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## Avoiding the First Amendment's Crosshairs: Revisiting Precedents & Refining Arguments in *Brown v. Entertainment Merchants Association*

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# Avoiding the First Amendment’s Crosshairs: Revisiting Precedents & Refining Arguments in *Brown v. Entertainment Merchants Association*

DANIEL BUTLER\*

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## I. INTRODUCTION

On June 27, 2011, the United States Supreme Court ruled, in the case of *Brown v. Entertainment Merchants Association*, that the state of California’s attempt to restrict children’s access to violent video games violated the First Amendment’s free speech clause. Three days later, comedian Jon Stewart, known for his political commentary and satire, attacked the decision on *The Daily Show*, Stewart’s aptly named talk show. After playing a clip from the video game *Mortal Kombat*, which depicted two men holding a woman by each leg while unceremoniously ripping her in half from groin to skull as her blood and organs splattered onto the screen, Stewart explained to the disgusted audience that “the Supreme Court has ruled 7-2 that the state of California has no interest in restricting the sale of this game to children. But, if while being disem-

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bowed, this woman were to suffer, perhaps, a nip slip, regulate away!”<sup>1</sup>

Unfortunately, Stewart’s analysis of *Brown* is quite accurate. Although he brings up the case primarily to generate laughs, the message he sends is clear: Our First Amendment jurisprudence has evolved into something peculiar. The First Amendment shuns modest forms of sexual content (e.g., nudity) but embraces gratuitous violence to an absurd degree. *Brown* is the latest affirmation of this inconsistency. In line with Stewart’s critique, Justice Stephen Breyer opined in his dissent: “But what sense does it make to forbid selling to a thirteen year old boy a magazine with an image of a nude woman, while protecting a sale to that thirteen year old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?”<sup>2</sup> Justice Breyer’s emotional plea did not persuade his colleagues, but it effectively highlights what he refers to as an “anomaly” in First Amendment jurisprudence.<sup>3</sup>

*Brown v. Entertainment Merchants Association* held that a California statute that placed restrictions on the sale or rental of violent video games to minors was unconstitutional.<sup>4</sup> Justice Antonin Scalia, writing for a majority of the Court, found that video games were protected speech under the First Amendment, that violent video games did not meet any of the recognized exceptions (i.e., obscenity, incitement, fighting words) to free-speech protection, that new categories of unprotected speech may not be added, and that California did not produce enough evidence to show that the law was justified by a compelling government interest.<sup>5</sup> Central to the case’s disposition was the majority’s rejection of California’s argument that violent video games should be included under the obscenity exception to free-speech protection. Arguing that the obscenity exception only applies to sexual materials, not violence, Justice Scalia placed the burden on the state of California to prove that the law was narrowly tailored to serve a compelling government interest. Unable to do so, the state of California’s game was over.

This Note will analyze and critique the strategy California used to defend its video-game legislation. Arguing that the Supreme Court

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1. *The Daily Show with Jon Stewart* (Comedy Central television broadcast June 30, 2011), available at <http://www.thedailyshow.com/watch/thu-june-30-2011/moral-kombat>; see also Margaret E. Jennings, Note, *Blood, Brains, and Bludgeoning, But Not Breasts: An Analysis and Critique of Brown v. Entertainment Merchants Association*, 32 *LOY. L.A. ENT. L. REV.* 87, 120 (2012).

2. *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

3. *Id.*

4. *Id.* at 2729 (majority opinion).

5. *Id.*

should have ruled in its favor, this Note will then posit an alternative tactic that future states could use in defending laws similar to the one in *Brown*. Part II will provide a background, tracing the history of video-game legislation up until 2005, when the California law was passed. Part III will discuss the procedural history of the case, starting with the pre-enforcement challenge, the opinion of the District Court, and the review of the Ninth Circuit Court of Appeals. Part IV will outline the Supreme Court's majority opinion, as well as Justice Alito's concurrence and Justice Breyer's dissent. Part V will critique the arguments presented, the Supreme Court's majority opinion and will then argue how two alternative strategies may prove successful in the future. Part VI will offer concluding thoughts.

## II. BACKGROUND

### A. *A Brief History of Video Games and the Law*

Video games first gained widespread popularity in the 1970s, in the form of video arcades.<sup>6</sup> But early games played on these arcade systems were primitive and lacked expressive content. For example, the game *PONG*, widely heralded as one of the most successful arcade games, simply required the player to move a joystick to hit a circle across a two-dimensional screen.<sup>7</sup>

Because of their rudimentary and unsophisticated content, these early games were not classified as speech under the First Amendment.<sup>8</sup> In *Showplace v. City of New York*, one of the earliest video game cases, a district court in New York determined that video games do not convey information or communicate any ideas and were therefore not analogous to motion pictures or books, which express ideas and affect viewers' attitudes and behavior.<sup>9</sup> Accordingly, the *Showplace* Court held that video games did not qualify for First Amendment protection.<sup>10</sup> Local governments were thus free to regulate video arcades without fear of encroaching upon free speech rights.

The *Showplace* precedent continued throughout the 1980s. Courts were reluctant to grant video games any degree of First Amendment protection. In one example, a Massachusetts court upheld a town's com-

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6. Garrett Mathew-James Mott, Comment, *Game Over for Regulating Violent Video Games? The Effect of Brown v. Entertainment Merchants Ass'n on First Amendment Jurisprudence*, 45 *LOY. L.A. L. REV.* 633, 637 (Winter 2012) (explaining that early public video arcades were not considered to have expressive content and thus were not viewed by courts as speech).

7. *Id.* at 638.

8. *Showplace Corp. v. City of New York*, 536 F. Supp. 170 (E.D.N.Y. 1982).

9. *Id.*

10. *Id.*

plete eradication of video arcades (dubbed “coin activated amusement machines”), rejecting arguments that the prohibition was an unreasonable restraint on expression or that it violated due process and equal protection guarantees.<sup>11</sup> Lesser, albeit significantly debilitating, restrictions on video arcades were upheld in other jurisdictions.<sup>12</sup>

The 1990s saw the emergence of the video-game console, a home-gaming device that allowed players to play video games directly on their television sets.<sup>13</sup> Video arcades still existed, but the advent of the console began to drastically alter the video-game industry and the governing law. No longer were gamers subject to the time, place, and manner restrictions of video arcades;<sup>14</sup> gamers could now play video games in the comfort of their own homes whenever they desired.

The content of the video games also began to change. Simple games like *PONG*<sup>15</sup> were replaced by more technologically advanced games such as *Super Mario Brothers* and *DOOM*. These new games involved real-time strategy, conveyed storylines, and placed the gamer in a first-person narrative role.<sup>16</sup> But courts were not so quick to embrace these technological breakthroughs as evidence of a new medium deserving of First Amendment protection. Courts acknowledged that video games were becoming more expressive, but they were also confused by the new technology,<sup>17</sup> and they often circumvented the question of whether these new expressive elements entitled video games to free speech protection.<sup>18</sup> Nevertheless, this “inability to fully comprehend the video games of the 1990s”<sup>19</sup> signaled a shift in judicial attitude. Although courts were not yet embracing video games as speech, they were certainly softening previous rulings and opening the door for future

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11. *Marshfield Family Skateland v. Town of Marshfield*, 450 N.E.2d 605, 607 (Mass. 1983) (holding that a total ban on video arcades was a valid exercise of the city’s police power).

12. See *Playtime Games, Inc. v. City of N.Y.*, 535 F. Supp. 1069 (E.D.N.Y. 1982); *Caswell v. Licensing Comm. for Brockton*, 444 N.E.2d 922 (Mass. 1983); *Tommy & Tina, Inc. v. Dep’t of Consumer Affairs of City of N.Y.*, 464 N.Y.S.2d 162 (N.Y. App. Div. 1983); *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297 (D. Mass. 1983).

13. Michael Poh, *Evolution of Home Video Game Consoles: 1967–2011*, HONGKIAT.COM, <http://www.hongkiat.com/blog/evolution-of-home-video-game-consoles-1967-2011/> (last visited Mar. 13, 2014).

14. See *Rothner v. Chicago*, 929 F.2d 297 (7th Cir. 1991) (holding that video games did not qualify for First Amendment protection, but that even if they did, an ordinance banning school children from playing them during school hours was a valid time, place, and manner restriction to prevent truancy).

15. See *supra* text accompanying note 7.

16. Edwin Evans-Thirlwell, *Feature: The History of First-Person Shooters*, VIDEO GAMES DAILY (Oct. 26, 2009), <http://videogamesdaily.com/features/200910/feature-the-history-of-first-person-shooters/>.

17. *Rothner*, 929 F.2d at 303; see also Mott, *supra* note 6, at 639.

18. *Rothner*, 929 F.2d at 303.

19. *Id.*

courts to do so as well.<sup>20</sup>

The single most important pre-*Brown* video-game case was decided on March 23, 2001, when Judge Richard Posner of the Seventh Circuit Court of Appeals held in *American Amusement Machine v. Kendrick* that some video games qualified for First Amendment protection.<sup>21</sup> Like *Brown*, *Kendrick* involved an ordinance that restricted minors' access to violent video games.<sup>22</sup> The ordinance required that the operator of five or more video-game machines in one place (video arcades) ensure a parent or guardian accompanied minors who wished to play violent games.<sup>23</sup> In addition, the ordinance required that there be a partition around such games to shield them from other non-violent games.<sup>24</sup> And finally, violent video games had to have warning labels that apprised users of the violent content contained therein.<sup>25</sup>

The *Kendrick* Court declared *some* video games to be "speech" within the meaning of the First Amendment:<sup>26</sup> "Without any attempt to address artistic merit, the court finds that the visual art and the description of the action-adventure games in the record support plaintiffs' contention that at least some video games contain protected expression."<sup>27</sup> However, the *Kendrick* Court noted that this did not automatically entitle certain games to full First Amendment protection.<sup>28</sup> The court accepted the city's argument that violent video games should fall within the obscenity exception<sup>29</sup> of the First Amendment.<sup>30</sup> The Court found that the city had legitimate reasons to be concerned that violent games could cause harm to children.<sup>31</sup> And those legitimate reasons, the court

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20. *Id.*

21. 244 F.3d 572 (7th Cir. 2001).

22. *Id.* at 573.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 574.

27. *Am. Amusement Machine Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 952 (S.D. Ind. 2000).

28. *Id.* at 954 ("The conclusion that at least some video games are protected by the First Amendment does not mean the city is powerless to regulate graphic violence in the games offered to children.").

29. Attempts to regulate speech are presumptively invalid because the First Amendment guarantees freedom of expression to the people. To rebut the presumption, the regulation must pass the strict scrutiny test, a near insurmountable burden that requires the government to show that the regulation is narrowly tailored to serve a compelling government interest. However, if a regulation seeks to regulate a certain kind of unprotected speech, such as obscene speech, fighting words, or incitement (yelling "fire" in a movie theater), the government is only required to show that the regulation is rationally related to its legitimate state interest, a much lower burden than strict scrutiny. *See* *Roth v. United States*, 354 U.S. 476 (1957); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011).

30. *Kendrick*, 115 F. Supp. 2d at 972–75.

31. *Id.* at 946 (arguing that the city did not have to establish that violent video games actually

continued, did not have to meet the strict scrutiny standard because “the Supreme Court has recognized that psychological protection of children is a compelling interest even without such definitive proof of actual harm.”<sup>32</sup> Critics claimed that such a move upset decades of obscenity precedent, which historically was limited to sexual content.<sup>33</sup> But the court saw no principled, constitutional distinction between violence and sex, and consequently determined that certain violent video games could be regulated like other obscene materials.<sup>34</sup> Therefore, the *Kendrick* Court concluded that the ordinance was a valid restriction on the First Amendment because it was carefully tailored to address obscene material that posed potential harm to children.<sup>35</sup>

However, the *Kendrick* Court’s opinion is largely meaningless. The decision was appealed to the Seventh Circuit Court of Appeals, and Judge Richard Posner, writing for a majority of the court, reversed. First, Judge Posner did not directly address the threshold question whether video games contained enough expressive content to qualify as “first amendment speech” like the District Court did. He simply expressed agreement with the District Court judge.<sup>36</sup> From there, Judge Posner then determined that the ordinance was not a valid restriction on free speech rights because violence was outside the boundary of the obscenity exception.<sup>37</sup> And because violent content was not a recognized exception to the general ban on content-based speech regulations, the ordinance was invalid unless it met the strict scrutiny standard of review.<sup>38</sup> After dismissing the evidence of harm as tenuous, Judge Posner determined that the ordinance was not narrowly tailored to serve a compelling government interest and therefore did not meet the strict scrutiny test for constitutional validity.<sup>39</sup> The ordinance, therefore, was held to be invalid.

Central to the Seventh Circuit’s disposition was the manner in which the state of Indiana attempted to place violence into the obscenity exception. As Judge Posner wrote, “The main worry about obscenity,

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caused harm to minors, but rather just had to show that there was a reasonable basis to believe that the restriction would aid in the city’s compelling interest in preserving the welfare of minors).

32. *Id.* at 955 (citing *Ginsberg v. New York*, 390 U.S. 629, 639–42 (1968) (upholding restriction on distribution of nude magazine to minors despite conflicting evidence on the actual harms posed by such magazines)).

33. *Id.*

34. *Id.* at 946–47.

35. *Id.* at 944.

36. *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (“Most of the video games in the record of this case, games that the City believes violates its ordinances, are stories.”).

37. *Id.* at 574.

38. *Id.* at 576–79.

39. *Id.*

the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis ordinance, but that it is offensive.”<sup>40</sup> Indiana attempted to declare violent video games obscene because they were harmful to children.<sup>41</sup> But as Judge Posner explained, obscenity is determined not by the harm to society, but rather by the material’s offensiveness to community norms: “Offensiveness is the offense.”<sup>42</sup> Indiana thus attempted to pigeonhole violence into obscenity without entirely understanding the underpinnings of such a classification. However, even if the Indiana lawyers had attempted to declare violence as obscene because it was offensive to community norms, they likely still would have faced resistance due to the nature of the games in the record, which were rather unrealistic and cartoon-like.<sup>43</sup> However, Judge Posner left open the possibility for a different ruling in the future: “If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries . . . a more narrowly drawn ordinance might survive a constitutional challenge.”<sup>44</sup>

It was against this backdrop that California Senator Leland Yee attempted to address video-game regulation in his home state. Dissatisfied with the direction of court rulings like *Kendrick*, along with the self-regulatory system of video games and the Entertainment Software Ratings Board, Senator Yee sought out to change the status quo.

### B. *The Entertainment Software Ratings Board*

The Entertainment Software Ratings Board (“ESRB”) is a private, non-profit, self-regulatory organization that provides content ratings for video games and mobile applications, enforces advertising and marketing guidelines for the video game industry, and helps companies implement responsible online privacy practices.<sup>45</sup> Founded in 1994, the ESRB provides content ratings for video games much like the Motion Picture Association of America provides content ratings for movies.<sup>46</sup> The ESRB rating is merely a guide; it is not a mandate, and retail stores and consumers alike are free to make their own decisions without experienc-

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40. *Id.* at 574.

41. *Id.*

42. *Id.* at 575.

43. *Id.* at 579.

44. *Id.*

45. *ESRB Ratings Process*, ENTMT’T SOFTWARE RATINGS BD., [http://www.esrb.org/ratings/ratings\\_process.jsp](http://www.esrb.org/ratings/ratings_process.jsp) (last visited Mar. 10, 2014).

46. Doug Gross, *The 10 Biggest Violent Video Game Controversies*, CNN (June 29, 2011, 12:06 PM), <http://www.cnn.com/2011/TECH/gaming.gadgets/06/29/violent.video.games/index.html>.



ing any legal consequences.<sup>47</sup> Video games are not required to receive a rating from the ESRB, but it has become a standard industry practice for manufacturers to seek an ESRB rating before placing their games on retail shelves.<sup>48</sup>

According to its Web site, the ESRB rates video games by reviewing a DVD that the game's publisher submits. Three or more "raters" review the DVD to ensure that the game content on the DVD is consistent with an ESRB questionnaire that the video-game publisher has already submitted. After determining that the DVD is an accurate portrayal of the actual gameplay, the raters assign the game one of six possible content ratings: Early Childhood ("EC"), Everyone ("E"), Everyone 10 years of age and older ("E10+"), Teen ("T"), Mature ("M"), and Adults Only ("AO").<sup>49</sup> The raters submit their rating to the rest of the ESRB staff, who check the rating to see if it is consistent with rating precedents. Once the staff approves the rating, it is submitted to the video-game publisher, who can either accept the rating or revise the game content and resubmit it to the ESRB, in which case the process would start anew.<sup>50</sup>

The ratings are displayed on the packaging of the game itself, and some retailers provide in-store signage (provided by the ESRB) that explains the differences between each rating.<sup>51</sup> Thus, the ratings are primarily used to educate consumers about the game's content and are not designed to compel or restrict the consumer from making his or her own choice.<sup>52</sup> However, the ESRB does encourage retailers to verify the age of minors before they buy a video game.<sup>53</sup>

The ESRB claims that it sanctions retailers who sell inappropriate games to minors or who submit misleading DVDs for testing.<sup>54</sup> Such sanctions include points, fines, product recall, and contractually "mandated corrective actions."<sup>55</sup> However, the effectiveness of this enforcement mechanism was called into question after an industry review performed by the Federal Trade Commission ("FTC") in 2004. In a report to Congress concerning video-game industry practices, the FTC explained that although the ESRB had made progress, there remained

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47. *ESRB Ratings Process*, *supra* note 45.

48. *Id.*

49. *Id.* Teen is designed for those aged 13 and older. Mature is designed for those 17 and older. Adults Only is designed only for those over age 18.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

room for improvement.<sup>56</sup> For example, many questioned the independence of the ratings board as a substantial portion of its members and much of its funding comes from industry sources.<sup>57</sup> These critics suggested that the ESRB may assign less restrictive ratings than warranted because of economic pressures exerted by members of the industry.<sup>58</sup> Specifically, these detractors pointed to the fact that most retailers will not stock "Adults Only"-rated games, creating an incentive for the ESRB to give such games a less restrictive content rating.<sup>59</sup>

Furthermore, the FTC report explained that marketing of "M"-rated games (those games suggested for players over 17 years of age) was heavily focused on television shows with a young teen audience and Internet sites with frequent teen visitors.<sup>60</sup> The ESRB prohibits marketing of "M"-rated games on television shows with a thirty-five percent or more under-17 audience. But the FTC reported that the thirty-five percent standard, in practice, cuts off very few shows popular with teens, and thus does little to minimize young teens' exposure to "M"-rated game advertisements.<sup>61</sup> The ESRB, naturally, denied any malice or wrongdoing.

### C. Senator Leland Yee's Assembly Bill 1179

Due in part to the perceived shortcomings of the ESRB, California Senator Leland Yee introduced Assembly Bill 1179 into the state legislature in 2005. The bill created a statute designed to restrict the sale of violent video games to children. It was specifically designed to withstand any constitutional challenge.<sup>62</sup> The law did not ban violent video games. It did not prohibit minors from possessing or playing them, nor did it place restrictions on adults. Rather, it simply restricted the sale or rental to children: "As such, the law operated in the same manner as laws restricting the sale of cigarettes, guns, ammunition and pornography to children."<sup>63</sup>

The California legislature made significant findings of fact to support the law's passage. Senator Yee, the author of the bill and former child psychologist, was adamant that violent video games significantly

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56. FED. TRADE COMM'N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REPORT TO CONGRESS 20-29* (July 2004), available at <http://www.ftc.gov/os/2004/07/040708kidsviolencecpt.pdf>.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. See discussion *infra* pp. 14-16.

63. Jennings, *supra* note 1, at 99.

harmed children and was determined to enact legislation to address the perceived problem. As justification for the law, Assembly Bill 1179 stated that

(a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.

(b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

(c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.<sup>64</sup>

Codified in California Civil Code sections 1746–1746.5, the bill was signed into law by Governor Arnold Schwarzenegger on October 7, 2005.<sup>65</sup> To specify which games would be placed under the law’s umbrella, and to avoid constitutional challenges for being unnecessarily vague, the term “violent” was defined as the following:

A video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

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

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

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.<sup>66</sup>

Also to avoid constitutional challenges for vagueness, the legislature specifically defined terms such as “cruel,”<sup>67</sup> “depraved,”<sup>68</sup> “tor-

64. Assemb. B. 1179 Ch. 638 (Cal. 2005).

65. Nich Maragos, *Yee, Schwarzenegger Respond to ESA/VDSA Lawsuit*, GAMASUTRA (Oct. 18, 2005), [http://www.gamasutra.com/php-bin/news\\_index.php?story=6884#.UPCaQI5Dw20](http://www.gamasutra.com/php-bin/news_index.php?story=6884#.UPCaQI5Dw20).

66. CAL. CIV. CODE § 1746(d)(1) (West 2011).

67. “Cruel” means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim. CAL. CIV. CODE § 1746(d)(2) (West 2011).

68. “Depraved” means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim. CAL. CIV. CODE § 1746(d)(2) (West 2011).

ture,”<sup>69</sup> “heinous,”<sup>70</sup> and “serious physical abuse.”<sup>71,72</sup> Section 1746(d)(3) provides further clarification by explaining that “[p]ertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim’s body, and helplessness of the victim.”<sup>73</sup>

It should be noted that this language was chosen meticulously. In fact, the text of Section 1746(d)(1)(A)(i)–(iii) mirrors the obscenity standard analyzed in the 1973 case of *Miller v. California*.<sup>74</sup> The three-prong test, commonly known as the *Miller* test, is used to assess whether material is obscene and thus unprotected by the First Amendment.<sup>75</sup> It asks,

(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 applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>76</sup>

Section 1746(d)(1)(A)(i)–(iii) is identical to the *Miller* test in almost every regard, save for a few words. In the first prong, the words “prurient interest” are replaced by “deviant or morbid interest of minors.” The second prong is amended to replace “sexual content specifically defined by applicable state law” with “prevailing standards in the community as to what is suitable for minors,” while the third prong remains unchanged.<sup>77</sup>

This deliberate word choice clearly reveals California’s strategy.

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69. “Torture” includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim. CAL. CIV. CODE § 1746(d)(2) (West 2011).

70. “Heinous” means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings. CAL. CIV. CODE § 1746(d)(2) (West 2011).

71. “Serious physical abuse” means a significant or considerable amount of injury or damage to the victim’s body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing. CAL. CIV. CODE § 1746(d)(2) (West 2011).

72. CAL. CIV. CODE § 1746(d)(2) (West 2011).

73. CAL. CIV. CODE § 1746(d)(3) (West 2011).

74. 413 U.S. 15, 24 (1973) (explaining the three-prong test for determining if material is to be considered obscene speech).

75. *Id.*

76. *Id.*

77. See *supra* text accompanying note 65 and note 75.

The state knew that the law would be challenged and fastened to defend it under an obscenity for minors defense, also known as the *variable obscenity defense*, successfully used in *Ginsberg v. New York*.<sup>78</sup> As will be conceded in subsequent sections<sup>79</sup>, this strategy, although ultimately not successful, was not entirely misguided.

### III: PROCEDURAL HISTORY OF *BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION*

Before delving into the merit of the legal tactics exercised in *Brown*, it is first necessary to place *Brown* in its proper context, by examining the procedural history of the case. The novelty of *Brown* goes beyond the substantive First Amendment implications. In fact, many Supreme Court scholars considered *Brown* a fascinating case rife with procedural irregularities and unusual judicial alliances.<sup>80</sup> Indeed, *Brown* was considered by some as the “most surprising decision of the term.”<sup>81</sup> The First Amendment implications are naturally the most important aspects of the decision. However, they cannot be fully understood without a detailed analysis of the process leading up to the decision.

#### A. *The Pre-Enforcement Challenge, Standing, and the District Court Opinion*

Not a single video game in California ever became subject to the law as its opponents filed a pre-enforcement challenge, effectively subjecting the law to a constitutional challenge before it ever got a chance to operate.<sup>82</sup> Opponents of the law, labeled the Video Game Software Dealers Association (“VSDA”) and the Entertainment Software Association (“ESA”), were two groups “who describe themselves as associations of companies in the video game industry.”<sup>83</sup> On October 17, 2005, just ten days after Governor Schwarzenegger signed the bill, the trade

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78. 390 U.S. 629 (1968) (using rational basis review to uphold a New York statute which made it illegal to sell “girlie” magazines to minors). A point of elaboration is in order here. *Ginsberg* is significant for purposes of *Brown* because it deals specifically with speech directed at minors. Citing the state’s interest in aiding parental authority and protecting children from harm, *Ginsberg* allowed New York to regulate speech considered obscene as to minors but not obscene as to adults by subjecting such regulation to a more lenient standard: rational basis review. The question that *Ginsberg* did not squarely answer, however, is how spacious is the category of speech that is “obscene-as-to-minors-but-not-adults.”

79. See *infra* Part V.

80. David G. Post, *Sex, Lies, and Videogames: Brown v. Entertainment Merchants Association*, 2011 CATO. SUP. CT. REV. 27 (2011).

81. Linda Greenhouse, *A Supreme Court Scoreboard*, N.Y. TIMES OPINIONATOR (July 13, 2011), <http://opinionator.blogs.nytimes.com/2011/07/13/a-supreme-court-score-card/>.

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

83. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d. 1034, 1037 (N.D. Cal. 2005).

associations filed a motion for a preliminary injunction, seeking to enjoin enforcement of the statute, as well as a declaratory judgment to declare the law “void and of no force and effect.”<sup>84</sup> On December 21, 2005, District Judge Ronald Whyte granted the preliminary injunction,<sup>85</sup> effectively placing the enforcement of the law on hold until the constitutional issues were properly adjudicated. In seeking a more permanent solution, a declaration that the law was unconstitutional, the plaintiffs subsequently filed a motion for summary judgment.

In their motion for summary judgment, the VSDA and ESA claimed that video games were subject to First Amendment protection and that the California law was an impermissible regulation on the content of speech.<sup>86</sup> Such a regulation, the plaintiffs contended, must be subject to the highest standard of free speech protection: strict scrutiny.<sup>87</sup> They argued that the law must be narrowly tailored and justified by a compelling government interest. The VSDA and ESA claimed that the law failed in both respects.<sup>88</sup>

First, the plaintiffs attacked the law’s supposed compelling government interest; namely, protecting children from harm by limiting their access to violent video game content.<sup>89</sup> The plaintiffs believed that there was insufficient evidence to draw a causal or correlative link between violent video games and violent behavior.<sup>90</sup> For every psychological study that supported such a link, the plaintiffs claimed that there was a conflicting study that reached the opposite conclusion.<sup>91</sup>

Second, the plaintiffs alleged that the law was not the least restrictive means of achieving the purported goal.<sup>92</sup> The plaintiffs argued that educational efforts, parental controls, and retailer enforcement initiatives,<sup>93</sup> such as the ESRB, were better-tailored approaches that dealt with the perceived problem more appropriately.<sup>94</sup>

Thirdly, the plaintiffs attacked the language of the law, calling it “unconstitutionally vague.”<sup>95</sup> As applied to video games, they claimed

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84. Complaint, *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (N.D. Cal. 2005), (No. C 05-4188), 2005 WL 2897373.

85. Order Granting Preliminary Injunction, *Schwarzenegger*, 401 F. Supp. 2d at 1037 (No. C 05-4188).

86. Plaintiff’s Motion for Summary Judgment at 7–8, *Video Software Dealers Ass’n v. Schwarzenegger*, No. C-05-04188 RMW (N.D. Cal. Aug. 6, 2007).

87. *Id.* at 10.

88. *Id.* at 11.

89. *Id.* at 13.

90. *Id.* at 16.

91. *Id.* at 17.

92. *Id.* at 22–24.

93. *Id.*

94. *Id.*

95. *Id.* at 26–28.

that the law would result in a substantial degree of confusion among video-game publishers, retailers, and customers. Such confusion, they alleged, stemmed from the law's inadequate definition of terms and phrases such as "violent," "deviant or morbid interest," "gratuitous violence," "image of a human being," "virtually inflict a high degree of pain," and "shockingly atrocious."<sup>96</sup> Such ambiguity, the plaintiffs argued, would negatively affect video-game publishers, who would be forced to guess at the meaning and scope of the law.<sup>97</sup> This would deliver a chilling effect on the expression of the plaintiffs' members.<sup>98</sup>

Defendants, the state of California, denied the allegations in the plaintiffs' complaint and summary judgment motion and thereafter filed competing motions. First, the state asserted that the VSDA and ESA did not have standing to assert the rights at issue. Interestingly, this claim contains some merit, but the district court did not give it much attention.<sup>99</sup> The law does not seek to regulate the publication of video games. Indeed, there is nothing in the law that prohibits the creation of a violent video game. Rather, the law regulates the free speech rights of a certain class of buyers (minors) by amending the relationship between buyers and sellers.<sup>100</sup> In such cases, the vendor can only assert standing on behalf of the buyer under third party, or *jus tertii* standing.<sup>101</sup> There are three factors to consider in granting such standing: (1) whether there is an injury in fact to a party; (2) whether a close relationship exists between the litigant and the third party; and (3) whether some obstacle impedes the third party from asserting his or her own rights in the matter.<sup>102</sup>

The VSDA and ESA satisfied the first prong of the test because the financial penalty for violations of the act is an "injury." However, the second and third prongs were not so clearly satisfied. Prior to *Brown* there was no precedent that established a close relationship between vendors and minor children. Only parents,<sup>103</sup> schools and teachers,<sup>104</sup> and medical providers<sup>105</sup> could assert the rights of minors as third parties.<sup>106</sup>

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96. *Id.*

97. *Id.*

98. *Id.*

99. See generally *Video Software Dealers Ass'n v. Schwarzenegger*, No. C 05 4188 RMW, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007).

100. See *Jennings*, *supra* note 1, at 117.

101. *Id.*

102. *Id.* (citing *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989)).

103. See, e.g., *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816 (1977).

104. See e.g., *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 638 F.2d 858 (1982).

105. See e.g., *Planned Parenthood of N. New Eng.*, 390 F.3d 53 (1st Cir. 2004).

106. *Jennings*, *supra* note 1, at 117 (arguing that the plaintiffs in *Brown* did not have standing to assert the free-speech rights of children).

Therefore, allowing the VSDA and ESA, vendors, to assert the rights of minors effectively set a new precedent for *jus tertii* standing never before seen.<sup>107</sup>

To counter the plaintiffs' substantive claims, the state of California argued that the law passes a strict scrutiny analysis. The state explained that the compelling government interest was not simply to restrict a child's access to violent material, but rather to aid parents in the upbringing of their child.<sup>108</sup> "The Supreme Court recognizes that parents, not society, are entitled to choose the appropriate material for their individual children to view or hear. And parents are entitled to the assistance of state laws in this battle."<sup>109</sup> Because the law did not prohibit minors from viewing violent games, but rather deferred to parents to make that decision, the state argued the law appropriately served a compelling government interest.<sup>110</sup>

The state also fired back at the plaintiffs' attack on the scientific validity of psychological studies performed to assess the impact of violent games on children's behavior. California pointed to numerous studies indicating both correlative and causal links.<sup>111</sup> Citing twenty-three articles by prominent social scientists<sup>112</sup> that explain the negative effects of violent video games on children, California contended that the record was proof of the legislature's due diligence in researching the issue.<sup>113</sup> The studies purportedly show that violent video games not only lead to aggressive behavior, but they also lead to a desensitization to violence, as well as decreased activity in the frontal lobes, or cognition centers, of the undeveloped child's brain:<sup>114</sup> "Automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance, reduced activity in the frontal lobes of the brain—each represents a distinct harm to the minds of children. And prevailing social science points directly to violent video games as a major culprit."<sup>115</sup>

The state admitted that the studies do not demonstrate absolute cer-

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107. *Id.*

108. Defendant's Motion for Summary Judgment at 5, *Video Software Dealers Ass'n v. Schwarzenegger*, No. C 05 4188 RMW (N.D. Cal. Aug. 6, 2007).

109. *Id.*

110. *Id.* at 11.

111. *Id.* at 8–15.

112. Such studies include research by Dr. Craig A. Anderson, PhD, chair of the Psychology Department of Iowa State University, as well as support from the American Academy of Pediatrics, the California Psychiatric Association, and the Indiana University School of Medicine.

113. Defendant's Motion for Summary Judgment, *supra* note 108, at 15.

114. *Id.* at 8–15.

115. *Id.* at 12.



tainty.<sup>116</sup> However, the state also pointed out that the courts generally give deference to legislative determinations.<sup>117</sup> Citing *Turner Broadcasting System, Inc. v. F.C.C.*,<sup>118</sup> California correctly explained that the First Amendment does not require absolute certainty: "All that is required is that the legislative body consider the available evidence, and draw reasonable inferences from the evidence considered."<sup>119</sup> And courts must "accord substantial deference to the predictive judgments" of the legislature.<sup>120</sup>

After arguing the validity of the compelling government purpose, the state of California turned its attention to the second element of strict scrutiny analysis: whether the act was narrowly tailored to advance its purported goal. At the outset, the state clarified that its intent was not to prevent children from harming others, but rather to prevent harm to children's cognitive development.<sup>121</sup> With this narrow goal in mind, the state argued that the means to achieve it were equally narrow for four distinct reasons.

First, the state argued that the act was narrowly tailored because it only addressed video games and not other forms of violent media. Although other forms of violent media can also have effects on a child's cognitive development, the state explained that video games have a much higher potential of harm because of their uniquely interactive nature.<sup>122</sup> To support this assertion, the state pointed to various studies conducted by professional medical associations,<sup>123</sup> which showed that violent video games posed a special risk.<sup>124</sup> "And according to the American Psychological Association, violent video games may be more harmful than violent television and movies because they are interactive, very engrossing, and require the player to identify with the aggressor . . . ."<sup>125</sup> Therefore, the law is narrowly tailored because it only regulates violent video games, and not other forms of media, which are not as harmful.

Second, the state argued that the law was narrowly tailored because

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116. *Id.* at 13–15.

117. *Id.* at 14.

118. 512 U.S. 622 (1994).

119. Defendant's Motion for Summary Judgment, *supra* note 108, at 14 (citing *Turner*, 512 U.S. at 666).

120. *Id.* at 14.

121. *Id.* at 12 ("In the instant case, California is seeking to prevent harm to minors, not to prevent them from committing violent acts.").

122. *Id.* at 15–16.

123. Such associations included the American Academy of Pediatrics, and the California Psychiatric Association.

124. Defendant's Motion for Summary Judgment, *supra* note 108, at 16.

125. *Id.* at 16.

the language that defined the relevant games to be regulated (which was charged by the plaintiffs as confusing and unconstitutionally vague)<sup>126</sup> was purposefully chosen to apply to only a small subset of games.<sup>127</sup>

Third, the law did not prohibit minors from buying, renting, or otherwise possessing violent video games. It simply required that they do so with parental permission. And the law did nothing to impede an adult's access to such games. This feature of the law, California argued, ensured that the law was specifically limited to children whose parents did not want them playing violent games and was thus narrowly tailored to serve its purpose of assisting parental authority.<sup>128</sup>

The final reason cited is that less restrictive means, such as the self-regulatory regime exemplified by the ESRB, had proven ineffective.<sup>129</sup> Citing studies by the Federal Trade Commission, the state explained how the ESRB rating system failed. In one such study, conducted in 2003, 69% of unaccompanied 13–16 year olds purchased “M”-rated games, and only 24% of cashiers asked the youth's age.<sup>130</sup> With such dismal statistics, the state argued, it was proper for the legislature to step in and replace the failed system of industry self-regulation.

With summary judgment motions to consider from each side, District Court Judge Whyte ruled in favor of the plaintiffs, turning the preliminary injunction into a permanent one and effectively holding that the law was facially unconstitutional.<sup>131</sup> Judge Whyte applied the strict scrutiny analysis that the plaintiffs requested.<sup>132</sup> He found that the interest to be protected, that of protecting minors from harm, was a compelling one, worthy of governmental action. However, Judge Whyte did not agree that the law was narrowly tailored to serve such a purpose.<sup>133</sup> The court noted weaknesses in the psychological studies proffered by California's expert witness, Dr. Craig Anderson, and showed skepticism towards research suggesting a causal link between violent video games and cognitive harm. For example, Judge Whyte was troubled that the law did not distinguish between minors of different ages: “The studies cited by the state do not demonstrate that exposure to violent video games of those nearing the age of majority has the same deleterious effect on them, as it does, for example, on those under age fourteen.”<sup>134</sup>

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126. See discussion *supra* Part III.

127. Defendant's Motion for Summary Judgment, *supra* note 108, at 16–17.

128. *Id.* at 17.

129. See discussion *supra* Part II.B.

130. Defendant's Motion for Summary Judgment, *supra* note 108, at 18.

131. Video Software Dealers Ass'n v. Schwarzenegger, No. C 05 4188 RMW, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007).

132. *Id.*

133. *Id.*

134. *Id.* at 10.

As a result, the law was seen as overbroad and unnecessarily general. The ESRB, in contrast, differentiates between minors of various age groups, and in that regard is less restrictive and more properly tailored.<sup>135</sup>

### B. *The Ninth Circuit Affirms*

Vowing to continue the fight, the state of California appealed the District Court order to the Ninth Circuit Court of Appeals. This time, however, the state slightly altered its strategy. Because the district court was so quick to dismiss the legislative determinations regarding the link between violence and video games, the state was skeptical that the Court of Appeals would view the evidence with any less skepticism—especially if the strict scrutiny standard was applied again. Therefore, the state sought to justify the law under the *Ginsberg* precedent, which the state argued, allowed a legislature to pass content-based free-speech restrictions on minors if a rational basis could be shown between the perceived harm and the restriction. Thus, if the state could persuade the court that *Ginsberg* controlled the outcome, it only needed to show that the restriction on minors' ability to obtain violent video games was rationally related to the state's interest in protecting them. As a significantly lower standard than strict scrutiny, the court would be more deferential to the legislative determinations that provided justification for the law.

Unfortunately for California, the Ninth Circuit did not take the bait. In fact, the state suffered a larger defeat. Not only did the *Ginsberg* strategy fail, the court also held that the law flunked both prongs of the strict scrutiny standard, holding that the alleged purpose was not a compelling government interest.<sup>136</sup>

We hold that the act, as a presumptively invalid content-based restriction on speech is subject to strict scrutiny, and not the "variable obscenity" standard from *Ginsberg v. New York*. Applying strict scrutiny, we hold that the act violates rights protected by the First Amendment because the state has not demonstrated a compelling interest, has not tailored the restriction to its alleged compelling purpose, and there exist less-restrictive means that would further the State's expressed interest.<sup>137</sup>

## IV. THE SUPREME COURT OPINIONS

The Supreme Court granted certiorari in April of 2010. But the

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135. See discussion *supra* Part II.B.

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

137. *Id.* at 953.

grant was perplexing.<sup>138</sup> This was not the classic case of a circuit split, or an area of law that required much clarification. The case was entirely affirmed on appeal. The Seventh, Eight, and Ninth Circuits were all in agreement: Content-based restrictions on video games were subject to a strict scrutiny analysis and were, for the most part, unconstitutional restraints on free expression. Many Court watchers were left scratching their heads: Why did the Court agree to hear this case?<sup>139</sup> There was even greater speculation that the case would be groundbreaking after the court kept delaying the issuance of its decision.<sup>140</sup>

However, those hoping for a dramatic realignment of First Amendment law were no doubt disappointed. The Court affirmed the Ninth Circuit 7-2, although there was an interesting mix of concurring and dissenting opinions: “But even more surprising was the lineup, which was not only unusual but unique; in almost two decades of service together on the Court, this was the first time, as far as I have been able to determine, that Justices Breyer and Thomas were together, alone, in dissent.”<sup>141</sup>

#### A. Justice Antonin Scalia’s Majority Opinion

Justice Antonin Scalia’s three-part opinion largely mirrors that of the Ninth Circuit. In Part II (Part I provided a brief procedural history), he rejected California’s attempt to bring violence under the obscenity umbrella.<sup>142</sup> In Part III he determined that the law also failed a strict scrutiny test.<sup>143</sup>

Part II begins with an exposition on free-speech law. He begins with the general rule that the government cannot restrict expression because of its messages, its ideas, its subject matter, or its content.<sup>144</sup> However, there are exceptions and Justice Scalia acknowledges three specifically: obscenity,<sup>145</sup> incitement,<sup>146</sup> and fighting words.<sup>147</sup> The majority then focused its attention to the instant case.

California argued the case with the same strategy it used before the

138. Andrew L. Schlafly, *Game Over for Childhood? Violent Video Games as First Amendment Speech*, 38 RUTGERS COMPUTER & TECH. L.J. 173, 175 (2012).

139. Post, *supra* note 80, at 5.

140. *Id.* at 6.

141. *Id.*

142. *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2733–2738 (2011) (rejecting California’s invitation to include violence as part of the obscenity exception to first amendment protection).

143. *Id.* at 2738–2743 (explaining how the statute fails strict scrutiny).

144. *Id.* at 2733 (citing *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

145. *Id.* (citing *Roth v. United States*, 354 U.S. 476, 483 (1957)).

146. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

147. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

Ninth Circuit. The state urged the Court to exempt the law from normal First Amendment strict scrutiny and apply instead the more lenient standard applied in *Ginsberg*. The law deserved such treatment, the state argued, because both *Brown* and *Ginsberg* involved state attempts to limit speech *directed at minors*. And just as the New York statute in *Ginsberg* was upheld under a rational basis, so too should the California law.<sup>148</sup>

But the majority rejected this argument, claiming *United States v. Stevens*,<sup>149</sup> not *Ginsberg*, controlled the outcome.<sup>150</sup> *Stevens* invalidated a federal law that criminalized the creation, sale, or possession of depictions of illegal animal cruelty, save for those depictions with literary, artistic, religious, journalistic, political, or educational value.<sup>151</sup> The law was deemed unconstitutional, the Court reasoned, because violent expression, no matter how disgusting, has historically been protected under the First Amendment.<sup>152</sup> The Court explained that, historically, only sexual material, not violent material, can qualify for the obscenity exception.<sup>153</sup>

Justice Scalia believed that the state of California's argument in *Brown* was analogous to the federal government's argument in *Stevens* and consequently rejected the attempt to gain the more lenient standard of review accorded to obscene materials.<sup>154</sup> "As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation . . . . That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of sexual conduct."<sup>155</sup>

This was a death knell to the law. Per First Amendment jurisprudence, the refusal to allow violent video games into the obscenity exception meant that the restriction would only be sustained if it passed a strict scrutiny analysis. In much the same manner as the district and appellate courts, the majority found that the regulation did not pass the strict scrutiny test and held the law unconstitutional.<sup>156</sup>

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148. Brief for Petitioner at 7, *Brown v. Entertainment Merch. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 2787546.

149. 130 S. Ct. 1577 (2010).

150. *Brown*, 131 S. Ct. at 2736.

151. *Stevens*, 130 S. Ct. at 1577.

152. *Id.*

153. *Id.*

154. *Brown*, 131 S. Ct. at 2736.

155. *Id.* at 2734 (quoting *Miller v. California* 413, U.S. 15, 24 (1973)).

156. *Id.* at 2742 (Justice Scalia found that the evidence justifying the law was weak, and that the law was both underinclusive in that it did not restrict other harmful violent media, and overinclusive in that it restricted minors who had parents who did not care what type of video games their children played).

### B. Justice Alito's Concurrence

Justice Alito and Chief Justice Roberts ultimately sided with the majority, but for a much more narrow, distinct reason. They found the law unconstitutional because the language of the statute was “impermissibly vague.”<sup>157</sup> For the most part, they avoided the broad constitutional questions discussed in the majority opinion.<sup>158</sup>

Justice Alito wrote that the law lacked sufficient definitions to properly inform video-game publishers of the kinds of games that would be subject to the law: “Here the California law does not define violent video games with the narrow specificity that the Constitution demands.”<sup>159</sup> Indeed, crucial terms such as “deviant” and “morbid” are not specifically defined in the statute, and the phrase “prevailing community standards as to what is suitable to minors” does not take into account the vast differences between, for example, nine year olds and seventeen year olds. It also does not serve the same limiting function as it did in the *Miller* context because, he explains, violence, historically, does not enjoy as uniform a consensus among communities as sexual expression.<sup>160</sup> Justice Alito found these factors would result in substantial enforcement problems by creating confusion and inequalities among video-game publishers, retailers, and consumers: “For all these reasons, I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires.”<sup>161</sup>

Interestingly, Justice Alito included an extensive section in his opinion that outlined why he did not join the majority. First, he did not believe that *Stevens* controlled the outcome, citing differences in degree between the two regulations. *Stevens* involved a federal law that completely prohibited a form of expression altogether—for children and adults. *Brown*, on the other hand, a state law, merely requires a child to get parental consent before buying certain video games.<sup>162</sup> Second, he disagreed with the majority's contention that the law unnecessarily restricted children who had parents indifferent to their choice of video games. Citing *Ginsberg*, Justice Alito explained that the California law reinforced parental decision-making exactly like the New York statute did: “Under both laws, minors are prevented from purchasing certain materials; and under both laws, parents are free to supply their children with these items if that is their wish.”<sup>163</sup> Thirdly, and perhaps most

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157. *Id.* at 2742–43 (Alito, J., concurring).

158. *Id.* at 2743.

159. *Id.*

160. *Id.* at 2746.

161. *Id.* at 2751.

162. *Id.* at 2747.

163. *Id.*

importantly for future regulations, Justice Alito was not as eager as the majority to embrace video games as mere “interactive literature.”<sup>164</sup> Justice Alito wrote that the majority did not give enough credence to the technological capabilities, the interactivity, and the astounding realism that separate video games from other forms of expression:<sup>165</sup>

When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.<sup>166</sup>

### C. Justice Breyer’s Dissent

Justice Breyer would have upheld the statute using what can best be described as a modified strict scrutiny analysis. He agreed with the state of California and wrote that *Ginsberg*, not *Stevens*, was the appropriate precedent, but the standard he used to validate the law falls somewhere between the rational basis used in *Ginsberg* and traditional strict scrutiny.

Perhaps the most unique aspect of Justice Breyer’s dissent is his endorsement of the science backing the law’s passage. As exhibited in the two appendices he attached to his opinion, Justice Breyer wrote that the evidence proffered by psychologists and medical associations was substantial and compelling.<sup>167</sup> Even if one argued that the evidence was not as definitive, Justice Breyer reminded the Court of the long history of judicial deference in legislative determinations.<sup>168</sup> And the law’s proposed restriction, he argued, was quite modest and served its stated interests of aiding parental authority and protecting children, narrowly and effectively.<sup>169</sup>

Moreover, Justice Breyer wrote that the evidence established that *Brown* was ultimately about the protection of children, not about whether violence should become a new category of unprotected expression. He emphasized on multiple occasions that, like the statute in *Ginsberg*, the statute here was specifically designed to protect minors, and that obscenity’s historical limitation to sexual content was based upon

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164. *Id.* at 2748–51.

165. *Id.*

166. *Id.* at 1251.

167. *Id.* at 2767–71 (Breyer, J., dissenting).

168. *Id.* at 2770.

169. *Id.*

regulations of *adult* expression.<sup>170</sup> This adult-minor distinction did not exist in *Stevens*, so its use as a precedent in the instant case was misplaced. Justice Breyer contended that this distinction was why “*Ginsberg* controls the outcome here *a fortiori*.”<sup>171</sup>

After discussing the case pursuant to his modified strict scrutiny analysis, in which he used somewhat of a balancing test,<sup>172</sup> Justice Breyer concluded that the law was facially constitutional and that the Court’s decision to the contrary created somewhat of a glitch in First Amendment law.<sup>173</sup> Providing cannon fodder for Jon Stewart, Justice Breyer quipped near the end of his dissent, “What kind of First Amendment would permit the government to protect children by restricting sales of [an] extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?”

## V. ANALYSIS & CRITIQUE

California had hoped that a majority of the Justices would view this case as Justice Breyer did. Unfortunately, that did not occur, but there is no doubt sufficient dicta within both Breyer’s dissent and Alito’s concurrence to suggest that the Supreme Court could schedule a rematch. Although *Brown* commanded a seven-Justice majority, the core issues of violence, obscenity, and the standard to apply to content-based restrictions to minors is a much more volatile 5-4 split.<sup>174</sup> Some commentators have jokingly suggested that the *Brown* opinions reach such differing conclusions that it could be said each opinion came out of a different legal system:<sup>175</sup> “[I]t’s as though the same statute had been presented for consideration to the highest court in the United States, Romania, Morocco, and Australia and these are the opinions that emerged from that process.”<sup>176</sup>

*Brown* was a victory for the video-game industry. However, the diverse opinions suggest that this area of law is not as settled as some may think. This is especially true when one considers, as Judge Posner, Justice Alito, and Chief Justice Roberts did, that video-game technology will only improve, becoming more violent, more realistic, and more interactive:<sup>177</sup>

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170. *Id.* at 2771.

171. *Id.*

172. See generally *id.* at 2767–71.

173. See *supra* Part I.

174. Post, *supra* note 80, at 51.

175. *Id.* at 45.

176. *Id.*

177. For an interesting look at the future of video game technology and the law, see Robert Bryan Norris, Jr., *It’s All Fun and Games Until Someone Gets Hurt: Brown v. Entertainment*



I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.<sup>178</sup>

With this understanding, it becomes useful to analyze and critique California's strategy in *Brown*, as states and industry representatives alike will no doubt try to take this game to the next level.

After a careful analysis, it can be argued that California's strategy should have won this battle. The reason that it did not was because the Supreme Court improperly applied *Stevens* to the facts when *Ginsberg* was the more suitable precedent. Moreover, there is insufficient language in *Ginsberg* to suggest that the "obscenity-for-minors" category must be limited in the same manner as the "adults-only" obscenity exception. The traditional obscenity limitations, laid down in *Roth v. United States*, do not support such a judicial construction.<sup>179</sup> However, *Brown* now occupies that once nonexistent precedent, so for better or worse, a future reliance on *Ginsberg* would still be a difficult, uphill battle.

Alternatively, it appears that an entirely different strategy was available to California and will be available to states in the future. Admittedly, it seems counter-intuitive to rely on an appellate court decision when Supreme Court precedent exists, but it is worth noting that Judge Posner's opinion in *Kendrick* left open the possibility that with increased technological innovations, video games, for purposes of unlimited free-speech protection, may end up falling victim to their own sword.<sup>180</sup>

A. *California's Reliance on Ginsberg was not Misguided, but a Slightly Different Tactic May Have Been More Successful*

At the outset, it should be acknowledged that California's reliance on *Ginsberg* was a sensible strategy that should have been met with greater agreement. Of all the Justices, Justice Breyer was most honest to Supreme Court precedent because *Ginsberg* was in fact a more appropriate precedent than *Stevens*. As Justice Alito articulated, the effects of the law in *Ginsberg* and the law in *Stevens* were drastically different: The law in *Stevens* would have imposed more stringent restrictions across a

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Merchants Association and the Problem of Interactivity, 13 N.C. J.L. & TECH. ON. 81 (2011); see also Mott, *supra* note 6, at 650–54.

178. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2751 (2011) (Alito, J., concurring).

179. See *infra* Part V.A.

180. See *supra* text accompanying notes 40–44.

wide variety of media with a much greater scope than both the law in *Ginsberg* and the law in *Brown*.

First, the law in *Stevens* was a federal one that criminalized not only the *sale or rental* of animal cruelty depictions; it also criminalized the *creation and possession* of such material. *Brown* merely placed a restriction on the *sale or rental* of a small subset of extremely violent video games, did not encroach upon the rights of publishers to create material, and did not seek to punish children who possessed and played violent video games, regardless of how they acquired them. The more important distinction, however, is that the law in *Stevens* applied to everyone in the entire country. Infants, grandparents, and everyone in between were subject to the same prohibition; there was no distinction between minors and adults. In stark contrast, the laws in *Ginsberg* and *Brown* only affected the free-speech rights of minors. Adults in New York were free to buy as many pornographic magazines as they wished, just as adults in California could buy violent video games without restrictions.

However, the trivial similarities between *Ginsberg* and *Brown* are only enough to pull *Brown* away from *Stevens*'s reach. The similarities discussed above do not contain enough significance to merit *Ginsberg* controlling precedent. This is because of an important distinction between the content of the two regulations (sex v. violence). However, in the future, these differences can be reconciled if it is argued that *Ginsberg* is not really a case about obscenity—an argument that California failed to fully articulate.

*Ginsberg* regulated sexual material aimed at minors. *Brown* regulated violent video games aimed at minors. California's opponents immediately distinguished these cases on the grounds that *Ginsberg* concerned obscenity, historically limited to sexual materials, whereas *Brown* concerned violent depictions, which have never been included in the obscenity doctrine. The knee-jerk reaction of many, including California, was to claim that the obscenity doctrine should be enlarged to include such disgustingly violent material.<sup>181</sup> In its brief, California explained that laws restricting access to both sexual and violent materials were motivated by identical community concerns.<sup>182</sup> Such similarity, it argued, meant that violent material could also be considered "obscene."<sup>183</sup> Even though that may be an accurate statement of legislative intentions, the argument too obviously asked the court to do something quite onerous: enlarge a category of unprotected speech. For

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181. Brief for Petitioner, *supra* note 148, at 31.

182. *Id.*

183. *Id.*

better or for worse, obscenity has been limited to sexual material since 1957.<sup>184</sup> And in a static legal system such as ours, so profoundly committed to *stare decisis*, the argument to *expand* the obscenity category will almost always fail, as it did in *Brown*.

But going forward, there may be a way to subvert the unfavorable obscenity precedent, or at least to better conceal an attempt to expand it. Revisiting *Roth v. United States*, the seminal case of modern obscenity jurisprudence, and then juxtaposing it with *Ginsberg* can be used to reframe the analysis in a light more favorable to a state defending a law like *Brown*. More specifically, future states should acknowledge that violent expression has no relation to obscenity, but also argue that *Ginsberg* has no relation to the obscenity doctrine. In fact, when examined closely, *Roth* suggests that *Ginsberg* has nothing to do with obscenity.<sup>185</sup> And once the Court accepts this premise, the unfavorable issue of obscenity is removed from the calculus. The focus thus shifts from one of sex, violence, and obscenity to the much simpler, much more favorable one of a state's police power to aid in parental authority and to protect children—the two stated aims of the *Ginsberg* and *Brown* laws. Therefore, this juxtaposition of *Roth* and *Ginsberg* may provide relief for any future state seeking to overturn the *Brown* precedent.<sup>186</sup>

*Roth*, decided in 1957, marked the first time the Supreme Court held that laws regulating obscenity did not violate the First Amendment.<sup>187</sup> Laws against obscenity had existed since the founding of the country; each state had its own, but in 1842, Congress began passing federal obscenity laws.<sup>188</sup> There were a total of twenty by the time *Roth* reached the Supreme Court.<sup>189</sup> Justice William Brennan, who would write the *Ginsberg* opinion eleven years later, wrote for a majority of the court. He held that obscenity statutes are permissible content-based regulations outside the usual protections of the First Amendment. In his reasoning, Brennan cited to numerous federal and state court opinions,

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184. *Roth v. United States*, 354 U.S. 476, 487 (1957).

185. *Id.* (explaining that obscene material is not simply material concerning sex. Obscenity must be sexual content that appeals to prurient interests. And the scope of prurient interests are to be judged only by reference to community norms applicable to the average citizen—men, women, and children included); see also *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2766 (2011) (Breyer, J., dissenting) (“Since the Court in *Ginsberg* specified that the statute’s prohibition applied to material that was not obscene, I cannot dismiss *Ginsberg* on the ground that it concerned obscenity.”).

186. See *infra* text accompanying notes 189–92; see also Vincent S. Onorato, Note, *Shielding Children from Nudity but not Violence . . . Do Minors’ First Amendment Rights Make Sense?*, 41 WASH. U. J.L. & POL’Y 151, 176–80 (2013) (arguing that violence should be treated as offensive as nudity or alternatively, that the “obscenity for minors” standard should be abolished).

187. *Roth*, 354 U.S. at 487.

188. *Id.* at 485.

189. *Id.*

state laws, and international agreements.<sup>190</sup> He also declared that obscene utterances are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>191</sup> However, Justice Brennan proscribed parameters to determine what actually could be considered obscene: “Obscene material is material which deals with sex *in a manner appealing to prurient interests*.”<sup>192</sup> The portrayal of sex or nudity is not enough. Such portrayals must give rise to immoral, lustful, indecent, depraved, or corrupt behavior in order to be considered obscene.<sup>193</sup> To determine whether such portrayals actually encouraged such behaviors, Justice Brennan explained that the test was not whether the material would arouse such reactions in a particular segment of the community; rather, the determination must be made with the average person in mind: “You may ask yourselves, does it offend the common conscience of the community by present-day standards.”<sup>194</sup> Brennan then added that “in determining that conscience, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.”<sup>195</sup>

*Roth* therefore stands for the proposition that obscenity, while not a precise concept, is sexual material that the community determines would arouse the prurient interests of the average person—not of a particular segment of the community. The goal of the obscenity doctrine, thus, is not to prevent tangible harm to certain people, but rather to separate offensive and inoffensive sexual materials. Applying this to *Ginsberg*, it becomes clear that although the New York statute dealt with sexual material, it is not an obscenity case under the traditional definition of obscenity set forth by *Roth*. This is because the average person in New York did not find “girlie” magazines to be obscene. In fact the *Ginsberg* court admits that, “[t]he girlie magazines involved in the sales here are not obscene for adults.”<sup>196</sup> Rather, New York targeted a particular segment of the community—minors. *Roth* specifically mentions that this is not the proper way to determine obscenity.<sup>197</sup> In fact, *Roth* overturned a prior obscenity test, known as the *Hicklin* test, which judged obscenity “by the effect of isolated passages upon the most susceptible

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190. *Id.*

191. *Id.*

192. *Id.* at 487 (emphasis added).

193. *Id.* at 486–87.

194. *Id.* at 490.

195. *Id.*

196. *Ginsberg v. New York*, 390 U.S. 629, 634 (1968) (citing *Redrup v. New York*, 386 U.S. 767 (1967)).

197. *Roth*, 354 U.S. at 489.

persons . . . .”<sup>198</sup>

*Ginsberg*'s divergence from traditional *Roth* obscenity norms is not to render *Ginsberg* as a whole moot or unconstitutional. In fact, many court observers and jurists, including the majority of the *Brown* Court, contend that *Ginsberg* represents an evolution of the concept of obscenity by creating a “sub-category” for minors.<sup>199</sup> But this “sub-category” is in actuality a brand new category of unprotected speech because its asserted justifications lie not in separating offensive and inoffensive sexual content, but instead with preventing harms.<sup>200</sup> And as Judge Posner articulated in *Kendrick*, obscenity is not about preventing harms, but rather is concerned with offensiveness.<sup>201</sup> But the New York statute in *Ginsberg* was clearly motivated by an attempt to prevent a perceived social harm:

[T]his Court, too, recognized that the State has an interest to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens. The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by s 484-h constitutes such an abuse. . . . Section 484-e of the law states a legislative finding that the material condemned by s 484-h 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*.<sup>202</sup>

Because “obscene-as-to-minors” was motivated by a legislative desire to prevent harm to a certain class of people, and not by traditional obscenity norms regarding offensiveness, it must follow that *Ginsberg*, even if accidentally, birthed a new category of speech regulation outside the protection of the First Amendment. Although the New York statute did regulate nude images, it does not follow that the new “obscene-as-to-minors” exception only concerns sexual subjects. Unlike *Roth*, this new category enjoyed no judicial precedents that limited it to a certain subject matter. As the first of its kind, *Ginsberg* thus articulated a test to place certain speech directed at minors outside the protection of the First Amendment if it could be shown that, like other categories of unprotected expression, the speech restriction passed a rational basis review.<sup>203</sup>

Under this framing of *Roth* and *Ginsberg*, a state could conceivably

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198. *Id.* at 489.

199. Post, *supra* note 80, at 36.

200. *Ginsberg*, 390 U.S. at 638–39.

201. See discussion *supra* Part II.A.

202. *Ginsberg*, 390 U.S. at 640–41 (internal quotations omitted) (emphasis added).

203. *Id.*

solve the obscenity conundrum and successfully argue that a statute like *Brown* triggers only rational basis review. While this strategy does not fix the anomaly in First Amendment jurisprudence, it achieves the narrow purpose of placing modest restrictions on a potentially harmful product marketed to minors. By placing *Ginsberg* into a different context, minors are better shielded from a small subset of games that even the industry itself believes should be restricted to adults.<sup>204</sup>

### B. *The Alternative Strategy: Death by Technology*

As the future of video games becomes rife with more realistic violence and interactive gameplay, scientific evidence may evolve to show the causal link that the *Brown* majority so desperately demanded and Justice Alito cautiously acknowledged. And in this regard, future laws may pass strict scrutiny, possibly making *Ginsberg* irrelevant to the inquiry.

If scientific evidence does evolve to show a more concrete link between cognitive harm and violent video games, then Justice Alito's concurrence and Judge Posner's *Kendrick* opinion will prove instructive. And the likelihood of whether such scientific evidence does evolve is tied to how interactive video games become.<sup>205</sup> It is worth noting the significant developments in video game technology since Senator Yee first introduced the bill in 2005. Illuminating these improvements underscores just how much more rapid is the pace of technological change than legal evolution. Like other industries, video game technology may soon leave modern precedents in the rearview.

Violence in video games has expanded tremendously in the last two decades. Games that were once only capable of showing primitive, 2D graphics on a big computer screen can now be played in high definition graphics on smartphones.<sup>206</sup> More recently, video-game consoles, such as the Xbox 360, the Playstation 3, and the Nintendo 3DS now support three-dimensional gaming, offering the gamer a stunningly realistic visual experience.<sup>207</sup> But the technology goes far beyond mere visual enhancements. For example, the Microsoft Kinect, an attachment to the Xbox 360, allows gamers to control their character's movement with the use of their body; no hand-held controller is needed.<sup>208</sup> For some games, users can purchase controllers that are shaped or modeled after whatever instrument the character in the game is using. For example, a gamer

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204. See discussion *supra* Part II.B.

205. See generally Norris, Jr., *supra* note 177, at 101–07.

206. *Id.* at 84–87.

207. *Id.*

208. *Id.*

could purchase a controller literally modeled in the relative shape and design of a real guitar to play the aptly named game, *Rock Band*. In a more violent application, players of the zombie-killing game *Resident Evil* could purchase a chainsaw-shaped controller to better simulate slicing through zombie hordes.<sup>209</sup>

Video games used to involve only the visual and somatosensory (touch) sensations. But now, a person's sense of sight, sound, touch, and even smell can be used in game.<sup>210</sup> And the manner in which those senses are stimulated are becoming ever more realistic and interactive. Indeed, the ultimate goal and effect of all the technological improvements is to make video games more like real life. To the extent that video games become more like simulators and less like games, new precedents may need to be drawn.

To this end, it appears that the future of violent video games' free-speech protection is not so much tied to the *Brown* precedent, but rather will be a function of technological developments. Essentially then, there is not much strategy to this alternative other than to wait for video games to develop themselves out of First Amendment protection. Once they reach such a level, a strict scrutiny test might be easier to pass. Ironically, the warnings of Justice Alito could come to fruition, because not too long ago, technology was the means by which video games first obtained free-speech protection.

## VI. CONCLUSION

The Supreme Court has spoken. Violent video games, no matter how disturbing they may be, can be sold to children without legal consequence. This Note has discussed whether this decision was proper in the eyes of the First Amendment. It has also addressed the legal strategies involved. It has not specifically commented on whether this decision was sound public policy. As the Supreme Court would surely exclaim, public policy decisions are outside the purview of the judiciary. Accordingly, the wisdom of whether society should allow children unregulated access to violent video games is outside the scope of this Note.

However, it is natural to explore the practical consequences of legal decisions. Although the ruling was a defeat for California, it appears that the fight did enact some reform. In a more recent FTC report on the

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209. *Id.* at 88.

210. Martin Delgado, *I Love the Smell of Napalm on My Xbox: How Computer Games of the Future Will Simulate the Real Stench of Battle*, THE DAILY MAIL (May 16, 2009, 11:22 PM), <http://www.dailymail.co.uk/sciencetech/article-1183465/I-love-smell-napalm-Xbox-How-games-future-simulate-real-stench-battle.html>.

marketing of violent entertainment to children,<sup>211</sup> the FTC concluded that the electronic-gaming industry's regulatory regime has become more effective than the corresponding film (Motion Picture Association of America) and music (Recording Industry Association of America) regulatory regimes.<sup>212</sup> Thus, it appears the video-game industry has responded to criticisms and is already preparing itself for a future fight down the road, in which the technology, and thus the stakes will no doubt be higher.

If states wish to enact similar laws in the future, the biggest obstacle they will face is the *Brown* decision. Even if *Ginsberg* is properly juxtaposed with *Roth* to place it in a more favorable context, regulators still have to surmount a judicial system unequivocally resistant to overturn precedents, especially when such precedents come from the Supreme Court. On the other hand, the video-game industry must be wary of itself. As the warnings of Justice Alito and Judge Posner demonstrate, video games are uniquely interactive and technologically driven. Thus, the line connecting them to books, radio, movies, plays, and other forms of historically protected media further fades with each passing year. And when this line vanishes, video games will be isolated on an island, effectively becoming a much easier target for regulators. But for now, it appears that the video game industry has won, and until either side makes a move, this game will remain paused.

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211. See 2004 FTC report, *supra* note 56.

212. FED. TRADE COMM'N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REPORT TO CONGRESS 23 (Dec. 2009), available at <http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf>.