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Losing the Game: An Analysis of the Brown v. Entertainment Merchants Association Decision and Its Ramifications in the Area of “Interactive” Video Games

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**LOSING THE GAME: AN ANALYSIS OF THE
BROWN v. ENTERTAINMENT MERCHANTS ASSOCIATION
DECISION AND ITS RAMIFICATIONS IN THE AREA OF
“INTERACTIVE” VIDEO GAMES**

*There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.*¹

INTRODUCTION

On February 27, 2004, seventeen-year-old Warren Leblanc of Leicester, England, lured his friend, fourteen-year-old Stefan Pakeerah, to an area of town commonly known as “The Dumps.”² Leblanc was armed with a knife and claw hammer.³ In a matter of minutes, Leblanc brutally murdered Pakeerah, inflicting over fifty separate injuries.⁴ Subsequent analysis of Pakeerah’s body revealed that he had been struck so hard with the claw hammer that his skull had been fractured multiple times, and the knife had been driven so deeply into his body that he suffered extensive kidney and liver damage.⁵

Soon after Pakeerah’s death, his parents called for a ban on violent video games, and, in particular, the controversial game *Manhunt*.⁶ Pakeerah’s mother heard that Leblanc was “obsessed” with the violent game and blamed Leblanc’s fixation with the game for the manner in which he carried out the brutal murder.⁷ Pakeerah’s father stated outside of court that “the way Warren committed the murder is how the game (*Manhunt*) is set out—killing people using weapons like hammers and knives. There is some connection between the game and what he has done.”⁸ Although the judge in Leblanc’s case proclaimed that Leblanc alone was responsible for the grisly murder,⁹ the

1. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2742 (2011) (Alito, J., concurring).

2. *Game Blamed for Hammer Murder*, BBC NEWS (July 29, 2004), http://news.bbc.co.uk/2/hi/uk_news/england/leicestershire/3934277.stm.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Game Blamed for Hammer Murder*, *supra* note 2.

8. *Id.*

9. Lee Glendinning, *Gang Culture Blamed as ‘Manhunt’ Killer is Sentenced to Life*, THE GUARDIAN, Sept. 4, 2004, at 10. The article quotes Judge Michael Stokes in his sentencing of Leblanc, where he stated “[o]ne thing is clear—you and you alone were responsible for this . . .”

incident nevertheless prompted some major retailers to pull *Manhunt* from their shelves.¹⁰

Manhunt was released in 2003, and it was immediately criticized for its graphically violent content.¹¹ A review of the game (giving the game an 8.3 out of 10) noted that the game “unflinchingly depicts intense graphic violence.”¹² Players assume the identity of James Earl Cash, a death row inmate who narrowly escapes capital punishment.¹³ For the remainder of the game, Cash performs a series of increasingly brutal murders at the behest of his sponsor, Starkweather, who captures the grisly scenes for his snuff films.¹⁴ Cash is encouraged to continually vary the method used for the murders, such as driving glass shards into victims’ eyes or forcing plastic bags over his victims’ heads until they start to twitch and suffocate.¹⁵ Blood gushes freely in the game, at times even soaking the screen, and the murders are accompanied by the screams and gurgling noises of the victims, prompting the review to warn that the “executions sound as sickening as they look.”¹⁶ The more gruesomely the murder is executed, the more Starkweather offers praise.¹⁷ The review notes that one will not tire of the explicit murders—“if you can stomach them in the first place.”¹⁸

The outcry over the shockingly violent content of the game was no surprise, even to its own developers.¹⁹ A former employee of Rockstar (the company that developed *Manhunt* and other controversial games such as *Grand Theft Auto*) posted on his blog that “there was almost a mutiny at the company over the game.”²⁰ Jeff Williams claimed that many of the Rockstar employees wanted no part of the game, because its unyielding violence made it different from the controversial games the company had released in the past.²¹ Williams stated: “*Manhunt*, though, just made us all feel icky. It was all about

Id.

10. *Retailer Pulls ‘Murder’ Video Game*, CNN WORLD (July 30, 2004), http://articles.cnn.com/2004-07-30/world/uk.manhunt.storeban_1_violent-video-rockstar-games-murder?_s=PM:WORLD.

11. Douglas C. Perry, *Manhunt*, IGN (Nov. 18, 2003), <http://ps2.ign.com/articles/440/440887p1.html>.

12. Description of *Manhunt* taken from: Greg Kasavin, *Manhunt*, GAMESPOT (Apr. 20, 2004), <http://www.gamespot.com/manhunt/reviews/manhunt-review-6083971/?page=1>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. See Kasavin, *supra* note 12.

18. *Id.*

19. Matt Cundy, *Manhunt Nearly Caused a “Mutiny” at Rockstar*, GAMESRADAR (July 26, 2007), <http://www.gamesradar.com/manhunt-nearly-caused-a-mutiny-at-rockstar/>.

20. *Id.*

21. *Id.*

the violence, and it was realistic violence. We all knew there was no way we could explain away that game. There was no way to rationalize it. We were crossing a line.”²²

Games such as *Manhunt* led legislatures to push for more stringent violent video game restrictions, fueled by parents such as Mrs. Pakeerah.²³ As an example, the 110th Congress introduced legislation attempting to regulate the sale or rental of “adult-rated” video games to minors.²⁴ However the bill was never passed due to First Amendment concerns.²⁵ The rationale behind this bill (and a flurry of similar legislation) was that violence could be portrayed in a manner that exempted it from First Amendment protection, at least with respect to minors.²⁶ In opposition to the growing amount of legislation against violent video games, however, many critics countered that these laws were a violation of the First Amendment right to free speech.²⁷

Over the past twenty years, a number of lower courts have grappled with the issue of whether or not video games qualify for First Amendment protection.²⁸ Assuming First Amendment protection even applies to video games, are all video games worthy of protection, or do some games (such as those that are as graphically violent as *Manhunt*) fall outside of this protection? Does the answer change when minors are playing the games? Can a law

22. *Id.*

23. See Petitioners’ Brief at 34, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 2787546 (noting that California is one of nine states/municipalities to pass laws restricting minors’ access to violent video games).

24. Video Games Ratings Enforcement Act, H.R. 5990, 110th Cong. (2008). The proposed bill essentially attempted to legislate the Entertainment Software Ratings Board (ESRB) voluntary ratings system.

25. *Video Games*, USLEGAL.COM, <http://entertainmentlaw.uslegal.com/censorship/ratings/video-games/> (last visited Apr. 14, 2012).

26. Indeed, Petitioners’ Reply Brief in *Brown* states “just as with sex, violent material can be depicted in a manner that falls outside the protection of the First Amendment in respect to minors. This is certainly true in the context of video games.” Petitioners’ Reply Brief at 9, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 4034925. To support this point, the Brief cites a description of *Manhunt*, pulled from a “Top 10” list of the most violent video games. *Id.* *Manhunt* was ranked number three, due to its “heinous acts of murder as part of a sadistic form of entertainment.” *Id.* Those acts include “[d]ecapitation, steel-object-to-the-brain impaling, and even the ability to jam a sickle up an unsuspecting victim’s ass . . .” *Id.*

27. Adam Cohen, *California’s Misguided War on Violent Video Games, Case Study*, TIME (Oct. 27, 2010), <http://www.time.com/time/nation/article/0,8599,2027692,00.html>.

28. See, e.g., *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009) (holding that the violent video games did not qualify for the First Amendment obscenity exception); *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 956 (8th Cir. 2003) (holding that a law prohibiting minors from playing violent video games without their parents’ consent was a violation of the First Amendment); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001) (holding that violent video games were entitled to First Amendment protection the same as any other art form).

targeting video games be upheld when it is specifically directed at violent, not sexually explicit, content?

In June 2011, the Supreme Court ruled on the interplay between First Amendment protection and violent video game legislation.²⁹ The case, *Brown v. Entertainment Merchants Ass'n*, was a response to a California statute prohibiting the sale or rental of “violent video games” to minors.³⁰ The statute, section 1746 of the California Civil Code, specifically stated that “a person may not sell or rent a video game that has been labeled as a violent video game to a minor” unless “the violent video game is sold or rented to a minor by the minor’s parent, grandparent, aunt, uncle, or legal guardian.”³¹ The definitional portion of the statute defines a “violent video game” as one in which “the range of options available to a player include killing, maiming, dismembering, or sexually assaulting an image of a human being.”³² Violations of the act were punishable by a civil fine of up to \$1,000.³³

Almost immediately after the statute passed, the Entertainment Merchants Association (a not-for-profit international trade association organization

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

30. *Id.* at 2732.

31. CAL. CIV. CODE § 1746.1 (2009).

32. *Id.* § 1746. The portion of the statute defining violent video games fully states: “Violent video game” means 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.

Id.

33. *Id.* § 1746.3. The full text of the penalty portion of the statute states:

Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars (\$1,000), or a lesser amount as determined by the court. However, this liability shall not apply to any person who violates those provisions if he or she is employed solely in the capacity of a salesclerk or other, similar position and he or she does not have an ownership interest in the business in which the violation occurred and is not employed as a manager in that business.

Id.

representing both the video game and software industries)³⁴ filed a pre-enforcement challenge to the Act, alleging that it violated the First Amendment.³⁵ The U.S. District Court for the Northern District of California agreed with the Association that the Act was in violation of the First Amendment, and the court preliminarily enjoined its enforcement.³⁶ The Ninth Circuit Court of Appeals affirmed the decision.³⁷ The Supreme Court then granted certiorari.³⁸ The stage was set for the Supreme Court to address the contours of First Amendment protection as it may apply to violent video games.

The Supreme Court ultimately upheld the decision of both lower courts and found the law to be in violation of the First Amendment.³⁹ The Court first noted that video games as a whole qualify for First Amendment protection, and while there are limited recognized exceptions of unprotected speech, this law could not be justified under one of those exceptions.⁴⁰ Furthermore, since there was not a compelling reason that could legitimate the First Amendment

34. ABOUT EMA, <http://www.entmerch.org/about-ema/index.html> (last visited Apr. 14, 2012) (“The Entertainment Merchants Association (EMA) is the not-for-profit international trade association dedicated to advancing the interests of the \$35 billion home entertainment industry. EMA-member companies operate approximately 35,000 retail outlets in the U.S. and 45,000 around the world that sell and/or rent DVDs, computer and console video games, and digitally distributed versions of these products. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry. EMA was established in April 2006 through the merger of the Video Software Dealers Association (VSDA) and the Interactive Entertainment Merchants Association (IEMA).”). EMA’s proclaimed mission is: “To protect the right to sell and rent entertainment products and content; promote the sale and rental of entertainment products and content; and provide a forum for all those engaged in the sale, rental and/or commercial delivery of home entertainment to consumers.” *Id.*

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

36. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1048 (N.D. Cal. 2007). The court held that although the Association had not demonstrated that they would likely succeed in arguing that the statute was unconstitutionally vague, they had proven that they were likely to succeed in arguing that the statute was a violation of minor’s First Amendment rights. *Id.*

37. *Video Software Dealers Ass’n v. Schwarzenegger*, 565 F.3d 950, 953 (9th Cir. 2009). The Ninth Circuit held that violent video games did not fall under the legal definition of “obscenity.” *Id.* Furthermore, the state had not demonstrated that there was a compelling interest to validate the law; the court further noted that even if a compelling interest had been demonstrated, the statute was not narrowly tailored enough to serve that interest. *Id.*

38. *Brown*, 131 S. Ct. at 2733.

39. *Id.* at 2742.

40. *Id.* at 2733.

imposition, and, regardless, the statute was not narrowly tailored enough to serve that interest, the Court invalidated the statute.⁴¹

This Note will first trace the development of First Amendment jurisprudence, focusing specifically on First Amendment protection as applied to evolving technologies and violent video games. It will then detail the Court's conclusion in *Brown* that violent video games do qualify for First Amendment protection and should not be exempt due to a traditional unprotected speech exception.⁴² Next, it will explain the positions of the concurrence and two dissents, focusing specifically on the criticism of the majority's quick dismissal of the argument that the interactive nature of video games presents special First Amendment concerns. Finally, this Note will conclude by surveying contemporary scholarly opinions to analyze whether the majority erred in essentially disregarding the argument that the interactivity of video games mandates that they be subject to a different First Amendment analysis, and by questioning whether the Court's decision will remain relevant as video game technology continues to improve.

I. HISTORY

A. *Basic First Amendment Protection Principles Regulating Artistic Expression*

The First Amendment, in full, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."⁴³ For purposes of First Amendment doctrine, the critical language is "Congress shall make no law . . . abridging the freedom of speech."⁴⁴ Courts have consistently interpreted this provision to mean that the government cannot restrict a type of expression based upon its subject matter or content.⁴⁵ Courts continually grapple with the idea of what is and is not "protected speech" and how new categories of expression may broaden or narrow that definition.⁴⁶

The principle of not restricting an expression based upon its subject matter or content also applies when the expression in question is an artistic one. In

41. *Id.* at 2741.

42. *Id.* at 2738.

43. U.S. CONST. amend. I.

44. *Id.*

45. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (noting that the First Amendment means that the government cannot restrict expression because of "its message, its ideas, its subject matter, or its content").

46. *Id.* at 574, 594–95 (Kennedy, J., concurring).

United States v. Playboy Entertainment Group, Inc., for instance, the Court struck down a provision of the Telecommunications Act that imposed content-based restrictions on television programmers.⁴⁷ The portion of the statute in question required cable television operators with channels primarily focused on sexually-oriented programming to either “fully scramble” or otherwise block those channels, or limit their transmission to the hours when children were unlikely to be viewing (between 10 PM and 6 AM).⁴⁸ In reaching the conclusion that this provision was invalid, the Court noted that one of the foundational principles behind First Amendment doctrine is the fact that the content of the expression should never affect whether or not the First Amendment protects it, since it is not the government’s place to determine what is worthy of societal value.⁴⁹ Instead, “esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree.”⁵⁰ Thus, it is inappropriate for the government to restrict an expression based solely upon its content, regardless of whether the expression is artistic or non-artistic.

B. *Examples of Unprotected Speech*

Although on the whole the government cannot curtail free speech, there are very limited areas in which the government may restrict expression. As the Supreme Court has explicitly stated, “[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”⁵¹ In certain limited exceptions, expressions may be prohibited when conflicting interests outweigh the right to speech.⁵² Although there may be various reasons why courts will decline First Amendment protection for a particular

47. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826–27 (2000).

48. *Id.* at 806.

49. *Id.* at 818.

50. *Id.* The court rejected the idea that it is the government’s place to restrict messages based on content, stating:

The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution is we assume that Government is best positioned to make these choices for us.

Id.

51. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

52. *Id.* at 571–72 (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”).

expression, three recognized areas of unprotected speech include incitement, fighting words, and obscenity.⁵³

The justification for restricting expression based on incitement is detailed in *Brandenburg v. Ohio*, where the Supreme Court stated that free speech expression can be curtailed in situations where the expression is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵⁴ However, incitement is a much higher standard than merely advocating a disturbing or violent position; to fully reach the level of incitement that is unprotected by the First Amendment, the speech must essentially be preparing a group for violent action and encouraging the group to take that violent action.⁵⁵ Thus, the key word in an incitement analysis is “imminent.” If speech is advancing a public disturbance or inciting people to action, then it can be curtailed to a certain extent as a protection mechanism.

Another recognized category of unprotected expression is fighting words. This standard was articulated in *Chaplinsky v. New Hampshire*, where fighting words were defined as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁵⁶ The fighting words doctrine is justified by the argument that there is no value in communications that are considered fighting words, and whatever slight benefit that fighting words may have is substantially outweighed by societal interests.⁵⁷ The belief is that the Constitution does not protect communications that are completely devoid of societal value (such as “epithets or personal abuse”) and therefore the punishment of those “fighting” words is not prohibited by the Constitution.⁵⁸ Courts have consistently held that when speech has absolutely no value, there is no justification for protecting it under the First Amendment, and it therefore can be restricted. However, this exception does not mean that the government can determine that the content of a certain expression has no societal value and thus restrict it; instead, it is limited to certain words and expressions that have traditionally been understood as having absolutely no value.

Obscenity, the final traditionally recognized exception of the three, seems to be the exception most commonly reviewed by courts, especially in recent years.⁵⁹ It is also the exception that is most relevant to this Note, as many proponents of violent video game regulation attempt to justify the legislation under the obscenity exception by encouraging the court to broaden the

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

54. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

55. *See Noto v. United States*, 367 U.S. 290, 297–98 (1961).

56. *Chaplinsky*, 315 U.S. at 572.

57. *Id.*

58. *Id.*

59. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011); *Miller v. United States*, 413 U.S. 15, 16 (1973); *Roth v. United States*, 354 U.S. 476, 479 (1957); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001).

traditional definition of obscenity to include violent expression.⁶⁰ The history of the obscenity exception is rooted in the belief that all ideas “having even the slightest redeeming social importance” are fully protected under the First Amendment—whereas obscenity has consistently been rejected as “utterly without redeeming social importance.”⁶¹ The Court in *Roth v. United States* established once and for all that obscenity is not constitutionally protected speech, and therefore, is an example of unprotected expression.⁶² In doing so, the Court limited the definition of obscenity to sexual materials.⁶³ The Court noted, however, that sex and obscenity were not synonymous, and merely sexual material is not considered unprotected expression.⁶⁴ Instead, for a sexually related expression to be characterized as obscenity, the material must deal with sex in a manner that appeals to prurient interest.⁶⁵ Prurient is defined as “characterized by or arousing inordinate or unusual sexual desire.”⁶⁶

In 1973, in *Miller v. California*, the Supreme Court delineated a specific test for when a court should find that an expression is obscene.⁶⁷ Since that time, courts attempting to determine whether an expression is obscene have applied this test:⁶⁸

- a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interests;
- 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.⁶⁹

Therefore, it is fairly clear from the *Miller* obscenity test that the Court intended, at least initially, that the obscenity exception should be limited to sexually explicit materials and not expanded to include things such as violent expression. The Court affirmed this distinction in *Winters v. New York*, finding that a New York statute targeting publications depicting “bloodshed” was not unprotected expression, since it did not target any “indecent or obscenity in

60. Eric T. Gerson, Note, *More Gore: Video Game Violence and the Technology of the Future*, 76 BROOK L. REV. 1121, 1154 (2011) (arguing that the most common argument advanced by those who support violent video game legislation is for courts to expand the legal definition of obscenity to include violent video games).

61. *Roth*, 354 U.S. at 484.

62. *Id.* at 485.

63. *Id.* at 485–86.

64. *Id.* at 487.

65. *Id.*

66. BLACK’S LAW DICTIONARY 1347 (9th ed. 2009).

67. *Miller v. California*, 413 U.S. 15, 24 (1973).

68. See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 574 (2002).

69. *Miller*, 413 U.S. at 24 (citation omitted).

any sense . . . known to the law.”⁷⁰ Since the work in *Winters* was violently explicit, but not sexually explicit, it did not qualify under the obscenity exception. The Court declined to broaden the obscenity definition to also include violent expression.⁷¹ Therefore, courts have consistently held that violent expression without a sexual component does not constitute obscenity and is consequently not unprotected expression, at least under the obscenity exception.⁷²

C. *The Obscenity Exception as It Relates to Minors*

Basic free speech issues become further complicated when considering what material should be limited to minors versus what material should be limited to adults. The argument is that there is a different definition of what is appropriate for minors to view versus what is appropriate for the general adult public.⁷³ In many situations, there is no difference between the two age groups in terms of dissemination as “the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”⁷⁴ As a whole, First Amendment principles are generally applied consistently to adults as well as minors.⁷⁵ However, there are cases when minors’ First Amendment rights are subjected to a different standard than those of adults.⁷⁶ One such situation arises when the obscenity exception is implicated, as *Mishkin v. New York* indicates. *Mishkin* specified that the test for obscenity often must be adjusted for “social realities” in order to be “assessed in terms of the sexual interests of its intended and probable recipient group.”⁷⁷ Applied to minors, this essentially means that when minors are the targeted group of a set of materials, the determination of what is obscene (and therefore excluded from First Amendment protection) must be altered in order to remain cognizant of the target audience.

The Court in *Ginsberg v. New York* reaffirmed this principle by upholding a state statute prohibiting the sale of harmful materials to minors under

70. *Winters v. New York*, 333 U.S. 507, 519 (1948).

71. *Id.*

72. *See Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992). The statute at question in this case was one that prohibited the rental or sale to minors of videos depicting violence. *Id.* at 686. The court noted that although what may be considered obscene is different depending on if the targeted audience is a minor or adult, obscenity nevertheless only covers expression that depicts or describes sexual conduct. *Id.* at 688. The court re-affirmed that obscenity does not include violence. *Id.*

73. *See id.*

74. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975).

75. *Id.*

76. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968).

77. *Mishkin v. United States*, 383 U.S. 502, 509 (1966).

seventeen.⁷⁸ There, the Court reiterated that laws targeting minors may be subject to a different standard, as states necessarily have more power to control the conduct of children than that of adults.⁷⁹ Since “the well-being of its children is of course a subject within the State’s constitutional power to regulate,” the Court upheld the notion that a different definition of obscenity can be applicable when material is targeting children rather than adults.⁸⁰ Therefore, although obscenity has uniformly been held to only apply to sexually explicit materials, there is a precedent for the definition of “sexually explicit” to be broadened when applied to laws targeting minors. The key determination that courts must make in situations where the obscenity exception is implicated is whether or not the statute attempting to regulate obscene speech targeted at minors is narrowly enough tailored to protect a compelling interest of minors.⁸¹

D. First Amendment Principles and Changing Technology

A key First Amendment issue relating to this Note is the evolution of First Amendment principles in light of changing technologies. As technology becomes more and more advanced, courts are presented with the challenge of determining whether traditional First Amendment jurisprudence applies, or whether Constitutional principles must adapt to fit changing technology.⁸² In short, the issue is whether First Amendment doctrine should remain constant throughout time or adjust to reflect the realities of advancing technology.

Courts have stressed that basic First Amendment principles remain the same, regardless of what technology or medium they are applied.⁸³ In *Joseph Burstyn, Inc. v. Wilson*, the Court was presented with the issue of whether motion pictures were protected by the First Amendment.⁸⁴ In their determination that this was protected expression, the Court noted that the “basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary.”⁸⁵ The Court noted that even if one were to accept the argument that movies possess a greater capacity for evil than other artistic mediums, it did not therefore follow that movies should be disqualified from First Amendment protection.⁸⁶ Despite this broad rule, however, the Court did caution that on a micro level, the same “precise rules”

78. *Ginsberg*, 390 U.S. at 633. The statute in question was New York Penal Law 484-h, which made it a crime for any person to sell or loan sexually explicit materials to a minor. *Id.*

79. *Id.* at 638.

80. *Id.* at 639.

81. *Id.* at 641.

82. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 502.

may not apply to every new type of medium, as each method of expression “tends to present its own peculiar problems.”⁸⁷ Therefore, while taking a firm stance that basic First Amendment principles apply equally to all forms of technology, the Court also softened this stance by recognizing that each subsequent technological form would probably need to be evaluated on an individual basis to determine if the same First Amendment analysis could be applied.

The recent case of *United States v. Stevens*, however, seemed to announce the general principle that First Amendment doctrine remains constant over time, even in light of technological advancement or changing mediums.⁸⁸ In that case, the government attempted to justify legislation prohibiting filming animal cruelty by claiming that animal cruelty depictions are categorically unprotected by the First Amendment.⁸⁹ In support of this justification, the government argued that new categories of unprotected speech could be added via a balancing test, a contention that the Court declared “startling and dangerous.”⁹⁰ The Court held that new categories of unprotected speech cannot simply be added by legislatures who find them overtly offensive—instead, the category must be rooted in traditional First Amendment jurisprudence.⁹¹ This distinction can also be applied to changing technologies when proponents argue that a new technology form may deserve a different First Amendment analysis.⁹² Therefore, the Court’s overall position has remained fairly clear: even though new technological challenges may arise, any restriction on free speech must nonetheless be justified under traditional First Amendment jurisprudence.

E. *First Amendment Principles Applied to Violent Video Games*

Although *Brown* was the first time the Supreme Court considered violent video game legislation, numerous lower courts had previously considered the

87. *Wilson*, 343 U.S. at 503.

88. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

89. *Id.* at 1584.

90. *Id.* at 1585.

91. *Id.*

92. Indeed, in the oral arguments of *Brown*, Justice Sotomayor made that very point. When questioning the attorney of the state of California about their argument to limit the sale of violent video games, Justice Sotomayor asked:

How is this any different than what we said we don’t do in the First Amendment field in *Stevens*, where we said we don’t look at a category of speech and decide that some of it has low value? We decide whether a category of speech has a historical tradition of being regulated. Now, other than some State statutes that you point to, some of which are very clearly the same as those we struck down in *Wynn*, where’s the tradition of regulating violence?

Transcript of Oral Argument at 8, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 4317136.

issue. Notably, the Seventh, Eighth, and Ninth Circuits had all previously ruled on questions very similar to the one faced by the Supreme Court in *Brown*.

In *American Amusement Machine Ass'n v. Kendrick*, decided in 2001, the Seventh Circuit addressed the First Amendment implications of an Indianapolis ordinance seeking to limit minors' access to violent video games.⁹³ Specifically, the statute limited minors' access to amusement machines exhibiting graphic violence, defined as a "visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration [disfigurement]."⁹⁴ In finding that video game violence (and indeed, violence in general) does not fall within any of the recognized First Amendment exceptions, the court also addressed the argument that video games should be considered under a different free speech standard since they are so interactive.⁹⁵ Judge Posner wrote, in what has since become a famous passage in violent video game/First Amendment controversies, "[M]aybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature . . . is interactive; the better it is, the more interactive."⁹⁶ This passage from Judge Posner has been widely cited in cases and scholarly opinions related to the regulation of violent video games.⁹⁷ Those who attack violent video game

93. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001). The ordinance at issue in the case sought to restrict minors' access to amusement machines that predominantly appealed to minors' "morbid interest in violence" or "prurient interest in sex" and that contained "graphic violence" or "strong sexual content." *Id.* The court noted that only the "graphic violence" portion of the statute was at issue in this case. *Id.*

94. *Id.*

95. *Id.* at 577.

96. *Id.* at 577. The full text of Posner's argument reads:

Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature 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.

Id.

97. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 12 (2002); Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 192–93 (2005); Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 264 (2004); Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1870 (2007); Jennifer Chang, Note, *Rated M for Mature: Violent Video Game Legislation and the Obscenity Standard*, 24 St. John's J. Legal Comment 697, 718 (2010); Gerson, *supra* note 60, at 1132; Ilana Lubin, Note, *Challenging Standard Conceptions of Tradition, Science and Technology in 2006: Why Laws Prohibiting the Sale of Violent Video*

legislation frequently cite this passage as evidence of the fact that video games are no more threatening than any other media form, and therefore, should not be subject to a different First Amendment analysis.⁹⁸ Despite the fact that the court found the ordinance to be in violation of the First Amendment, however, the opinion noted that “a more narrowly drawn ordinance might survive a constitutional challenge.”⁹⁹ Thus, the Seventh Circuit found this particular ordinance targeting video game violence unconstitutional, but it left open the possibility that more narrowly tailored statutes could be permissible, if the government could prove that there was a compelling interest justifying the restriction.

Similar to the Seventh Circuit, the Eighth Circuit found in 2003 in *Interactive Digital Software Ass’n v. St. Louis County* that an ordinance restricting the sale or rental of graphically violent video games to minors violated the First Amendment.¹⁰⁰ In reaching this conclusion, the court wrote that to accept violent video game legislation as justified by a compelling interest “would be to invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority.”¹⁰¹ For video game legislation to succeed in the future, the court warned, governments must demonstrate with empirical studies and support that there is a link between playing violent video games and resulting harm to minors.¹⁰² Absent that link, violent video game legislation violates the First Amendment.¹⁰³ Thus, the Eighth Circuit’s major issue with the ordinance targeting violent video games was that it was simply unsupported by any documented evidence.

As in the Seventh Circuit, the Eighth Circuit addressed the issue of interactivity in video games. At the outset, the Eighth Circuit recognized that although violent themes are prevalent in many different entertainment mediums, “the interactive play of a video game might present different difficulties.”¹⁰⁴ Ultimately, however, the court found that a similar level of interactivity may exist in movies (where you can choose to skip to certain scenes via a DVD menu or fast forward) or even choose-your-own-adventure series, and regardless, there is no justification for treating video games any

Games to Minors Should be Ultimately Upheld, 13 Cardozo J.L. & Gender 173, 181 (2006); Robert Bryan Norris, Jr., Note, *It’s All Fun & Games Until Someone Gets Hurt: Brown v. Entertainment Merchants Association and the Problem of Interactivity*, 13 N.C. J.L. & TECH. ON. 81, 97 (2011).

98. Calvert, *supra* note 97.

99. *Kendrick*, 244 F.3d at 580.

100. *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 956 (8th Cir. 2003).

101. *Id.* at 960.

102. *Id.* at 959.

103. *See id.*

104. *Id.* at 957.

differently in a First Amendment analysis merely because they may be more interactive.¹⁰⁵

The Ninth Circuit most recently addressed the issue of violent video game legislation in its 2009 decision in *Video Software Dealers Ass'n v. Schwarzenegger*, the appellate court decision later reviewed in *Brown*.¹⁰⁶ The court addressed the government's argument that they should apply a "variable obscenity" standard by first determining that video games are a protected form of speech, and then noting that the obscenity doctrine has never before been expanded to include violent content.¹⁰⁷ Thus, the court applied strict scrutiny to the statute and held that it was not narrowly tailored to protect a compelling interest.¹⁰⁸ It is worth noting that the Ninth Circuit did not address the contention that video games present a unique First Amendment issue due to their interactivity. Although these three examples were not the only lower court decisions on the subject of violent video game legislation,¹⁰⁹ they nonetheless were the most influential prior to *Brown*. In the wake of these decisions, the question was whether the Supreme Court would choose to rule upon violent video game legislation absent a conflict among circuits. In the case of *Brown*, the Supreme Court granted certiorari to rule on the issue of violent video game legislation.¹¹⁰

II. ANALYSIS

A. *The Majority, Concurrence, and Dissents*

When presented with section 1746 of the California Civil Code, which banned the sale of violent video games to minors,¹¹¹ the majority in *Brown v. Entertainment Merchants Ass'n* struck it down as unconstitutional.¹¹² The Court first held that video games qualify for First Amendment protection.¹¹³

105. *Interactive*, 329 F.3d at 957–58.

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

107. *Id.* at 957–58.

108. *Id.* at 967.

109. Respondents' Brief in Opposition in *Brown v. Entertainment Merchants Ass'n* lists other cases striking down violent video game legislation as a violation of First Amendment, including: *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd* 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). Brief of Respondents at 1, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 3535053.

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

111. CAL. CIV. CODE § 1746 (2009).

112. *Brown*, 131 S. Ct. at 2742.

113. *Id.* at 2733.

This was a point that received little debate, as even the proponents of the violent video game legislation recognized that video games as a whole are a medium deserving of First Amendment protection.¹¹⁴ Although the Court recognized the aforementioned unprotected speech exceptions (incitement, fighting words, and obscenity), it determined that this Act did not fall within any of those categories.¹¹⁵ Specifically, the Court was not persuaded that violent speech constituted obscenity.¹¹⁶ The government had argued that the Act targeted the “violence equivalent of sexual obscenity,” and since the determination of what was covered by the Act was structured similarly to the *Miller* three prong test, it should therefore be evaluated under the obscenity exception.¹¹⁷ To illustrate their point that violence was not considered obscenity, the majority detailed a long tradition of exposing children to violence in America, including *Grimm’s Fairy Tales*, *The Odyssey* of Homer, and the *Inferno*,¹¹⁸ concluding that minors’ access to violent speech has historically never been restricted via the unprotected speech exception.¹¹⁹ Therefore, the Court determined that none of the unprotected speech exceptions were applicable to the California statute.

The Court then addressed California’s argument that video games present special First Amendment problems due to their interactive nature.¹²⁰ In response to this argument, the Court noted that all media is to some extent “interactive,” saying that “choose-your-own-adventure” stories are evidence of this fact (an argument that echoes the Seventh and Eighth Circuits’ opinions).¹²¹ Despite the fact that video games may enable “participation” in ways that other media do not, the Court determined that was “more a matter of degree than of kind.”¹²² The majority then cited Judge Posner’s famous passage from *Kendrick*, noting that “all literature is interactive.”¹²³ In total, the response to the argument that “video games present special problems because they are ‘interactive’” was limited to one paragraph in the overall opinion.¹²⁴

114. Brief of Respondents at 17, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 3535053 (stating that “California has never contested that video games are expression entitled to First Amendment protection”).

115. *Brown*, 131 S. Ct. at 2735.

116. *Id.* at 2734.

117. Petitioners’ Reply Brief at 3, 7, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 4034925 (noting that the Act’s terms were modified in *Miller*, although “the Act replaces ‘prurient’ interest in sex with ‘deviant interest in violence’”).

118. *Brown*, 131 S. Ct. at 2736–37.

119. *Id.* at 2736.

120. *Id.* at 2737–38.

121. *Id.* at 2738.

122. *Id.*

123. *Brown*, 131 S. Ct. at 2738.

124. *Id.* at 2737–38.

Having determined that the Act was an imposition upon an area of protected speech, the Court noted that it would be invalid unless California could prove that it was justified by a compelling government interest and that it was narrowly drawn to serve that interest.¹²⁵ The Court held that no such interest existed, as the state's evidence showing a connection between exposure to violent video games and harmful effects was not compelling.¹²⁶ Regardless, the Court found that the statute was not narrowly tailored since it was under-inclusive in the sense that it only excluded video games (and not other media forms such as literature or movies) and over-inclusive in the sense that it abridged First Amendment rights of children whose parents have no problem with violent video games.¹²⁷ Therefore, the majority held that the statute was invalid since the First Amendment protects video games, the statute was an imposition on that protection, and California could not offer a justification for the imposition.¹²⁸ Although the Court recognized that California was interested in solving a serious social problem, it nevertheless stressed that this piece of legislation was not the solution.¹²⁹

The concurrence, authored by Alito and joined by Roberts, agreed with the overall conclusion that the Act was invalid, but disagreed as to why.¹³⁰ The concurrence found the statute invalid since it was impermissibly vague, with its terms not being fully defined and no distinction made between minors at different ages.¹³¹ One of the concurrence's primary problems with the majority's rationale focused on the majority's hasty dismissal of the possibility that evolving technologies may require a different constitutional analysis than their less advanced predecessors.¹³² The concurrence based this criticism on the fact that the majority had failed to even consider the possibility that video games may present a different constitutional challenge than other mediums.¹³³ Specifically, the concurrence cautioned that "there are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television

125. *Id.* at 2738.

126. *Id.* at 2738–39. The Court specifically found that the evidence offered by the state (that there is a link between violent video games and harmful effects in children) had been "rejected by every court to consider them, and with good reason." *Id.* The Court noted that even assuming the studies were correct that there is a link, that link is very small and indistinguishable from the same problem in other mediums. *Id.*

127. *Id.* at 2740–42.

128. *Brown*, 131 S. Ct. at 2741–42.

129. *Id.* at 2741.

130. *Id.* at 2742 (Alito, J., concurring).

131. *Id.* at 2746.

132. *Id.* at 2748.

133. *Brown*, 131 S. Ct. at 2750 (Alito, J., concurring).

show.”¹³⁴ The concurrence felt the majority had not devoted enough time or energy to evaluating this argument and to actually considering whether video games should be subjected to a unique First Amendment evaluation.¹³⁵

Alito and Roberts noted that the majority should have devoted more time to considering not only the interactive nature of video games being sold today, but also those that are likely to come in the future.¹³⁶ As evidence of that point, the concurrence described current video games as “strikingly realistic” and “virtually indistinguishable from actual video footage.”¹³⁷ In terms of the future, the concurrence cautioned that soon video games will cause a player to “experience physical sensations supposedly felt by a character,” such as “the splatting blood from the blown-off head.”¹³⁸ The point of all this anecdotal support is that video games continue to rapidly evolve and may soon be at the point where they will be nearly identical to reality. The concurrence cited a brief from the International Game Developers Association (which, interestingly enough, was actually written in support of the respondents, Entertainment Merchants Association) stating that video games are “far more concretely interactive” than any other medium¹³⁹—a conclusion the concurrence called “surely correct.”¹⁴⁰ Despite this interactive difference however, the concurrence felt that the majority treated video games exactly the same as any other medium, a choice which may have been too hasty.¹⁴¹ Overall, the concurrence concluded that this specific statute was invalid, but a statute serving the same interests may very well be constitutional if more narrowly tailored.¹⁴²

134. *Id.* at 2742.

135. *Id.* The hesitation of the concurrence to automatically accept the majority’s conclusion that video games are exactly the same as other mediums is reflected in the oral argument transcript, as well. Chief Justice Roberts, who joined Justice Alito in the concurrence, questioned Mr. Smith (Attorney for Respondents Entertainment Merchants Association):

What about—the distinction between books and movies may be that, in these video games, the child is not sitting there passively watching something; the child is doing the killing. The child is doing the maiming. And I suppose that might be understood to have a different impact on the child’s moral development.

Transcript of Oral Argument at 26–27, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 4317136. Mr. Smith’s answer to Chief Justice Roberts’ question was that although there might be some difference, the State of California had not produced any evidence to that effect. *Id.*

136. *Brown*, 131 S. Ct. at 2748 (Alito, J., concurring).

137. *Id.*

138. *Id.* at 2748–49.

139. *Id.* at 2750 (quoting Brief of Amici Curiae International Game Developers Association and Academy of Interactive Arts and Sciences in Support of Respondents at 3, *Brown*, 131 S. Ct. 2729 (No. 08-1448)).

140. *Brown*, 131 S. Ct. at 2750 (Alito, J., concurring).

141. *Id.*

142. *Id.* at 2748.

Justice Thomas's dissent diverged from the issues present in the majority and concurrence. Thomas instead based his opinion on an originalism approach.¹⁴³ Thomas wrote that as the First Amendment was originally understood, minors possessed no right to free speech; therefore, the Act cannot logically be constitutionally impermissible.¹⁴⁴ To support this argument, Thomas detailed a long history of minors' lack of a right to free speech, from the Puritans, to the Revolution, to the present day.¹⁴⁵ Although Thomas's dissent is quite lengthy, and probably worthy of a note solely analyzing only his position, his dissent will not be examined any further in this Note, as it is not relevant to the issues being examined herein.

Justice Breyer's dissent, on the other hand, returned to the issues cited by both the majority and concurrence, finding that the statute was not impermissibly vague and was supported by a sufficiently compelling interest.¹⁴⁶ In support of the compelling interest argument, Breyer detailed a long list of studies finding a link between violent video games and aggressive behavior in minors.¹⁴⁷ Because of this link, Breyer argued that the restrictions on violent video games were valid.¹⁴⁸ Breyer's dissent concluded that the statute's restriction upon free speech was "modest at most" and therefore found the California law constitutional.¹⁴⁹

B. *The Aftermath of the Brown Decision in Terms of the Interactivity Argument*

Although the majority may be correct that video games as a whole are a medium deserving of First Amendment protection, one must nonetheless question whether the concurrence was correct in its criticism of the majority's hasty dismissal of the interactivity question. The *Brown v. Entertainment Merchants Ass'n* decision has not been without its fair share of critics already, despite being less than a year old. For instance, recognized Supreme Court analyst Linda Greenhouse classified this case as the "[m]ost surprising decision" of the term.¹⁵⁰

143. *Id.* (Thomas, J., dissenting).

144. *Id.*

145. *Brown*, 131 S. Ct. at 2752–59. (Thomas, J., dissenting).

146. *Id.* at 2771 (Breyer, J., dissenting).

147. *Id.* at 2771–79.

148. *Id.*

149. *Id.* at 2771.

150. Linda Greenhouse, *A Supreme Court Scorecard*, OPINIONATOR N. Y. TIMES BLOG (Jul. 13, 2011), <http://opinionator.blogs.nytimes.com/2011/07/13/a-supreme-court-scorecard/>. Greenhouse argues that *Brown* was the most surprising decision of the term because of the general consensus among lower courts prior to the Supreme Court's ruling. *Id.* Specifically, Greenhouse notes that usually when the Supreme Court acts "in the absence of a conflict among the lower courts," they usually believe the lower court rulings are wrong and are seeking to

Was the majority too quick to dismiss the possibility that the increasingly interactive nature of video games means that they should be subject to a different First Amendment analysis than their less technologically advanced predecessors, such as television, books, and movies? Did the concurrence exercise the most prudent approach when evaluating the issue of violent video game legislation? A detailed review of scholarly opinions on the subject reveals that many scholars believe that the *Brown* majority erred in so quickly dismissing the possibility that the changing interactive nature of video games may lead to an evolving First Amendment jurisprudence.¹⁵¹ This vast body of scholarly work criticizing the majority's viewpoint indicates that although the Supreme Court has now ruled on the issue, the debate over violent video games and First Amendment protection is far from over.

C. *The Argument for Protecting All Violent Video Games, Regardless of Interactivity*

Some commentators argue that the majority's opinion (based on the line of lower court decisions preceding it) was exactly correct, and that video games should not be treated differently from other forms of media in a First Amendment analysis. Nearly all these opinions admit, however, that regardless of how the First Amendment treats the form, at some fundamental level, there may be a difference in the interactive level of video games and other medium forms.

Clay Calvert, former Co-Director of the Pennsylvania Center for the First Amendment at Pennsylvania State University, admits in his article *Violence, Video Games, and a Voice of Reason*, that there may be a "qualitative difference" between the violence in video games and that in other media.¹⁵² He argues that much of this difference may be attributable to the "participatory, interactive nature of video games."¹⁵³ Nonetheless, he calls the push for legislation regulating violent video games a "hysterical narrative."¹⁵⁴ His overall conclusion is that regardless of any "qualitative differences" that may exist between video games and other media, there is still no justification for

correct them. *Id.* This opinion is supported by Respondent's Brief in Opposition in *Brown*, which notes that "Petitioners offer no persuasive reason for the court to review this ruling. There is no split of authority on the questions presented. To the contrary, the lower courts are unanimous as to the constitutionality of bans on distribution of violent video games." Brief of Respondents at 12, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 3535053. It is perhaps best left to another to speculate as to why the Supreme Court granted certiorari on a case when there was no circuit split and yet ultimately affirmed the lower courts.

151. See, e.g., Gerson, *supra* note 60, at 1139; Lubin, *supra* note 97, at 181; Chang, *supra* note 97, at 730.

152. Calvert, *supra* note 97, at 11.

153. *Id.*

154. *Id.* at 3.

intruding upon a minor's First Amendment rights—a practice Calvert calls “one generation's efforts to control both the culture and the cultural artifacts of another generation.”¹⁵⁵ Thus, Calvert concludes that although there is a distinguishable difference in the interactive nature of video games as compared to any other media form, that difference is not relevant to First Amendment analysis.

Abby Schloessman Risner grants in *Violence, Minors, and the First Amendment* that violent video games may present “a valid reason for concern,” although she nevertheless concludes that such concern does not lead to a change in First Amendment analysis.¹⁵⁶ She notes that “the goal of protecting children from potential harm is not sufficient for denying speech protection under the First Amendment.”¹⁵⁷ In Risner's view, First Amendment concerns trump societal concerns. Thus, although the goals of violent video game legislation may be praiseworthy, opponents believe the First Amendment principles outweigh the goals.

Luis S. Herrero Acevedo advances another argument for why violent video games should not be subject to a different First Amendment analysis in his comment *Speech, Violence and Video Games*.¹⁵⁸ Herrero asserts that violent video game legislation, like attempts to stifle rock-and-roll and novels before it, is spurred on by generational conflicts, and the First Amendment exists as one of the few safeguards against this conflict—“to secure a long-lasting and strong cultural environment over temporary concerns.”¹⁵⁹ Without the First Amendment, arguably, laws would constantly change to reflect cultural context. This opinion is supported by the Amicus Curiae Brief of the Cato Institute in Favor of Respondents, which claimed that the “interactive” argument against video games is not new, as each new technological form argued to have been an “exception” to First Amendment principles has attempted to have been justified by the “interactive argument.”¹⁶⁰ As the Brief argued, “[C]ritics of cheap fiction and movies and radio and comics claimed that each of those new mediums presented a unique potential for harm . . . [but] . . . the only real difference is the method of depiction.”¹⁶¹ The Cato Institute argued that “some believe that video games more fully immerse the

155. *Id.* at 30.

156. Abby L. Schloessman Risner, Comment, *Violence, Minors and the First Amendment: What is Unprotected Speech and What Should Be*, 24 ST. LOUIS UNIV. PUB. L. REV. 243, 244, 265 (2005).

157. *Id.* at 265.

158. Luis S. Herrero Acevedo, Comentario, *Speech, Violence, and Video Games: Is Grand Theft Auto Worthy of First Amendment Protection*, 76 REV. JUR. U.P.R. 421, 438–39 (2007).

159. *Id.* at 439.

160. Brief of the Cato Institute as Amicus Curiae Supporting Respondents at 15–16, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697184.

161. *Id.* at 16.

user in the story . . . but all forms are, in one way or another, participatory.”¹⁶² This generational conflict theory is one that was also argued by the Entertainment Merchants Association during oral arguments. Paul Smith, attorney for the Entertainment Merchants Association, stated that to accept the principle that a new medium automatically mandates a new First Amendment analysis is indicative of “a history in this country of new mediums coming along and people vastly overreacting to them, thinking the sky is falling.”¹⁶³ In support of this assertion, Smith cites crime novels, comic books, movies, television, rock lyrics, and the internet as examples of new mediums that caused an uproar when first encountered.¹⁶⁴ In short, proponents of this argument all feel that if a different analysis is applied to video games, it would not stop there. Instead, as each new and further technologically advanced media form comes along, there are those who will oppose it and demand it be exempt from First Amendment protection.

Some supporters of video games even argue that the interactive nature of video games means they are a more valuable form of expression than other media forms. In their Brief of Amicus Curiae in Favor of Respondents, ID Software LLC argued that “to seek to deny protection to video games because of their interactivity mistakes a virtue for a flaw.”¹⁶⁵ Instead of fearing video games because of their interactive component, legislators should praise video games, since, “as more than one court has recognized, expression is enhanced by interactivity.”¹⁶⁶ As ID Software LLC points out, the interactivity as a virtue argument is actually judicially supported. The District Court of Connecticut, for instance, noted that “the nature of the interactivity . . . tends to cut in favor of First Amendment protection, inasmuch as it is alleged to *enhance* everything expressive and artistic” about video games.¹⁶⁷ The brief of Entertainment Merchants Association also heralded the interactive nature of video games as a virtue, stating that “California fundamentally distorts bedrock First Amendment principles when it suggests that video games are entitled to a

162. *Id.*

163. Transcript of Oral Argument at 38, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 4317136.

164. *Id.*; see also Brief of Respondents at 1, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 3535053 (“The California statute at bar is the latest in a long history of overreactions to new expressive media. In the past, comic books, true-crime novels, movies, rock music, and other new media have all been accused of harming our youth. In each case, the perceived threat later proved unfounded. Video games are no different. They are a widely popular form of expression enjoyed by millions of people. As such, under the First Amendment, they cannot be censored absent the most compelling justification, based on firm evidence of harm, through a narrowly tailored statute where there is no less-restrictive alternative.”).

165. Brief of Amicus Curiae ID Software LLC in Support of Respondents at 6, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 3697200.

166. *Id.*

167. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002).

lesser protection because their interactivity *increases* the impact of their expression on the viewer.”¹⁶⁸ Thus, these sources all argue that video games as a whole should perhaps be even *more* deserving of First Amendment protection due to their creative and artistic benefits, which necessarily stem from the interactivity of the medium.

Proponents of this argument further stress that contrary to the “alarmists” who seek to connect video games to school shootings, for instance, video games can actually have a beneficial social component. Jeffrey O’Holleran argues in *Blood Code: the History and Future of Video Game Censorship* that “a positive aspect of violent gaming exists: social interaction.”¹⁶⁹ By engaging in multi-player games (through a mechanism such as Xbox Live), gamers may actually learn valuable social skills.¹⁷⁰ Although social benefits must nonetheless be weighed against any potential drawbacks, this argument presents an interesting question in O’Holleran’s view: “Do the negative consequences outweigh the positive to the point of justifying extra regulation?”¹⁷¹ Considering that there might actually be positive benefits associated with playing video games (such as creative and social benefits), perhaps the majority was correct in finding that all violent video games are deserving of protection, regardless of the level of interaction inherent in the game.

D. The Argument for a Potentially Unique First Amendment Analysis of Violent Video Games Due to Their Interactive Nature

The opinions referenced above seem to be in the minority, however, as the majority of scholarship analyzing *Brown* and decisions like it finds that there is a notable difference between video games and other media forms; the majority therefore concludes (to varying extents) that video games should possibly be subjected to a unique First Amendment analysis, or at the very least, that the Court erred in dismissing that argument so quickly. The root of this argument is that there is a distinction between video games and other media forms that cannot be ignored, in that video games are almost “a fully immersive fantasy experience.”¹⁷² As a result, perhaps the concurrence in *Brown* was correct in finding that the majority too hastily dismissed the possibility that the evolving interactive nature of video games may require an evolving First Amendment analysis as well. A recent comment by James Dunkelberger analyzing the *Brown* decision concludes just that. Dunkelberger writes that the *Brown*

168. Brief of Respondents at 19, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 3535053.

169. Jeffrey O’Holleran, Note, *Blood Code: The History and Future of Video Game Censorship*, 8 J. TELECOMM. & HIGH TECH. L. 571, 597 (2010).

170. *Id.* at 602.

171. *Id.* at 603.

172. Gerson, *supra* note 60, at 1122.

majority failed in not undertaking a more comprehensive analysis of video games, stating “*Kendrick, Interactive Digital*, and most recently, *Brown*, discount too quickly the wide range of game-play opportunities available to modern gamers.”¹⁷³ The point is that courts may fail to truly understand just what playing a modern video game entails, and may therefore err in automatically applying existing First Amendment jurisprudence without further consideration.

One argument in support of this proposition does not advocate for a new First Amendment jurisprudence but rather argues that violent video game legislation can be justified under existing constitutional jurisprudence, namely the unprotected speech doctrine. This argument stresses that although constitutional principles should remain fairly standard over time, they should nonetheless be flexible enough to evolve as technologies change. One proponent of this argument, Jennifer Chang, argues in *Rated M for Mature* that video game legislation could possibly be justified under the *Miller* obscenity exception, since “it is apparent that the *Miller* Court intended to allow the standard to evolve as community standards changed” and that obscenity standards must therefore evolve “alongside developments in technology that force society to face the reality of the virtual world it has created.”¹⁷⁴ This argument stresses that the definition of obscenity should be flexible enough to reflect changes in technology, and therefore, as video games become more technologically advanced, courts should consider whether the definition of obscenity should also evolve. Patrick M. Garry, Professor of Law at University of South Dakota Law School, went even further than Chang and called the obscenity exception a “narrow pigeonhole exception,” arguing that now is the time to consider its modification.¹⁷⁵ Ilana Lubin, writing prior to the decision of *Brown*, advocates a persuasive argument for expanding the *Ginsberg* decision to apply obscenity to video game violence. She essentially argues that although courts may have been correct in finding the interactivity argument unpersuasive in prior video games, more advanced games strain that analysis since they have become so realistic and depict human-like characters.¹⁷⁶ These

173. James Dunkelberger, Comment, *The New Resident Evil? State Regulation of Violent Video Games and the First Amendment*, 2011 B.Y.U. L. REV. 1659, 1674 (2011). Although Dunkelberger’s overall point is that “prevailing constitutional norms leave virtually no room for regulation of violent video games,” he nonetheless notes the interactivity offers a persuasive argument for possibly treating video games differently, and states that “a brief overview of judicial thinking on this subject and close analysis lend credence to Justice Alito’s position that the *Brown* majority might have been too quick to dismiss any possibility of a constitutionally significant distinction.” *Id.* at 1672,

174. Chang, *supra* note 97, at 725–26, 730.

175. Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 147–48 (2004).

176. Lubin, *supra* note 97, at 180.

authors seem to advocate that video games require a different First Amendment analysis than other media forms but argue that it should be rooted in existing jurisprudence such as the obscenity exception.

However, as Eric T. Gerson explains in his article *Video Game Violence and The Technology of the Future*, although expanding the legal definition of obscenity to include video game violence is the argument most frequently advanced by proponents of regulation, it nonetheless is unlikely to occur, as the Court has consistently held that obscenity only applies to sexually explicit content.¹⁷⁷ Since violence has consistently been viewed as entirely distinct from sexual content, it is unlikely that proponents who seek to regulate video game violence under the obscenity standard will be successful, regardless of the advances that may occur in technology.¹⁷⁸ Thus, although this may be one of the most logical arguments for restricting violent video game speech, it nonetheless is likely to fail based upon historical precedence.

Although obscenity is the most commonly cited existing category of unprotected speech for the regulation of violent video games, other proponents have argued that the increasingly interactive nature of violent video games possibly implicates the incitement exception as well.¹⁷⁹ Pointing to increasingly interactive game systems such as Xbox Kinect (where the character's action on the screen exactly mirrors that of the individual playing), the argument is that this type of technology moves the player into "actual facilitation of action" that is reminiscent of the incitement standard defined in *Brandenburg*.¹⁸⁰ In short, this argument contends that the technological advances of video games may cause them to become a type of expression that constitutes incitement.¹⁸¹ To date, no court has considered whether participating in a video game rises to the level of incitement. However, based primarily upon courts' treatment of video game legislation as being outside of the obscenity exception, this argument also seems unlikely to succeed. Additionally, incitement is a high standard to meet—the expression must essentially be demanding that individuals take action immediately. It seems a stretch to contend that the experience of playing a video game could command an individual to take action, but it is possible.

In his note, Gerson offers other possible solutions to what he sees as an inevitability—that "current First Amendment jurisprudence on violent content in video games . . . will soon be outdated and irrelevant."¹⁸² Gerson feels that

177. Gerson, *supra* note 60, at 1154, 1156.

178. *Id.* at 1127, 1131.

179. Jennifer Jones, Note, *Evolving Entertainment Technology: Can New Types of Fun Lead to New Types of Liability*, 13 YALE J.L. & TECH. 188, 210 (2010–2011).

180. *Id.* at 209–10.

181. *Id.* at 210.

182. Gerson, *supra* note 60, at 1121, 1124.

even if courts' current treatment of video games is valid, it will quickly become obsolete as video games continue to progress.¹⁸³ Among Gerson's proposed solutions to this problem are a technological tipping point (where games that become so technologically advanced/fully interactive beyond a court-decreed point become removed from First Amendment protection),¹⁸⁴ states' creation of more narrowly tailored statutes,¹⁸⁵ or the creation of a new category of unprotected speech.¹⁸⁶ Regardless of which of these approaches courts take, Gerson stresses this thesis: "the law must adapt to the changing technological climate."¹⁸⁷ These suggestions seem more viable than those propounded by scholars arguing to restrict video game speech under existing exceptions. Since courts have considered (and rejected) the argument that violent video games qualify for one of the existing unprotected speech exceptions, it seems logical to look for another solution, and Gerson's suggestions seem practicable.

Gerson's conclusion that current video game jurisprudence may soon no longer be relevant is seconded by David Kiernan, who cautioned in 2000 that past video game decisions which were made in the "embryonic stages of video game development" could no longer be applied to the more sophisticated technology of video games in 2000.¹⁸⁸ Imagine how much further video games have evolved in the past decade since those words were written, and Kiernan's cautionary warning becomes even more potent. More recent scholarly work concurs with Gerson and Kiernan's point as well. In his analysis of the *Brown* decision, David G. Post, Professor of Law at Temple University, challenges the reader as to whether "this particular crack (the conflict between violent video game legislation and the First Amendment) is truly sealed up or just papered over for the moment."¹⁸⁹ Robert Bryan Norris, Jr. offers a similar criticism of the *Brown* majority, simply stating "the Supreme Court has gracelessly glossed over the unique challenges presented by interactivity in video games."¹⁹⁰ Gerson's, Kiernan's, Post's, and Norris's critiques of video game First Amendment jurisprudence (and the *Brown* holding, in particular) center on the fact that video games are constantly evolving and changing, and the suggestion that the courts' unwillingness to take that factor into account may result in their decisions soon being rendered obsolete.

183. *Id.*

184. *Id.* at 1153.

185. *Id.* at 1157.

186. *Id.* at 1158.

187. *Id.* at 1162.

188. David Kiernan, Note, *Shall the Sins of the Son be Visited Upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 218 (2000).

189. David G. Post, *Sex Lies and Videogames: Brown v. Entertainment Merchants Association*, 27 CATO SUP. CT. REV. 1, 52 (2011).

190. Norris, *supra* note 97, at 84.

A great deal of the criticism of violent video game cases (including *Brown*'s majority opinion) centers on courts' analyses of the interactive element of video games as comparable to that of literature and movies. This argument is perhaps best summarized by Judge Posner, who stated that the argument that video games should be subjected to a different standard is erroneous because "[a]ll literature . . . is interactive; the better it is, the more interactive."¹⁹¹ Multiple scholars have dismissed this statement as overly simplistic. Kevin Saunders, Professor of Law at Michigan State University, says that "to say that literature is interactive because the reader empathizes with a character is a far cry from interactivity in the sense of participation in the action."¹⁹² Saunders notes that Posner has confused two different types of interaction—literary interaction and actual participation in the action (such as in video games).¹⁹³ Christopher Dean concurs with this point, asserting that the "interactive nature of video games" is a "unique characteristic that distinguishes it from other more innocuous forms of expression."¹⁹⁴ Indeed, to anyone who has watched a movie and then played a video game, the two experiences are undoubtedly quite distinct. The experience of passively watching a movie simply cannot rival actually participating in the action of a video game.

That distinction turns specifically on the participatory features of a video game. As the state of California noted in its initial brief, "[T]he level of graphic detail and realism contained in many modern violent video games is without historical parallel."¹⁹⁵ When one plays a video game, they are involved in the "decision-making and carrying out (of) the violent act" which results in "a greater effect from violent video games than a violent movie."¹⁹⁶ In a shooting game, for instance, "you're the one who decides whether to pull the trigger or not and whether to kill or not."¹⁹⁷ In short, you are not only watching the action. You are creating, experiencing, and responding to the action in a way that a passive viewer simply does not.

But "pulling the trigger" is just the tip of the iceberg in terms of how a gamer can participate in a game. In the *Amici Curiae* Brief jointly submitted

191. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

192. Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. MICH. ST. U. DET. C.L. 51, 71 (2003).

193. Saunders, *supra* note 97, at 264.

194. Christopher Dean, Note, *Returning the Pig to its Pen: A Pragmatic Approach to Regulating Minors' Access to Violent Video Games*, 75 GEO. WASH. L. REV. 136, 164 (2006).

195. Petitioners' Brief at 643, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 2787546.

196. Brief of Amicus Curiae of California State Senator Leland Y.Yee, et al., in Support of Petitioners at 16, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 2937557.

197. *Id.* at 17.

by twelve states, the details of a 2003 game entitled *Postal* were revealed.¹⁹⁸ The participatory actions in that game allow the player to do the following: “decapitate people with shovels and have dogs fetch their severed heads . . . urinate on people to make them vomit . . . [or] shoot players with a shotgun that has been silenced by ramming it into a cat’s anus.”¹⁹⁹ The crucial point here is not just that these acts are shocking and appalling, though they certainly are. Instead, the problematic feature (from the viewpoint of proponents of violent video game legislation) is that the interactive nature of the video game allows the player to be the one actually choosing to engage in that action.²⁰⁰ Although these examples come from just one game, there are numerous other games that contain similar, if not more shocking, actions that the player can engage in.²⁰¹ It would be pointless (and repetitive) to detail all of the scenarios. The basic point is that these participatory features necessarily mean that video games affect the player in a very different way than movies or books may affect the watcher or the reader.

Unfortunately, the issue is not just that video games are more interactive. Instead, it is the question of just what that interactive component may entail. Although disputed, substantial evidence exists indicating that this increase in interactivity also leads to an increase in behavioral problems. As Kevin Saunders points out, this correlation seems logical, as “the interactivity of the violent video game in which the player himself responds using virtual violence would seem more likely to lead the player to respond with violence in future situations than would simply viewing characters on a screen.”²⁰² Saunders’s assertion is supported by empirical evidence. In their Brief of Amicus Curiae in Support of Petitioners, California State Senator Leland Yee, the California Chapter of the American Academy of Pediatrics, and the California Psychological Association noted the following:

new data shows that the intensity of interactive video games may be habituating and that 2 to 3 hour sessions of intense interactions with video games raise adrenaline levels in children and produces extended physiological arousal. In the medical community concern has been raised at prolonged and regularly repeated states of adrenalized arousal and hyper-vigilance involved in children watching violent video games and the possible harmful effects on still developing bodies and brains.²⁰³

198. Brief for Amici Curiae Louisiana, et al., Supporting Petitioners at 1–2, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 2866116.

199. *Id.*

200. *Id.* at 2–3, 25.

201. *Id.* at 3–4, 8–9.

202. Saunders, *supra* note 97, at 71.

203. Brief for California State Senator Leland Y. Yee, et al., in Support of Petitioners at 6, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 2937557.

Despite these worries highlighted in this Amicus Curiae brief and numerous other similar studies, the majority essentially rejected all of the empirical evidence, instead noting that “these studies have been rejected by every court to consider them” since “[t]hey do not prove that violent video games *cause* minors to *act* aggressively,” but rather, at best show “some correlation.”²⁰⁴

Breyer’s dissent challenged the majority’s assertion, arguing that there are “many scientific studies that support California’s views,” including “causal evidence that playing these games results in harms.”²⁰⁵ Breyer argued that the courts should defer to these experts, noting that “I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have . . . found a significant risk that violent video games . . . are particularly likely to cause children harm.”²⁰⁶ Breyer critiqued the majority by stating “the majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislation no deference at all.”²⁰⁷ Breyer also advocated for legislative deference during the *Brown* oral arguments, when he stated, “If I can say could a legislature have enough evidence to think there is harm, the answer is yes.”²⁰⁸

Legislative deference is a key principle related to judicial decisions,²⁰⁹ so Breyer’s criticism of the majority is particularly apt. By substituting their own opinions for those of a legislature that has studied and examined congressional findings, the majority risks overstepping its own constitutional authority.²¹⁰ When a legislative body presents findings on a certain subject, courts are (to a certain extent) required to show the congressional body some level of deference.²¹¹ In the case of restricting speech to protect harms, the Supreme Court has stated that the appropriate level of deference is “to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.”²¹² There clearly was an abundance of legislative findings in this case, as illustrated by Breyer’s dissent.²¹³ Breyer attached to his dissent two appendices listing numerous studies demonstrating a link between

204. *Brown*, 131 S. Ct. at 2739.

205. *Id.* at 2768 (Breyer, J., dissenting).

206. *Id.* at 2769 (Breyer, J., dissenting).

207. *Id.* at 2770 (Breyer, J., dissenting).

208. Transcript of Oral Argument at 29, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 4317136.

209. *See Brown*, 131 S. Ct. at 2770 (Breyer, J., dissenting).

210. *Id.* (Breyer, J., dissenting) (“The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all.”).

211. *See id.* (Breyer, J. dissenting).

212. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994).

213. *Brown*, 131 S. Ct. at 2769–70 (Breyer, J., dissenting).

violent video games and psychological harm.²¹⁴ As a justification for the appendices, Breyer notes that:

[m]any . . . of these articles were available to the California Legislature . . . I list them because they suggest that there is substantial . . . evidence supporting . . . (the conclusion) that violent video games can *cause* children psychological harm . . . [a]nd consequently, these studies help to substantiate the validity of the original judgment of the California Legislature.²¹⁵

Breyer's point is that there seems to be extensive findings that the California Legislature relied upon in its creation of the statute in issue, and therefore the Court should have afforded the legislature its proper deference as the lawmaking body.²¹⁶ Instead, the Court seemed to utterly disregard the legislative findings, or, at the very least, not find them worthy of serious credence.

The petitioners' Brief, however, argued that the causal connection the majority seemed to demand is simply an impossibility, since to test the proposition would be to require a study isolating a minor from all other kinds of violence while only subjecting them to violent video games.²¹⁷ In light of the fact that this type of study is essentially an impossibility, the question becomes, what more evidence could the state of California have submitted that would indicate a compelling interest? This question is particularly relevant to those states that will continue to seek a way to regulate violent video games after the *Brown* decision.

Perhaps the problem is that First Amendment protection should not automatically be extended to all new types of communication. Indeed, Professor Garry argues in his article *Defining Speech in an Entertainment Age* that "[i]f every new technology is automatically given First Amendment status, as seems to be the case with video games, then there is a risk that the First Amendment may become meaningless through an endless process of dilution."²¹⁸ Garry's article was written prior to the decision of *Brown*, but its criticisms are easily applied to the majority holding in the case. Garry's major problem with the courts' treatment of violent video games is the precedent that it sets for even newer technologies that may emerge in the future.²¹⁹ Garry

214. *Id.* at 2771 (Breyer, J., dissenting).

215. *Id.* at 2772 (Breyer, J., dissenting).

216. Indeed, the majority notes in its opinion in *Brown* that "[w]e have no business passing judgment on the view of the California Legislature that violent video games (or for that matter, any other forms of speech) corrupt the young or harm their moral development." *Id.* at 2741.

217. Petitioners' Brief at 48–49, *Brown*, 131 S. Ct. 2729 (No. 08-1448), 2010 WL 2787546 ("[S]uch a study would be as unethical as it is impracticable. By effectively requiring it, the Ninth Circuit placed California in a situation where it could only justify a law prohibiting the sale of violent video games to minors through the use of a study that can never be performed.")

218. Garry, *supra* note 178, at 140.

219. *Id.*

criticizes courts for automatically classifying each new technological advancement as protected speech and argues that courts should “actually examine the issue and come to some sort of modern definition of First Amendment speech.”²²⁰ Instead of actually analyzing each new technological medium, Garry argues courts automatically apply First Amendment protection—a knee-jerk reaction which may actually undermine the First Amendment.²²¹ Garry seems to be correct that the majority’s opinion implies that regardless of the technological advancement, a new medium qualifies for First Amendment protection automatically. As Ken Paulson, President and CEO of the First Amendment Center, writes, “[T]he Supreme Court’s ruling [in *Brown*] is a vibrant application of 219-year-old principles to cutting-edge technology and asserts that any new forms of communication or media to come will be protected by the First Amendment.”²²² As technology continues to advance, the Court should admit that a strict First Amendment jurisprudence may not be applicable, and should instead consider whether an updated First Amendment jurisprudence is warranted.

Although this argument may be offensive to those who believe First Amendment law must remain constant, even in light of changing technologies, it is not without support from existing jurisprudence. Remember, for instance, what the *Burstyn* court cautioned back in 1952: although First Amendment principles remain the same over time, precise rules may need to be flexible, as each new type of expression “tends to present its own peculiar problems.”²²³ Even the recent case of *United States v. Stevens*, which concluded that new categories of unprotected speech cannot just be added by legislatures who find them overtly offensive, was not dealing with changes in technology (just changes in cultural viewpoints).²²⁴ Perhaps evolving technologies (as illustrated by interactive video games) present the perfect impetus for the courts to reconsider (potentially) outdated First Amendment jurisprudence. The *Brown* decision may quickly become obsolete as newer video game technologies are introduced.²²⁵ Regardless, as the cursory rejection of the argument that the interactive nature of video games merits a further analysis

220. *Id.*

221. *Id.* at 160–61.

222. Ken Paulson, *Court’s Video-Game Ruling Shields Emerging Media*, FIRST AMEND. CTR. (June 27, 2011), <http://www.firstamendmentcenter.org/courts-video-game-ruling-shields-emerging-media>.

223. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

224. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

225. See Norris, *supra* note 97, at 115 (“The fully immersive and simulatory capabilities of tomorrow’s video games pose true challenges to society and to the underlying rationale of the *Brown* decision. The interactivity of video games, and the medium’s ability to function as both expression and as a tool for enjoyment or instruction, may be areas where reevaluation under the law is necessary.”).

demonstrates, the *Brown* majority did not even consider whether video games present a unique First Amendment issue.

E. Recommendations

As argued by both the Alito/Roberts concurrence and the Breyer dissent, it seems the majority erred in so quickly dismissing the peculiar problems video games may present. After all, the Court disposed of California's argument that "video games present special problems because they are 'interactive'" in only a single paragraph.²²⁶ The comparison of a video game to a choose-your-own-adventure novel, while not unfounded, seems overly simplistic. It seems almost absurd to contend that flipping to a certain page and discovering the fate of a character is comparable to feeling your finger on the trigger, focusing in on your target, pulling the trigger, and watching as he explodes. The majority of scholars agree, and rightfully so, that there are tangible differences between video games and other mediums—and those differences will only become more pronounced as video games continue to evolve.

That difference is centered on the fact that when one plays a video game, one is not only involved in the action—one is creating it. And as video games become more advanced, one will not only be creating it, but will likely also be experiencing the action as well. "Rumble paks," originally introduced in 1997 for the Nintendo 64, allow the player to "feel" when he is shot or struck via a vibration in the controller.²²⁷ Now, the rumble feature is considered standard in video game systems.²²⁸ Rumble paks are a very rudimentary example of how the experience of playing a video game may be different from any other medium. The Xbox Kinect, released in just the past two years, is a further effort to attempt to integrate the player into the game.²²⁹ According to one of its developers, its purpose is "to remove the last barrier between you and the entertainment you love . . . [b]y making you the controller."²³⁰ Each of these advancements is aimed at one ultimate goal: to eventually eliminate the distinction between playing a video game and experiencing it as real life. The

226. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2737–38 (2011).

227. Levi Buchanan, *Happy Birthday, Rumble Pak*, IGN RETRO (Apr. 3, 2008), <http://retro.ign.com/articles/864/864231p1.html>.

228. *Id.*

229. *Kinect for Xbox 360 is Official Name of Microsoft's Controller-Free Game Device*, MICROSOFT NEWS CTR. (June 13, 2010), <http://www.microsoft.com/presspass/features/2010/jun10/06-13kinectintroduced.mspx>.

230. Andrew Burger, *Microsoft Injects Interactivity, Content into New Xbox Entertainment Platform*, TELECOMPETITOR (June 15, 2010), <http://www.telecompetitor.com/microsoft-injects-interactivity-content-into-new-xbox-entertainment-platform/>. The article describes the Kinect as "bring[ing] virtual reality a step closer to reality, immersing users in virtual environments and enabling them to interact within them by tracking body movements and gestures, as well as by understanding voice commands." *Id.*

ultimate goal is to have the player forget he is playing a game and instead have the graphics and experience seem so real that he cannot tell where the game ends and reality begins. When that distinction is finally achieved, how can the majority's opinion remain relevant?

Based upon the vast body of scholarly work on the topic and the previous lower court decisions, it appears the concurrence took the most prudent approach in finding that, although this particular California statute may be impermissible, other statutes may prompt a reevaluation of First Amendment doctrine. Video games are rapidly evolving, a point which the majority essentially disregarded. Although the Court's holding may be applicable to the current status of video games, it fails to account for any advances that may occur. Thus, the majority opinion may very soon become outdated and irrelevant.

Those looking to regulate violent video games, however, would be well advised to search for another approach than the one taken by the California legislators in *Brown*. Judicial history has shown us that restrictions on violent video games are unlikely to succeed under an obscenity justification, or any other area of existing First Amendment jurisprudence. Instead, those seeking to regulate violent video games through legislation should consider justifying the restrictions under the cautionary standards advocated by the concurrence and the Breyer dissent. The argument that video games are more interactive than other media forms (and are therefore deserving of a unique First Amendment analysis) will only become more and more potent as video games continue to technologically advance.

Perhaps the response to dealing with a "new" form of technology is having the courts consider a "new" kind of solution. In that vein, the best solution may be the one advocated by Eric T. Gerson—the technological tipping point approach.²³¹ Under this analytical structure, any games that are so interactive beyond a court-determined "tipping point" would be removed from First Amendment protection.²³² Although this approach would solve the interactive issue while still allowing less "threatening" video games to receive First Amendment protection, it is not without its drawbacks. One of the primary issues that could arise with this solution is the determination of what exactly constitutes the "tipping point." Who would determine such a standard? How would courts apply it? Undoubtedly, this solution would necessarily entail a fairly subjective and murky body of jurisprudence. Furthermore, it does not solve the problem of attempting to justify the legislation under the obscenity exception, which courts have continually rejected.

Perhaps the more workable solution is that statutes in the future must be more narrowly drawn and tailored to serve a compelling interest. This

231. Gerson, *supra* note 60, at 1153.

232. *Id.*

argument is the one that courts have previously seemed the most receptive to; Posner concluded that “a more narrowly drawn ordinance might survive a constitutional challenge.”²³³ Even the majority itself in *Brown* (and certainly the concurrence) seems to agree that if the statute had been more narrowly constructed, it possibly could have passed constitutional muster (assuming a compelling interest could be shown). As Ilana Lubin wrote in 2006, although the California statute was “more specific” than its predecessors, that did not mean it would pass constitutional muster, but, “[i]t will only take one statute to pass muster, and the other states will inevitably follow suit.”²³⁴ In light of the fact that every court who has considered the issue has determined that violent video game legislation cannot be considered obscene, a statute that will satisfy the strict scrutiny analysis seems to be the most viable option for states who continue to seek a way to regulate the sale or rental of violent video games to minors. It seems unlikely that legislatures will simply stop trying to find ways to regulate violent video games after *Brown*.²³⁵

Maybe the problem is that the scientific evidence has not quite advanced to the point where it can justify that compelling interest, which is a problem that may soon take care of itself as video games continue to increase in interactivity. Perhaps a more narrowly drawn statute, supported by more concrete empirical evidence, may eventually persuade the courts to reevaluate whether violent video games are deserving of First Amendment protection. Considering that the evidence in this case persuaded at least Justice Breyer (and possibly Justices Alito and Roberts also), more substantial scientific proof would likely persuade more judges that a substantial harm exists.

Regardless of which approach courts may take in the future of First Amendment video game legislation, one thing seems fairly clear: even though the Supreme Court has issued a “final” ruling on the subject, the constitutional problems that violent video games present will continue to plague courts.

CONCLUSION

In *Brown v. Entertainment Merchants Ass’n*, the Supreme Court grappled for the first time with the issue of whether violent video games deserve First Amendment protection. In a majority holding that has already proven controversial, the Court held that video games are protected speech, violent video games do not fall into any of the recognized unprotected speech

233. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001).

234. Lubin, *supra* note 97, at 185.

235. See Bruce Hausknecht, *Dig Deeper: The First Amendment and Violent Video Games*, CITIZENLINK (June 27, 2011), <http://www.citizenlink.com/2011/06/27/dig-deeper-the-first-amendment-and-violent-video-games> (noting of *Brown* that “even though the decision is a disappointment for parents, it will give guidance for future efforts that California and other states may undertake to craft effective laws to protect children from violent material”).

expressions, and the California statute could not be justified by a compelling interest.²³⁶ The concurrence dismissed the statute on due process grounds (finding the statute unconstitutionally vague), but simultaneously warned that the majority should have been more cautious in evaluating the special First Amendment problems presented by violent video games.²³⁷ Thomas's dissent found the statute permissible under an originalist approach,²³⁸ whereas Breyer's dissent found the statute permissible since it was supported by a compelling interest.²³⁹

Although this holding was consistent with previous lower court holdings, many scholars have questioned whether the majority erred in barely even acknowledging that an argument could be made for a different constitutional standard for video games due to their interactive nature. Although some scholarship wholeheartedly supports the majority, most scholarship is more cautionary in nature, positing that the interactive nature of video games warrants some deeper constitutional analysis. In this respect, therefore, it appears that the majority erred in dismissing the interactive argument as out of hand, a criticism pointed out by the concurrence.

Thus, although *Brown* gave lower courts a definitive answer on the issue of violent video game legislation, it nevertheless begs the question as to how long the decision may continue to be relevant. If experts are correct and video games advance to the point where it is nearly impossible to distinguish them from reality, the majority's opinion may soon become obsolete. Empirical evidence may soon emerge demonstrating that as video games become more interactive, the dangers they pose to children increase as well. At this point, such a link remains speculative. Either way, it is clear that in spite of the Supreme Court finally ruling on the issue, the controversy surrounding violent video game legislation is far from over.

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236. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741–42 (2011).

237. *Id.* at 2742 (Alito, J., concurring).

238. *Id.* at 2761 (Thomas, J., dissenting).

239. *Id.* at 2771 (Breyer, J., dissenting).

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