee.²⁰

The *Roth* court defined obscene materials as those which deal with sex in a manner that appeals to prurient interests.²¹ However, recognizing that such a definition of obscenity could be subject to overbroad applications, and thereby impinge upon protected forms of speech, the Court made a distinction between obscene works and works that portray sex:

The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.²²

The *Roth* court determined that the test for obscenity is whether the average person, “applying contemporary community standards,” finds that the material, in its majority, appeals to prurient interests.²³ It emphasized that the test was not whether certain books, pictures or publications would arouse sexual thoughts in “a particular segment of the community, *the young, the immature or the highly prudish . . .*”²⁴

In 1971, *Roth* was superseded by *Miller v. California*.²⁵ In the same vein as *Roth*, the *Miller* court found that the sale of obscene materials through a mass mailing campaign did not enjoy First Amendment protection.²⁶ The *Miller* court, however, implemented a new three prong test:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁷

In essence, the Court now required that state obscenity statutes define obscenity *more narrowly*.

¹⁹ *Id.* at 479, n.1.

²⁰ *Id.* at 492.

²¹ *Id.* at 487.

²² *Id.* at 487–88.

²³ *Id.* at 489.

²⁴ *Id.* at 490 (emphasis added).

²⁵ 413 U.S. 15 (1973).

²⁶ *Id.* at 36.

²⁷ *Id.* at 24–25 (emphasis added).

Given that minors' First Amendment right to receive information is more limited in scope, states' ability to censor obscene speech as to the general adult population means that states have even more power in censoring such speech as to minors. Nonetheless, the Supreme Court "has rejected state action that would make material *entirely* unavailable to minors *regardless of* the minors' own parents' preferences for openness."²⁸ While the *Ginsberg v. New York* court upheld the constitutionality of a New York criminal statute that prohibited the selling of obscene materials directly to minors,²⁹ it carved out one significant exception: parents were still free to purchase such materials for their minors.³⁰ The *Ginsberg* court added that this limitation on obscenity regulations stemmed from the "constitutional interpretation [that] has consistently recognized . . . [a] parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."³¹

B. Indecent Speech

In *F.C.C. v. Pacifica Foundation*, the Supreme Court held that indecent speech is protected by the First Amendment, but that the Federal Government has the power to regulate indecent broadcasts pursuant to 18 U.S.C. § 1464.³² The Court found that broadcasting was one particular context in which constitutional protection of indecent speech is not absolute because "broadcasting is uniquely accessible to children, even those too young to read."³³ The *Pacifica* court distinguished obscene materials from indecent ones by stating that "[p]rurient appeal is an element of the obscene, but [that] the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."³⁴

Ultimately, "[c]hild-protection censorship tests the limits of the First Amendment only when it suppresses nonobscene sexual material."³⁵ This is because while it seems logical that obscene

²⁸ Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 233 (1999) (emphasis added).

²⁹ *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) ("material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined . . .").

³⁰ *Id.* at 639.

³¹ *Id.*

³² *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (stating that "[a]lthough [indecent] words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment."). See also 18 U.S.C. § 1464 (1976) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.").

³³ *Pacifica*, 438 U.S. at 749.

³⁴ *Id.* at 740.

³⁵ Andrew A. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 625–26 (2005).

materials can be prohibited as to minors, the prohibition of indecent—but not quite obscene—materials to minors is much more nuanced when considering that an indecency law runs the danger of being both overbroad and vague.³⁶ A law that—like the age rating systems of the MPAA or the ESRB—denies minors access to material that depicts human nudity would be unconstitutionally broad “because it would deny minors access to art history books, sex-education materials, and movies with even the mildest scenes of nudity.”³⁷

This is exactly what happened in *Reno v. ACLU*, where the Court held that two provisions of the Common Decency Act (“CDA”) which sought to protect minors from “harmful” materials on the Internet abridged speech protected by the First Amendment.³⁸ In part, the Court reasoned that these provisions were overbroad and vague because the provisions did not allow for parents to consent to their children receiving restricted speech, and did not provide a concise definition of the term “indecent.”³⁹

C. Violent Speech

Unlike obscene speech, violent speech is generally protected under the First Amendment. However, there are two main exceptions. In 1949, *Chaplinsky v. New Hampshire* found that “fighting words” which “by their very utterance inflict injury or tend to incite an immediate breach of the peace” was not constitutionally protected speech.⁴⁰ Similarly, in 1969, *Brandenburg v. Ohio*, held that “free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation,” unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴¹

However, as recently as 2011, *Brown v. Entm’t Merchants Ass’n* struck down a California statute that prohibited the sale of violent video games to minors without parental supervision.⁴² *Brown* stated that “new categories of unprotected speech”—beyond obscenity (*Roth*), fighting words (*Chaplinsky*), and incitement (*Brandenburg*)—“may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”⁴³ The Court reiterated that the United States

³⁶ *Id.* at 630.

³⁷ *Id.*

³⁸ *Reno v. ACLU*, 521 U.S. 844, 861 (1997).

³⁹ *Id.* at 865–66.

⁴⁰ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (refused to invalidate a New Hampshire public law, which prohibited directing offensive speech at others in public).

⁴¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (held that a statute that forbid assembly for purposes of advocating the need for crime, sabotage or violence as a means of reform was unconstitutional).

⁴² 131 S. Ct. 2729 (2011).

⁴³ *Id.* at 2734.

does not have a tradition of limiting minor's access to depictions of violence,⁴⁴ and that the State of California had been unable to show that the statute's restrictions on violent video games met parents' need to control their children's access to violent video games.⁴⁵ Furthermore, the *Brown* court found the statute over-inclusive because "[n]ot all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games."⁴⁶

II. SELF-REGULATORY ASSOCIATIONS AND VOLUNTARY AGE RATING SYSTEMS

As expounded upon in Part I of this Note, First Amendment jurisprudence has clearly established that courts must generally—but with certain very limited exceptions—"remain neutral in the marketplace of ideas."⁴⁷ In the absence of widespread government intervention, many private sector industries—such as for motion pictures and video games—have seen fit to self-regulate their own markets in hopes of both appeasing the public and to stave off potential future government regulation.⁴⁸ Self-regulation "refer[s] to a group of companies acting collectively . . . through a trade association" in order to (1) legislate: define the appropriate rules; (2) adjudicate: determine whether a violation of the rules has taken place; and (3) enforce: impose sanctions against violators who have ignored the rules.⁴⁹ Although not enforced by law, the age rating schemes of self-regulatory associations like the MPAA and the ESRB are *de facto standards* of classification.⁵⁰ This means that their age rating systems have achieved such a level of public acceptance and compliance that their guidelines are followed *as if* imposed by law.

Given the high rate of success of the age rating systems of the MPAA and the ESRB, should books also be subject to age ratings? What would the implications of an age rating scheme for books have on the First Amendment rights of minors?

A. Motion Pictures

In 1922, a nonprofit trade association, the Motion Pictures Producers and Distributors Association ("MPPDA")—later renamed the Motion Picture Association of America—was formed to protect the

⁴⁴ *Id.* at 2736.

⁴⁵ *Id.* at 2740.

⁴⁶ *Id.* at 2741.

⁴⁷ *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).

⁴⁸ Angela J. Campbell, *Self-Regulation and the Media*, 51 *FED. COMM. L.J.* 711, 715 (1999).

⁴⁹ *Id.* at 714–15.

⁵⁰ *Bates*, *supra* note 5, at 637 (1970); *Cross*, *supra* note 5, at 311.

interests of the film industry in response to public objections over increasingly explicit films, as well as to curtail potential government intervention and censorship.⁵¹ In 1930, the MPPDA adopted the Motion Picture Production Code which set forth the rules of moral conduct through which films could obtain a seal of approval.⁵² Although submitting to the code was voluntary, filmmakers that refused to submit their films for evaluation were likely to be boycotted by the National Legion of Decency, and those films would not be distributed by any of the major studios at the time, which had agreed to only distribute movies bearing the code's seal of approval.⁵³

In 1952, however, the Supreme Court in *Joseph Burstyn Inc. v. Wilson* held that motion pictures were protected by the First Amendment.⁵⁴ The Court stated that “[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas,”⁵⁵ and that even if one accepts the hypothesis that films have a “greater capacity for evil, particularly among the youth of a community, than other modes of expression . . . it does not follow that motion pictures should be disqualified from First Amendment protection.”⁵⁶ Following *Wilson*, in 1968, the *Interstate Circuit Inc. v. City of Dallas* recognized that while motion pictures are protected by the First Amendment, films are also subject to certain limitations.⁵⁷ However, the Court emphasized that “restrictions imposed cannot be so vague as to set the censor . . . adrift upon a boundless sea.”⁵⁸ As such, the Court found unconstitutionally vague the City of Dallas' scheme classifying motion pictures as either “suitable for young persons” or “not suitable for young persons.”⁵⁹

In response to the Supreme Court's ruling in *Interstate Circuit*, the MPAA read “[b]etween the lines of the decision” and created “a private

⁵¹ Jason K. Albosta, *Dr. Strange-Rating Or: How I Learned That The Motion Picture Association Of America's Film Rating System Constitutes False Advertising*, 12 VAND. J. ENT. & TECH. L. 115, 125 (2009).

⁵² Mosk, *supra* note 6, at 136. Among these “forbidden elements” were profanity, nudity, drugs, sex perversion, white slavery, miscegenation, venereal diseases, children's sexual organs, mockery of the clergy and “offense to any nation, race or creed.” JON LEWIS, HOLLYWOOD V. HARDCORE, HOW THE STRUGGLE OVER CENSORSHIP SAVED THE MODERN FILM INDUSTRY, 301–02 (2002). Special care also had to be exercised with subjects such as use of flags, international relations, sedition, brutality, “[s]ympathy for criminals,” men and women in bed together, “first-night scenes,” “excessive or lustful kissing,” women “selling their virtue,” rape scenes, among many others. *Id.*

⁵³ Albosta, *supra* note 51, at 125–26.

⁵⁴ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (finding unconstitutional a New York Statute that banned films depicting “sacrilegious” material).

⁵⁵ *Id.* at 501.

⁵⁶ *Id.* at 502.

⁵⁷ 390 U.S. 676, 684 (1968).

⁵⁸ *Id.*

⁵⁹ *Id.* at 688–89.

ratings system which was narrowly drawn.”⁶⁰ Shortly thereafter, in 1968, the MPAA replaced its moral censorship guidelines, and put into effect the modern voluntary rating system utilized by the film industry today: General Audience (G), Parental Guidance Suggested (PG), Parents Strongly Cautioned (PG-13), Restricted (R), and No One 17 and Under Admitted (NC-17).⁶¹ The factors considered when rating a film are “mature themes, language, depictions of violence, nudity, sensuality, depictions of sexual activity, adult activities (*i.e.*, activities that adults, but not minors, may engage in legally), and drug use.”⁶²

Much of the criticism aimed at the MPAA’s age rating system has focused not only on the lack of qualifications of its raters and the lack of transparency in the rating process, but also on the system’s coercive and anti-competitive influence within the movie industry.⁶³ First, the MPAA’s membership is led by the six largest motion picture studios in the United States.⁶⁴ This partnership raises concerns that the age rating system is a “common scheme” employed “to deprive the film marketplace of independent centers of decision making, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.”⁶⁵ Second, although the age rating system is voluntary, and does not carry the force of law, it has a huge impact on the movie’s profitability at the box office due to the National Association of Theatre Owners’ (“NATO”) support of the MPAA.⁶⁶ NATO members represent 85% of the movie theaters in the United States.⁶⁷ These chains then “enforce the system by refusing admission to R-rated movies to persons unable to show identification that they are seventeen years old unless they are accompanied by a parent or an adult guardian with proof of

⁶⁰ Jacob Septimus, Note, *The MPAA Ratings System: A Regime Of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69, 72 (1996).

⁶¹ *Our Story*, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/our-story/> (last visited Oct. 22, 2014).

⁶² *Classification and rating rules*, MOTION PICTURE ASSOCIATION OF AMERICA, 1, 6 (2010), http://www.filmratings.com/downloads/rating_rules.pdf. Movie ratings today are issued by an independent division within the MPAA: the Classification and Rating Administration (“CARA”). At any given time, CARA is made up of ten to thirteen raters who serve a maximum of seven year terms. The only required qualifications for these raters is that they represent the diversity of American parents and that “[e]ach member of the Rating Board must be a parent and may not have any other affiliations with the entertainment industry.” While the identities of the Chairperson and Senior Raters of CARA are disclosed, other raters’ identities are kept hidden to protect them from any potential pressures from film producers and distributors). *See id.* at 1–2.

⁶³ *See* Albosta, *supra* note 51, at 143. *See also* Corey E. Kilburn, Comment, *An Offer You Can’t Refuse: A Sherman Act Antitrust Examination of the Motion Picture Association of American and the Use of the Ratings System as an Unreasonable Restraint on Trade*, 82 UMKC L. REV. 255, 256 (2013).

⁶⁴ *Our Story*, *supra* note 61. The studios are Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, and Warner Bros. Entertainment Inc.

⁶⁵ Kilburn, *supra* note 63, at 271.

⁶⁶ *Id.* at 260.

⁶⁷ *Id.*

age.”⁶⁸ Minors are not admitted to NC-17 rated movies even if accompanied by parents.⁶⁹ Filmmakers who refuse to edit their movies according to MPAA guidelines are constrained to the 15% of the movie theaters not monopolized by NATO.⁷⁰

MPAA criticism became judicial commentary in *Miramax Films Corp. v. Motion Picture Ass’n of America, Inc.*, where Miramax films sought a judicial alteration of an X rating imposed on one of its movies by the MPAA.⁷¹ While the Supreme Court of New York established that it was precluded from substituting their judgment for that of a private nongovernmental organization,⁷² the Court delivered some scathing criticism of the MPAA. Despite the MPAA’s staunch denial of censorship, the court found that the MPAA exerted economic pressure that lead to censorship within the industry.⁷³ The Court also stated that while the MPAA’s rating system was a successful marketing tool, its Rating Board was not comprised of child care professionals that could provide guidance on what is actually harmful for minors.⁷⁴

B. Video Games

In 1994, the Entertainment Software Association established the Entertainment Software Review Board in order to set forth a voluntary age rating system for video games. The creation of the ESRB was propelled by the 1993 release of gory video games such as *Mortal Kombat* and *Night Trap* and the perceived threat of government intervention and regulation.⁷⁵ The primary goal of the rating system was to provide “concise and objective information about the content in video games . . . so consumers, especially parents, can make informed choices.”⁷⁶ As a result, video game publishers could now submit their software for the ESRB to rate into a particular category: Childhood (C), Everyone (E), Everyone 10+ (E10+), Teen (T), Mature (M), and Adults Only (AO).⁷⁷ Some of the factors considered in the rating process are: sexuality, language, violence, drug use or references, and gambling.⁷⁸

In the end, video game ratings have a significant impact on sale

⁶⁸ *Id.*

⁶⁹ *Film Ratings*, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/film-ratings/> (last visited Oct. 22, 2014).

⁷⁰ Kilburn, *supra* note 63, at 256.

⁷¹ *Miramax Films Corp. v. Motion Picture Ass’n of America, Inc.*, 148 Misc.2d 1 (1990).

⁷² *Id.* at 8.

⁷³ *Id.* at 2, 7.

⁷⁴ *Id.* at 5–6.

⁷⁵ THOMAS SELZ, ET AL., 1 ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 6:30.

⁷⁶ *ESRB Ratings guide*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Feb. 15, 2015).

⁷⁷ *Id.*

⁷⁸ *Frequently Asked Questions*, ENTERTAINMENT SOFTWARE REVIEW BOARD, <http://www.esrb.org/ratings/faq.jsp#21> (last visited on Feb. 15, 2015).

and distribution.⁷⁹ The ESRB's market presence is such that "[v]irtually all major national retailers, countless independent retailers and many game center operators work with the ESRB to educate their customers and employees about ESRB ratings and store policies regarding the sale or rental of M . . . and AO . . . rated games."⁸⁰ These retailers, in turn, require age verification from buyers of M or AO rated video games.⁸¹ Furthermore, while the ESRB's ratings are voluntary and not enforceable by law, video game publishers can be subjected to monetary fines of up to \$1,000,000 for boxed content that egregiously fails to disclose content.⁸² Video game publishers who wish to use the ESRB ratings are contractually bound to "comply with numerous requirements addressing how ratings information must be displayed on game packaging and in advertising."⁸³

In 2011, *Brown v. Entm't Merchants Ass'n* held that video games are subject to the protections of the First Amendment.⁸⁴ The Court found that video games "[l]ike protected books, plays, and movies . . . communicate ideas through familiar literary devices and features distinctive to the medium. And 'the basic principles of freedom of speech . . . do not vary' with a new and different communication medium."⁸⁵ The Court also stated that "California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games" because the ESRB already helps inform the public as to the contents of video games.⁸⁶

C. What About Books?

Unlike the film or video game industry, books are not subject to age rating guidelines implemented by private self-regulatory organizations. This lack of self-regulation in books means that while minors are denied access to movies or video games with "mature" content, they can buy books with analogous subject matter. Although books geared at children and young adults often place age guidelines on the inside of book covers, these guidelines are largely a marketing tool for parents who wish to find age appropriate content for their children.⁸⁷

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011).

⁸⁵ *Id.* at 2733.

⁸⁶ *Id.* at 2740.

⁸⁷ Scholastic, the largest publisher of children's books, has age groups ranging from ages 0–3 (Books to Cuddle With); ages 4–7 (Books to Explore Together), ages 8–10 (Books to Grow On); and ages 11+ (Books to Discover). *About Our Age Groups*, SCHOLASTIC, <http://www.scholastic.com/parents/resources/article/parent-child/about-our-age-groups> (last visited Nov. 21, 2013). Similarly, Barnes and Noble, the world's largest bookseller, has their own

These guidelines carry none of the *de facto* legitimacy that the age rating systems of the MPAA or the ESRB have created. Although the publishing industry has attempted to introduce more formalized age ratings,⁸⁸ these attempts have not extended to the proposal of a self-regulatory organization for books that would impose these age ratings.

In her 2011 *Wall Street Journal* article, *Darkness Too Visible*, book critic Meghan Cox Gurdon criticized that contemporary Young Adult novels of today are filled with foul language, self-harm, self-loathing, sex, and violence—themes that would otherwise “get a song or movie branded with a parental warning.”⁸⁹ Cox denounced today’s literary culture for pushing away parents who object to the storylines in the children and young-adult books of today. Cox urged parents not to be dissuaded by accusations of censorship “when publishers use the vehicle of *fundamental free-expression principles* to try to bulldoze coarseness or misery into [] children’s lives.”⁹⁰

While Cox may be technically correct that “[p]athologies that went undescribed in print 40 years ago . . . are now spelled out in stomach-clenching detail,”⁹¹ the “pathologies” described in the books of the past where considered just as “stomach-clenching” by their own generations. With the nineteenth century, for example, came the advent of the dime novel.⁹² Dime novels were pocket sized books that—for a dime—related the sensationalist stories of the day. Young audiences were lured by the stories of the American frontier, outlaws, heroes, lovers, and maidens in distress.⁹³ However, “[t]o many American literary and educational establishments, these dime novels, with their . . . violent characters, intricate plots, changing identities and confusion of right and wrong, gave serious and improper messages to the day’s susceptible youth and were therefore severely criticized.”⁹⁴ Like Cox and today’s proponents of child protection censorship laws, “[t]he moral leaders of the day wanted literature to reflect idealistic family life[.]”⁹⁵

No “moral leader” was perhaps more vocal—and infamous—than anti-Vice crusader Anthony Comstock, Chief Head of the New York Society for the Suppression of Vice, an organization dedicated to

age range system: ages 0–2, ages 3–5, ages 6–8, ages 9–12, and teen. *Kid’s Books*, BARNES AND NOBLE, <http://www.barnesandnoble.com/u/childrens-books-kids-books/379003144> (last visited Nov. 21, 2013).

⁸⁸ See *supra* Intro.

⁸⁹ Meghan Cox Gurdon, *Darkness Too Visible*, WALL. ST. J. (June 4, 2011), available at <http://online.wsj.com/news/articles/SB10001424052702303657404576357622592697038>.

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.*

⁹² VICKI ANDERSON, *THE DIME NOVEL IN CHILDREN’S LITERATURE 1* (2005).

⁹³ *Id.* at 1–2.

⁹⁴ *Id.* at 2.

⁹⁵ *Id.*

policing public morality.⁹⁶ In 1873, Comstock successfully spearheaded a campaign for Congress to pass legislation that would prohibit the sending and delivery of “obscene, lewd, or lascivious book, pamphlet, picture, paper, print” through the mail.⁹⁷ This federal obscenity legislation became known as the Comstock Act,⁹⁸ and set the stage for the implementation of “Comstock Laws” in individual states—such as those later challenged in *Roth v. United States*⁹⁹ and *Ginsberg v. New York*.¹⁰⁰ In his 1883 book, *Traps for the Young*, Comstock declared that that there was “no more active agent employed by Satan in civilized communities to ruin the human family than EVIL READING.”¹⁰¹ He warned parents and community leaders against the dangers of the dime novel on the morals of the young, and encouraged only “the sale and publication of good wholesome reading.”¹⁰²

Similar to the ways in which young audiences were drawn to the “mature” themes of the nineteenth century dime novels, minors of today are increasingly reading books aimed at adult readers. Indeed, many of the books found on required high school reading lists are not part of the child, young adult or teen genres.¹⁰³ Books like Toni Morrison’s *Beloved* and Harper Lee’s *To Kill a Mockingbird* are some of the books most often challenged due to their sexual content, “offensive” language, religious and political views and general “unsuitability” to age group.¹⁰⁴ Minors are also free to purchase these “controversial” classics outside of school, and, save for the unlikely refusal of the rare conservative bookseller, they have unencumbered access to the more commercial and risqué fare as well.

With the success and prominence of the age rating guidelines for movies and video games, debates have arisen as to whether books should be subject to the same treatment.¹⁰⁵ Proponents of an age rating

⁹⁶ *Id.* at 84.

⁹⁷ Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 747 (1992).

⁹⁸ *Id.* at 748.

⁹⁹ *Roth v. United States*, 354 U.S. 476 (1957).

¹⁰⁰ *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹⁰¹ ANTHONY COMSTOCK, *TRAPS FOR THE YOUNG* 240 (3d ed. 1883).

¹⁰² *Id.* at 42.

¹⁰³ *Summer Reading for Kids and Teens: Required Reading for Middle School and High School Students*, AMAZON, http://www.amazon.com/gp/feature.html/ref=br_lf_m_1000090471_pglink_1?ie=UTF8&docId=1000090471&plgroup=1&plpage=1 (last visited Oct. 22, 2014). Among the required books are *Beloved* by Toni Morrison, *Lolita* by Vladimir Nabokov, *Lord of the Flies* by William Golding, and *A Clockwork Orange* by Anthony Burgess.

¹⁰⁴ *Banned and Challenged Classics*, AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/bbooks/frequentlychallengedbooks/classics> (last visited on Feb. 15, 2015); FREQUENTLY CHALLENGED BOOKS OF THE 21ST CENTURY <http://www.ala.org/bbooks/frequentlychallengedbooks/top10> (last visited on Oct. 22, 2014).

¹⁰⁵ See, e.g., C.J. Daugherty, *Fifty Shades of YA: Should Teen Books Have Ratings?* THE

systems for books point to the double standard that exists between the treatment of books and visual media. As a result of this double standard, some online presences have attempted to fill the perceived gap by employing their own age rating schemes for books. Among these are Common Sense Media, Compass Book Ratings, Novel Book Ratings, and Rated Reads.¹⁰⁶ The slogan for Compass Book Ratings asks the very question that this Note seeks to answer: “movies have ratings . . . why not books?”¹⁰⁷

III. BOOKS SHOULD NOT BE SUBJECT TO AGE RATINGS

The case law presented in Part I.A. of this Note has clearly established that minors have a constitutional right to receive information, but that the government can—in certain circumstances—shield minors from speech which it deems harmful. In the instances where “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription” by the government¹⁰⁸ private censorship is free to step in. Aware of this opening, self-regulatory organizations like the MPAA and the ESRB have famously opted to create age rating systems for their respective forms of media. As detailed in the introduction to this Note, however, the book publishing industry has been unsuccessful in implementing a formal age rating system for the literary market, due in large part to strong opposition from authors, librarians, and readers.

This Note argues that books should not be subject to age ratings because: (1) age rating is censorship which has been criticized by the Supreme Court; (2) parents are in the better position to control children’s access to age inappropriate books; (3) age ratings for books would not take into account the “mature minor” who is capable of reading beyond his or her age group; and (4) visual media and literature are not consumed and processed by minors in the same ways.

TELEGRAPH, (Sept. 22, 2012), <http://www.telegraph.co.uk/culture/books/booknews/9558797/Fifty-Shades-of-YA-Should-teen-books-have-ratings.html>; Husna Haq, *Should Young Adult Books Have Age Ratings?* THE CHRISTIAN SCIENCE MONITOR (July 9, 2012), <http://www.csmonitor.com/Books/chapter-and-verse/2012/0709/Should-young-adult-books-have-age-ratings>; Jason Koebler, *Is It Time to Rate Young Adult Books for Mature Content?* U.S. NEWS (May 8, 2012), <http://www.usnews.com/news/articles/2012/05/18/is-it-time-to-rate-young-adult-books-for-mature-content>; Barbara Vey, *Should There Be a Rating System for Books?* PUBLISHER’S WEEKLY (Feb. 26, 2014), <http://blogs.publishersweekly.com/blogs/beyondherbook/?p=10211>.

¹⁰⁶ See *Book Reviews*, COMMON SENSE MEDIA, <https://www.common sense media.org/book-reviews> (last visited Oct. 22, 2014); *Methodology*, COMPASS BOOK RATINGS, <http://www.compassbookratings.com/methodology/> (last visited Feb. 15, 2015); NOVEL BOOK RATINGS, <http://novelbookratings.com/ratingReviewSystem.php> (last visited Feb. 15, 2015); *Ratings Guide*, RATED READS, <http://ratedreads.com/book-review-ratings-guid/> (last visited Feb. 15, 2015).

¹⁰⁷ COMPASS BOOK RATINGS, *supra* note 106.

¹⁰⁸ *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975).

A. Age Ratings Are Censorship

In *Miramax Films*, the Supreme Court of New York stated that “[c]ensorship is an anathema to our Constitution and to this Court . . . [and] notwithstanding the denials of censorship . . . the present system of rating motion pictures . . . is censorship from within the industry rather than imposed from without, *but censorship nevertheless*.”¹⁰⁹ Similarly, in the context of violent speech, the Supreme Court, in *Brown v. Entm’t Merchants Ass’n*, reiterated that the United States does *not* have a “longstanding tradition” of restricting a minor’s access to “depictions of violence.”¹¹⁰ As exemplified by the plots of some of the most beloved—and uncensored—children’s books, there is “no shortage of gore”:¹¹¹

Grimm’s Fairy Tales, for example, are grim indeed. . . . Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven. High-school reading lists are full of similar fare In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch . . . [a]nd Golding’s *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island.¹¹²

The Supreme Court’s criticism of censorship can be easily applied to an age rating schemes for books. Age ratings for books would rely on groups of private individuals to prejudge the ability of literature to promote—or detract from—minors’ emotional and intellectual development. By making these “value” judgments, age rating schemes restrict minors’ First Amendment rights to receive information. Furthermore, the arbitrariness of age ratings often leads to vague—and downright ridiculous—results, which encompass speech protected under the First Amendment. Organizations like the MPAA, for example, have rated the movie *Twister* PG-13 due to “intense depiction of *very bad weather*,”¹¹³ while the ESRB raters do not even play the very video games they are asked to rate.¹¹⁴ Under such preceding models, an age

¹⁰⁹ *Miramax Films Corp. v. Motion Picture Ass’n of America*, 560 N.Y.S.2d 730, 731 (N.Y. Sup. Ct. 1990) (emphasis added).

¹¹⁰ *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2736–37 (2011) (internal quotations omitted).

¹¹¹ *Id.* at 2736.

¹¹² *Id.*

¹¹³ FILMRATINGS.COM, <http://www.filmratings.com> (last visited Feb. 14, 2015) (emphasis added). Among other strange ratings are *Team America* being “[r]ated R for graphic crude and sexual humor, violent images and strong language—all involving puppets,” *Alice in Wonderland* being “[r]ated PG for fantasy action/violence involving scary images and situations, and for a *smoking caterpillar*.” *Id.* (emphasis added).

¹¹⁴ *Frequently Asked Questions*, ENTERTAINMENT SOFTWARE REVIEW BOARD,

rating scheme for books does not have much to recommend it.

In the public school book censorship context, the Supreme Court has heavily criticized the notion that restrictions on books can be implemented based on personal value judgments. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, three members of a board of education sought to remove certain books from school libraries because they were “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”¹¹⁵ The school board members believed that it was their moral duty “to protect the children in [their] schools from this moral danger”¹¹⁶ The Supreme Court upheld the students’ challenge to the censorship of the books, stating that “[l]ocal school boards may not remove books from school libraries *simply because they dislike the ideas* contained in those books”¹¹⁷ Quoting *Tinker v. Des Moines Independent Community School District*’s¹¹⁸ famous proclamation, *Pico* stated that “students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”¹¹⁹ *Tinker* made clear, by implication, “that those same children possess First Amendment rights *outside* the school setting.”¹²⁰

Ultimately, age ratings are censorship because they flag “controversial” speech that the government has deemed protected under the First Amendment, but that private parties nonetheless wish to withhold from minors. In a pluralistic society, however, minors need to be prepared to participate in the “adult marketplace of ideas,”¹²¹ which will not occur if they are raised in an “intellectual bubble.”¹²² While perhaps effective at preventing minors from accessing what some consider to be age-inappropriate content, “[a]ge-staggered blocking and

<http://www.esrb.org/ratings/faq.jsp#> (last visited Feb. 15, 2015). The ESRB gives three reasons for their raters not playing the games they rate: (1) video games take over fifty hours of game play; (2) video games are “player-controlled,” and therefore “there are many different permutations of gameplay”; and (3) games are usually submitted for rating before they are complete due to early advertising deadlines.

¹¹⁵ *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 857 (1982) (internal quotations and citations omitted). Among the books sought to be removed from the school were *Slaughterhouse-Five* by Kurt Vonnegut, Jr., *Best Short Stories of Negro Writers* edited by Langston Hughes, *Go Ask Alice* by Oliver LaFarge, *Black Boy* by Richard Wright, *A Hero Ain’t Nothin’ But a Sandwich* by Alice Childress, and *Soul on Ice* by Eldridge Cleaver. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 854 (emphasis added).

¹¹⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹¹⁹ *Pico*, 457 U.S. at 865 (internal quotations and citations omitted).

¹²⁰ Ross, *supra* note 28, at 236 (emphasis added).

¹²¹ Garfield, *supra* note 35, at 585.

¹²² *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (In overturning an Indianapolis ordinance forbidding minors from playing violent video games at arcades absent parent supervision, Judge Posner stated that “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”).

rating schemes are blunt instruments for determining appropriateness for kids . . . and they inevitably censor material that would be educational for some of them.”¹²³ Moreover, like other forms of censorship, age ratings on books would also run the risk of creating a catch 22, where minors could be enticed by the very books they are supposedly not old enough to read.

B. Parental Control

Critics and supporters of child protection censorship are constantly at odds about the role parents should play in controlling or censoring the subject matter to which minors are exposed. While both groups agree that parents must play a role in the rearing of their children, they disagree as to the degree of monitoring that parents can or should actually conduct.¹²⁴ Supporters of child protection censorship state that parents need help from the government because “it is impossible for parents to monitor their children’s access to speech when violent and sexual images pervade the media.”¹²⁵

However, the fact that there are parents who do not or cannot monitor what their minors read, does not justify the imposition of age ratings on books. The burden of restricting minors’ access to “inappropriate books” should be placed on parents because, unlike a one size fits all age rating scheme, they are in a better position to determine which types of books their minors are mature enough to read. In simple terms,

[Parents are] better suited to the task of evaluating the . . . maturity and sophistication of their own children. . . . [because t]he expertise of parents is based on a more fully informed understanding and concern for the social, educational, cultural, moral and spiritual well-being and development of their own children.¹²⁶

In recognition of the role that parents play in raising and protecting minors, *Prince v. Commonwealth of Massachusetts* stressed that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹²⁷ Even *Ginsberg*, which upheld a New York criminal obscenity statute,

¹²³ Marjorie Heins, *On Protecting Children - From Censorship: A Reply to Amitai Etzioni*, 79 CHI.-KENT. L. REV. 229, 253 (2004).

¹²⁴ Garfield, *supra* note 35, at 581 (“The difference between proponents and critics of child-protection censorship . . . is one of degree rather than of kind.”).

¹²⁵ *Id.* at 587.

¹²⁶ *Sheck v. Baileyville Sch. Comm.*, 530 F.Supp. 679, 692 n.20 (D. Me. 1982) (granting students a preliminary injunction against the banning of school library books).

¹²⁷ *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944).

found that if parents were open to exposing their children to “obscene” material, states could not prohibit the sale of such materials to minors who had parental consent.¹²⁸ Similarly, *Brown* found that a California act prohibiting the sale of violent video games to minors over-exclusive because the act would not allow minors, whose parents do not object to them playing violent video games, to purchase those video games.¹²⁹

Ultimately, age rating guidelines—while helpful to parents—do nothing for minors but limit their First Amendment right to receive information and undermine their intellectual and emotional maturity to read about certain subject matters.

C. *The Varying Levels of Maturity in Minors*

A minor’s sophistication and individual emotional and intellectual maturity are key considerations in deciding what kinds of books may or may not be harmful to him or her. Age ratings on books, on the other hand, would do away with these nuances and assume that a minor’s ability to read certain literature is a direct reflection of his or her particular age group. Supporters of child protection censorship claim that minors are vulnerable to harm in the face of inappropriate materials about sex, violence, and drugs¹³⁰ because minors have an undeveloped intellectual and emotional maturity that leaves them unable to make informed decisions.¹³¹ This Note argues, however, that at least some minors are able make independent reading choices with little—if any—emotional or intellectual scarring.¹³² Age ratings for books would not take into account the varying levels of maturity of minors to read about certain “mature” subject matters. Age rating schemes “merge[] toddlers, grade-schoolers, and teenagers into one vast pool of vulnerable youth.”¹³³

Although decided in the context of minors’ reproductive rights, *Bellotti v. Baird* set the stage for the “mature minor” and his or her ability to make independent choices regardless of his or her age group.¹³⁴ While the Supreme Court did not provide a definition of what constitutes a “mature minor,” it did assert that determination of maturity must be made on a case-by-case basis and described age limits as “inevitably arbitrary.”¹³⁵ Even though invoked in the context of minors’

¹²⁸ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

¹²⁹ *Brown v. Entm’t Merchs. Ass’n.*, 131 S. Ct., 2729, 2741 (2011).

¹³⁰ Garfield, *supra* note 35, at 586.

¹³¹ *Id.* at 601.

¹³² See also MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP AND THE INNOCENCE OF YOUTH 12 (2007) (“[s]ome older children and adolescents are able to process information and make coherent decisions at the same level as many adults.”).

¹³³ *Id.* at 259.

¹³⁴ *Bellotti v. Baird*, 443 U.S. 622 (1979).

¹³⁵ *Id.* at 643 n.23.

health care decisions, the reasoning of the mature minor doctrine can be applied to minor's First Amendment right to receive information. After all, if some minors are mature enough to make abortion decisions regardless of their age group, then some minors are surely mature enough to direct their literary pursuits.

Furthermore, the United States District Court of Maine in *Sheck v. Baileyville School Committee* found that while it was possible that students—minors—could be harmed by a book that had been banned from the library due to their age and lack of maturity, “it is not an acceptable assumption that all students, regardless of their age or maturity, might be harmed by exposure to such language.”¹³⁶ *Sheck* stated that when “restricting student access to ‘objectionable’ language,” close attention must be paid to the ‘the age and sophistication of the students . . .’¹³⁷ The court recognized that while determining the individual sophistication of each student “would seem to impose an onerous administrative burden,” teachers and librarians possess expertise “in the area of assessing individual-student intellectual and literary interests and sophistication.”¹³⁸

D. *Inherent Difference Between Visual Media and Books*

Finally, there is some credence to the idea that books are less likely to lead to a traumatic experience for minors as they do not depict their content as directly as visual media. Barrie Gunter, psychologist and Professor of Mass Communication at the University of Leicester, commented that

Broadcasting explicit depictions of sex leaves little to the imagination. Such portrayals are ‘in your face’ and once a child has been exposed to them, the experience cannot be taken back . . . Books are different. Texts require us as readers to conjure up our own images of the events and people described. *This means we are protected by our imaginations.* Children’s imaginations—because of their limited life experiences—accord them even more protection. . . . [T]here is much less reason to be concerned about the harm factor because the younger the child the less they are likely to relate to adult themes.¹³⁹

In other words, images are much more “accessible” than words because they do not leave room for the immature minor to “auto-censor” what he or she is viewing (beyond closing his or her eyes). The

¹³⁶ 530 F. Supp. 679, 691 (D. Me. 1982).

¹³⁷ *Id.* (internal quotations and citations omitted).

¹³⁸ *Id.* at 692 n.20.

¹³⁹ Castella, *supra* note 15 (emphasis added).

Court in *Brown*, however, found this argument to be unpersuasive, stating that good books are interactive in nature.¹⁴⁰ The *Brown* court referred to books which contain “choose-your-own-adventure stories,”¹⁴¹ and quoted Judge Posner when he stated that “[l]iterature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.”¹⁴²

While this Note does not take a stance on visual media’s ability to cause more or less harm, or be more or less “interactive” than a book, it does argue that being drawn into a book’s plot presupposes an understanding of the subject matter presented. The impact that words on the page have on a minor depends largely on the maturity and reading comprehension of the reader and his or her ability to “visualize” the words on the page. A perfect example of this concept is comic books, which unlike literary books, *are* subject to age ratings imposed by their own publishers.¹⁴³ Unlike a graphic comic book or movie, however, it is unlikely that a child or minor will read beyond the first couple of pages of a book like *Fifty Shades of Grey* without getting bored, or that they would fully understand the explicitness of the scenes on the page. As for the minors that do understand, perhaps they are mature enough to not be “scarred” by such themes. For those concerned about the impact that similar fare will have on minors, perhaps it is time for parents—not “one size fits all” restrictive age rating scheme—to intervene and have that discussion with their children.

CONCLUSION

Ultimately, as books continue to cover a wider range of controversial topics—the child protection censorship debate will continue. Although restricting minors’ access to obscene, indecent, or violent books is not an illegitimate concern, it must also be balanced with minors’ First Amendment right to receive information. While the age rating systems of the MPAA and ESRB have found success within their respective industries, it does not mean that books should be subject to the same treatment.

As stated in Part III of this Note, age ratings are a form of censorship that would heavily limit minors’ First Amendment right to receive information through the oldest and—arguably—the most

¹⁴⁰ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2739 (2011).

¹⁴¹ *Id.* at 2738.

¹⁴² *Id.* at 2739 (quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)).

¹⁴³ See Anthony Falcone, *All Ages Means Kids*, COMICBOOKSDAILY.COM (Feb. 12, 2012) <http://www.comicbookdaily.com/columns/whosoever-holds-this-hammer-blogs-2/all-ages-means-kids/>; *Ratings*, DC COMICS, <http://www.dccomics.com/ratings> (last visited Feb. 15, 2015).

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respected medium: books. The burden of restricting minors' access to books should rest largely on the parent and the minor's own ability to discern what he or she feels mature enough to read. While age rating guidelines for books may be effective at keeping "obscene" topics away from minors, such guidelines are also broad enough—and arbitrary enough—to censor minor's access to speech protected by the First Amendment.

Ultimately, this Note subscribes to the principle that while "[i]t may be that children are so immature and unsophisticated that they can easily be led into confusion and error . . . some risk of confusion and error is preferable to the risk of a deadening conformity of thought."¹⁴⁴ To over protect minors from Comstockian "evil reading" is "to give children a false impression and feed them escapism in the bad sense."¹⁴⁵

*Nathalie De Choudens Baez**

¹⁴⁴ Brief Amicus Curiae of the Council for Periodical Distributors Associations, Inc. at 4, *Ginsberg v. State of New York*, 390 U.S. 629 (1968), 1967 WL 113637, at *8 (quoting *Exclusion of Children from Violent Movies*, 67 COL. L. REV. 1149, 1158 (1967)).

¹⁴⁵ Lewis, *supra* note 1 at 31.

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