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Jessica Fisher*

Brown v. Entertainment Merchants Association: "Modern Warfare" on First Amendment Protection of Violent Video Games

Introduction

In *Brown v. Entertainment Merchants Association*,[1] the Supreme Court of the United States struck down a California law that restricted violent video game sales to minors because the law infringed upon constitutionally protected speech and the legislature had neither a compelling government interest nor proscribed means narrowly tailored to that interest.[2] The Court held that the California law was unconstitutional because the law placed restrictions on free speech, protected by the First Amendment, and those restrictions did not pass strict scrutiny.[3] The Court determined that the California law did not pass strict scrutiny because strict scrutiny requires that California show an actual state interest in restricting speech and that the law is as narrowly tailored as possible to serve that interest.[4] The Court clearly stated that California could not meet this heavy burden.[5] However, in its opinion, the Court too hastily concluded that video games should be treated the same as other media of speech such as radio broadcasts, print publications, and television without further considering their relatively new and uniquely interactive qualities.[6] The Court should have deferred to the legislature and experts who study

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1. 131 S. Ct. 2729 (2011).
2. *Id.* at 2738–39, 2741.
3. *Id.* at 2738.
4. *See infra* Part IV.A (arguing that the Supreme Court came to the correct conclusion when it determined that the California law attempted to regulate the content of violent video games, which are a form of speech that is protected by the First Amendment. A law seeking to place limits on the content of protected speech must pass strict scrutiny, and the California law was unable to meet this standard).
5. *See infra* Part IV.A.
6. *See infra* Part IV.B (arguing that the Court should not have so quickly dismissed the new and evolving medium of violent video games as the same as other media of expression such as books, radio broadcasts, and motion pictures).

video games and their effects before quickly determining that this rapidly-advancing and increasingly interactive technology presents no new challenges to the First Amendment jurisprudence of freedom of speech.[7] In the future, states that wish to restrict violent video game sales to minors should more narrowly tailor statutes to very specific depictions of violent situations that also include obscenity for a better chance of meeting the strict scrutiny that is required of laws that infringe upon First Amendment rights.[8]

I. The Case

Respondents, Video Software Dealers Association (VSDA) and Entertainment Software Association (ESA), brought an action against Petitioners, various members of the California state government,[9] alleging that California Civil Code §§ 1746–1746.5 ("the Act") was unconstitutional.[10] The Act prohibited the sale or rental of violent video games to minors without parental permission and required that merchants of these games display a specific symbol on the front packaging of the video game.[11] Specifically, VSDA and ESA alleged that (1) video games are a form of speech protected by the First Amendment, (2) the definition of "violent video game" is vague, and (3) the provision of the Act requiring violent video games to be labeled in this manner violates the First Amendment.[12]

In crafting this legislation, California State Senator Leeland Yee unsuccessfully attempted to create a law that prohibited the sale of violent video games to minors.[13] Former California Governor, Arnold Schwarzenegger, signed California Assembly Bill 1179 of 2005 into law on October 7, 2005,[14] and it was to take effect on January 1, 2006, as California Civil Code §§ 1746–1746.5.[15] The Act provided that "[a] person may not sell or rent a video game that has been labeled as a violent video

7. *See infra* Part IV.B.

8. *See infra* Part IV.C (arguing that a state should closely tailor a statute restricting the distribution of violent video games to minors by targeting very particular portrayals of obscenity such as nudity, rape, and other crimes of a sexual nature).

9. Respondents were Arnold Schwarzenegger, former Governor of California; Bill Lockyer, former Attorney General of California; George Kennedy, former District Attorney for Santa Clara County; Richard Doyle, former City Attorney for the City of San Jose; and Ann Miller Ravel former County Counsel for the Country of Santa Clara. Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1037–39 (N.D. Cal. 2005).

10. *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1039.

11. CAL. CIV. CODE §§ 1746–1746.5 (West 2006), *invalidated by* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

12. *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1039.

13. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011); A.B. 1179, 2005–06 Leg. Sess. (Ca. 2006).

14. *Brown*, 131 S. Ct. at 2732. California Assembly Bill 1179 of 2005 was to become California Civil Code § 1746–1746.5. Cal. Assemb. B. No. 1179, 2005 Leg., 2005 Sess. (Cal. 2005).

15. CAL. CIV. CODE § 1746–1746.5 (West 2009).

game to a minor,"[16] and defined "violent video game" as "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."[17] The Act also imposed a requirement that violent video games be labeled with an "18" of a specific size and color on the front packaging of the video game.[18] A merchant or owner of a business who violated any provision of the Act is subject to a fine of up to $1,000.[19]

Shortly after former Governor Schwarzenegger signed California Assembly Bill 1179,[20] VSDA and ESA filed a complaint in the United States District Court for the Northern District of California and a motion for preliminary injunction soon after, seeking to prevent the enforcement of the Act.[21] The District Court held that the costs of implementing the Act, including the infringement of First Amendment rights and expenses associated with the implementation of the Act, outweighed the potential harm of a delay in the implementation of the Act.[22] The District Court granted VSDA and ESA's motion for preliminary injunction and enjoined California from enforcing the Act.[23] Next, VSDA and ESA moved for summary judgment and for enforcement of the Act to be permanently enjoined.[24] The United States District Court for the Northern District of California held that the Act was unconstitutional, granted summary judgment, and permanently enjoined Petitioners from enforcing the Act on August 6, 2007.[25] The Court of Appeals for the Ninth Circuit affirmed the decision of the district court.[26] The court of appeals concluded that the Act was a content-based regulation subject to strict scrutiny and was presumptively invalid, because, despite the State demonstrating a compelling

16. CIV. § 1746.1 (providing that: "(d)(1) '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 with 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").

17. CIV. § 1746.

18. CIV. § 1746.2.

19. CIV. § 1746.3.

20. Cal. Assemb. B. No. 1179, 2005 Leg., 2005 Sess. (Cal. 2005).

21. Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1034, 1039 (N.D. Cal. 2005), *aff'd,* No. C-05-04188 RMW, 2007 WL 2261546 (N.D. Cal. 2007), *aff'd,* 556 F.3d 950, 953 (9th Cir. 2009), *aff'd sub nom.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

22. *Id.* at 1048.

23. *Id.*

24. *Id.*

25. Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188 RMW, 2007 WL 2261546, at *12 (N.D. Cal. Aug. 6, 2007), *aff'd,* 556 F.3d 950, 953 (9th Cir. 2009), *aff'd sub nom.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

26. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 967 (9th Cir. 2009), *aff'd sub nom.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

interest to protect the physical and psychological well-being of minors, it did not tailor the restriction to the least-restrictive means possible to achieve this purpose.[27]

The Supreme Court granted certiorari to decide if the Act comported with the First Amendment of the Constitution.[28]

II. Legal Background

In order for a challenged legislative act that restricts historically protected speech to be declared constitutional, the State must show that the legislature has a compelling government interest to protect and that the act is narrowly tailored to protect that interest.[29] There are limited categories of speech that historically have not qualified for First Amendment protection such as speech that incites violence,[30] fighting words,[31] advocacy of illegal conduct,[32] defamation,[33] and obscenity.[34] New categories that have not been historically unprotected cannot be added to this list.[35] Depictions of violence have been traditionally protected,[36] and violent video games qualify as speech that is protected by the First Amendment.[37] Legislative acts that propose restrictions on speech must pass strict scrutiny.[38] The plaintiff has the burden of

27. *Id.* at 965.

28. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011).

29. R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (holding that an ordinance that is overbroad does not pass the strict scrutiny required by statutes that restrict First Amendment freedom of speech).

30. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (holding that inflammatory speech that is likely to produce imminent lawless action is not protected by the First Amendment).

31. Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942) (holding that words uttered with the purpose to inflict injury or immediately incite an immediate breach of the peace are of no social value and are part of a category of speech not protected by the First Amendment).

32. Schenck v. United States, 249 U.S. 47, 52 (1919) (introducing the "Clear and Present Danger Test" and holding that speech that advocates for immediate and illegal action is not protected by the First Amendment).

33. *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 283–86 (1964) (stating a test to determine instances of libel, or defamation, against a public figure).

34. Roth v. United States, 354 U.S. 476, 489 (1957) (holding that speech whose "dominant theme . . . taken as a whole appeals to the prurient interest" is a category of speech that is not protected by the First Amendment).

35. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (holding that "depictions of animal cruelty" is not a class of speech that has been historically unprotected by the Constitution, and this new class cannot be created and added to the list of existing unprotected classes of speech that have a long history of being excluded from the protections of the First Amendment) (internal quotations omitted).

36. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) (discussing that the obscenity exception to the First Amendment only covers depictions of sexual conduct and not what the legislature finds to be shocking or violent). *See generally* Miller v. California, 413 U.S. 15, 24 (1973) (determining that to be considered obscenity, speech must appeal to the prurient interest, which puts it outside of First Amendment protection); Cohen v. California, 403 U.S. 15, 20 (1971) (discussing how in order to be considered obscenity, the speech must be erotic); *Roth*, 354 U.S. at 489 (providing that obscenity must have an element that applies to the prurient interest).

37. *Brown*, 131 S. Ct. at 2736 ("California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none.").

38. R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992); *see* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1, 3–4 (1972) (discussing

showing that (1) government has an actual interest that it wishes to protect,[39] and (2) the act was narrowly drawn to protect this interest.[40]

A. Depictions of Violence Are One of the Historically Protected Categories of Speech, and Violent Video Games Qualify for First Amendment Protection

The First Amendment provides protection for speech stating, "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."[41] The Free Speech Clause prohibits restrictions on an individual's freedom of speech, which has historically been recognized to include entertainment.[42] The First Amendment protects entertainment including books, plays, radio broadcast, television, and movies.[43] As technology continues to advance, the freedom of speech has been extended to video games.[44] The First Amendment protects these media, because "[a]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[45]

There are exceptions to the general rule that the First Amendment protects speech. Historical categories of unprotected speech exist: speech that incites violence,[46] fighting words,[47] advocacy of illegal conduct,[48] defamation,[49] and

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the relatively vigorous level of scrutiny requires that the means of legislation must substantially further the ends of the legislation in order for the legislation to pass the strict scrutiny that the First Amendment requires).

39. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.") (citing Sable Commc'ns of California, Inc. v. FCC et al., 492 U.S. 115, 126 (1989) (providing that "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest" and determining that there is a governmental interest in protecting the well-being of minors)).

40. *R.A.V.*, 505 U.S. at 395; *see generally* Gunther, *supra* note 38 (discussing how one of the requirements of strict scrutiny is that an act that infringes on speech must be narrowly drawn so that the means of the act support its ends).

41. U.S. CONST. amend. I, § 1.

42. Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 148 (2004).

43. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952) (concluding that just because books, newspapers, magazines, and motion pictures are produced and sold for a profit does not mean that they are outside of the protection of the first amendment and providing that motion pictures are another medium of speech that is granted protection by the First Amendment).

44. *See generally id.* (discussing that first amendment protections of speech do not change depending on the type of medium through which the speech is expressed and stating, "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment").

45. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotations omitted) (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (quoting Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 95 (1972))).

46. *See supra* note 30 and accompanying text.

obscenity.[50] Although this list is not exhaustive, the categories of unprotected speech are limited to those that have a history of not being protected or contribute little social value.[51] Depictions of violence are one of the categories of speech that have been historically protected by the First Amendment, although there have been attempts to censor speech in this area over the decades.[52] Specifically, governments have attempted to prove that motion pictures are outside of the First Amendment's protections.[53] However, the Court held in *Joseph Burnstyn, Inc. v. Wilson* that even though movies could pose a different type of danger to minors than other media of speech before them, movies do not require "unbridled censorship" and exclusion from First Amendment protection.[54]

The Supreme Court recently held in *United States v. Stevens* that absent a historical precedent of protection of a particular category of speech, new categories of unprotected speech may not be added.[55] In *Stevens*, Respondent, Robert J. Stevens, a small-time author and producer, challenged his arrest under a statute that criminalized the commercial creation, sale, or possession of depictions of animal cruelty.[56] This type of video production was declared illegal under the law, and Stevens was convicted in the United States District Court for the Western District of Pennsylvania and given a 37-month jail sentence in 1999 for his involvement in those productions.[57]

The Supreme Court held in *Stevens*, a statute that criminalized the commercial sale, possession, and depiction of animal cruelty was invalid under the First Amendment because it was substantially overbroad.[58] In the reasoning of the

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47. *See supra* note 31 and accompanying text.

48. *See supra* note 32 and accompanying text.

49. *See supra* note 33 and accompanying text.

50. *See supra* note 34 and accompanying text.

51. *See* United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) ("Our decisions . . . cannot be taken as establishing a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them.").

52. Winters v. New York, 333 U.S. 507, 518–20 (1948) (discussing that violence is not part of the obscenity that the Constitution is permitted to regulate, and concluding that the statute in this case restricting the possession of certain magazines contained no unconstitutional obscenity).

53. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).

54. *Id.* at 502.

55. *Stevens*, 130 S. Ct. at 1584 (holding that absent a historical background of protection, new categories of speech may not be added to the already designated categories of unprotected speech). *Stevens* was decided only a few days before *Brown*, and it has created a lot of controversy in Free Speech jurisprudence, but, as the Court affirmed in *Brown*, new categories of unprotected speech may not be created "absent a long . . . tradition of proscription." Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011).

56. *Stevens*, 130 S. Ct. at 1582–83 (discussing a law that sought to provide that depictions where an animal is being maimed, mutilated, tortured, wounded, or killed is not protected by the First Amendment).

57. *Id.* at 1584.

58. *Id.* at 1592.

opinion, Chief Justice Roberts relied heavily on the notion that there are only a few limited categories of unprotected speech.[59] In the opinion, Chief Justice Roberts emphasized that when the Court has identified categories of speech that are outside of First Amendment protection, it is not done simply on the basis of cost-benefit analysis, as the Government alleged in this case, but instead there must be some other compelling interest in protecting a class of individuals.[60] Ultimately, the Court "decline[d] to carve out from the First Amendment any novel exception for [the Statute] . . . ," therefore, depictions of animal cruelty are protected by the First Amendment.[61]

As *Stevens* illustrates, there have been recent attempts to add more categories of unprotected speech that have been unsuccessful.[62] Although there may be new and undiscovered categories of unprotected speech added to the list, states have been more successful in expanding existing categories of unprotected speech.[63] For example, the Court in *Ginsberg v. New York* expanded the category of obscenity to include distribution of pornography to minors.[64] The Court was careful to note that this was merely an expansion of obscenity by adding the words "to minors" to an already constitutional prohibition on speech, and a new category of unprotected speech was not created.[65] Thus, courts have held that depictions of violence in various media are protected speech.[66]

Attempts by states to censor violent video games are relatively new and legal action relating to video game violence did not develop until the mid-1990s and early 2000s, and none have been successful at categorizing violent video games as an unprotected category of speech.[67] Partially due to the urging of Senators Lieberman and Krohl over concerns of violence portrayed in video games, the video game industry established the Entertainment Software Rating Board (ESRB) as a means of self-censorship in the videogame industry.[68] However, there was no litigation surrounding violent video games and the debate about their censorship did not heat

59. *Id.* at 1584–85.

60. *See id.* at 1585.

61. *Id.* at 1586.

62. *See id.* at 1584 ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them.").

63. Ginsberg v. New York, 390 U.S. 629, 637 (1968) (holding that a statute expanding the definition of obscenity by adding the words "to minors" to each provision did not invade freedom of expression).

64. *Id.* at 643 (adjusting the definition of obscene materials to include a prohibition on the sale of sexually explicit materials to minors).

65. *Id.*

66. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (discussing how motion pictures are one of the many media of speech that is protected by the First Amendment).

67. Jeffrey O'Holleran, *Blood Code: The History and Future of Video Game Censorship*, 8 J. TELECOMM. & HIGH TECH. L. 571, 580 (2010).

68. *Id.* at 583–84.

up until after the violent school shootings in high schools in the late 1990s.[69] Throughout the early and mid-2000s, Jack Thompson became famous for his campaign against violent video games and filed many suits on behalf of many victims violently murdered by perpetrators who may have been influenced by violent video games.[70] Aside from a few laws, similar to the one in *Brown*, the only other attempt has been to place restrictions on the packaging of games considered to be particularly violent by the ESRB.[71]

B. Legislative Acts That Propose Restrictions on Protected Categories of Speech Must Pass Strict Scrutiny by Having a Compelling Government Interest and Being Narrowly Tailored to Protect That Compelling Interest, a Two-Prong Test That Places a High Burden on the Government

In First Amendment litigation, the burden is on the government to show that an act can pass strict scrutiny.[72] The state must prove that the act is aimed at eliminating an actual problem.[73] Also, the government must demonstrate that the means by which the act restricts speech is tailored in the narrowest way to solve this problem.[74] An act is not narrowly tailored if it is underinclusive or overinclusive.[75]

First, a plaintiff must show that there is an actual and compelling problem that the government seeks to remedy with the act in order to pass strict scrutiny.[76] A legislature can show a compelling problem by the use of evidence in the form of case-studies and research by people deemed to be experts in a particular field.[77] If a

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69. *Id.* at 584. In the wake of tragedies such as the school shooting at Columbine, video game violence drew more attention and even became part of the 2000 presidential campaign. *Id.*

70. *Id.* at 586–93. Although he was disbarred for life due to the tactics he used in his cases, Jack Thompson was still an important figure in the fight against violent video games. He even helped work on some legislation against violent video games. *Id.* at 592–93.

71. *See, e.g.*, Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 650–51 (E.D. Mich. 2006) (citing Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) and Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 959 (8th Cir. 2003)) (holding video games were protected speech in a case that involved specific packaging restrictions for violent video games).

72. *See generally* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) (discussing that the plaintiff bears the burden of showing that the legislature has presented evidence of an actual problem that is in need of solving and the law is aimed at solving this problem).

73. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) ("For a law to be narrowly tailored, the government must prove the Court's satisfaction that the law actually advances the interest." (footnote omitted)).

74. R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

75. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993) (holding that a statute aimed at outlawing animal sacrifice in religious ceremonies is underinclusive, as the statute was aimed at discriminating against the Santeria religion, which uses animal sacrifice in its religious rituals).

76. *Playboy*, 529 U.S. at 818 ("When First Amendment compliance is the point to be proved, the risk of nonpersuasion—operative in all trials—must rest with the Government, not with the citizen." (citation omitted)).

77. This is often done by presenting witness testimony at legislative committee hearings on the particular topic. *See, e.g.*, Michael Dresser & Timothy B. Wheeler, *Thousands Go to Annapolis for Gun-Control Rally and*

court determines that the state has shown that a particular interest is compelling, the government has passed the first prong of the strict scrutiny test.[78]

There are few statutes that have passed this first prong by showing that there is an actual and compelling government interest that the act protects. One such statute restricts the shipment or transportation of pornography depicting minors.[79] Conversely, the Court recently held in *United States v. Alvarez*[80] that the Stolen Valor Act[81] was unconstitutional, because it violated the First Amendment.[82] The Stolen Valor Act made it a misdemeanor to falsely represent oneself as having received a United States military honor.[83] Writing for the plurality, Justice Kennedy declared that the Court has never decided that speech falls outside of First Amendment protections based on falsity alone.[84] What is particularly interesting in this case was the Court's discussion of compelling government interest.[85] The plurality emphasized how the First Amendment mandates that there must be a direct causal link between the restriction on speech between the act's restriction and the injury that is to be prevented.[86] In *Alvarez*, the Court determined that the link between protecting the military honors system and the Act's restriction on false statements was not shown.[87] This was largely due to the fact that the Government did not rely on much research, case studies, and expert testimony to show that punishing these false statements in order to uphold the U.S. military honor was a compelling government interest.[88]

Next, a plaintiff must demonstrate that the piece of legislation is narrowly tailored to serve its interest.[89] An act is narrowly drawn if it is not overinclusive or

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Hearing, BALT. SUN, Feb. 6, 2013, http://articles.baltimoresun.com/2013-02-06/news/bs-md-omalley-guns-20130204_1_assault-weapons-gun-control-gun-buyers (discussing a recent hearing on gun-control in Annapolis, Maryland and mentioning the process for legislative hearings).

78. *See generally* Volokh, *supra* note 73 (discussing how a law must pass strict scrutiny, including how a law must show a compelling government interest).

79. 18 U.S.C. § 2252 (2006). In New York v. Ferber, 458 U.S. 747, the Court held that child pornography may be deemed obscene without first passing the *Miller* Test for several reasons, including that the government has a compelling interest in protecting children from sexual exploitation. New York v. Ferber, 458 U.S. 747, 756 (1992).

80. United States v. Alvarez, 132 S. Ct. 2537 (2012).

81. 18 U.S.C. § 704 (2006), *invalidated by Alvarez*, 132 S. Ct. at 2551.

82. *Alvarez*, 132 S. Ct. at 2551.

83. 18 U.S.C. § 704 (2006).

84. *See Alvarez*, 132 S. Ct. at 2540 (discussing how *Stevens* determined that there may exist some new categories of unprotected speech but stating that the Court has not yet examined false statements as one of these categories).

85. *Id.* at 2549–50.

86. *Id* at 2549 ("The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show why counterspeech would not suffice to achieve its interest.").

87. *Id.*

88. *See id.* (describing how the Government did not and could not show how punishing false statements served the end of protecting the military honors system).

89. *See* Volokh, *supra* note 73, at 2418.

underinclusive.[90] An act is overinclusive if it includes types of speech that need not be prohibited by the statute.[91] More specifically, "[a] law is not narrowly tailored if it restricts a significant amount of speech that doesn't implicate the government interest."[92] For example, a law that prohibits a corporation from supporting or opposing a referendum proposal, because this support might influence an election outcome, could be considered overinclusive.[93] It could be overinclusive, because the shareholders of the company could unanimously support this referendum outside of any desire to influence an election.[94] Alternatively, a statute is underinclusive if it does not prohibit all types of like speech.[95] Underinclusiveness can lead a court to doubt that a state is pursuing the interest that it states it wishes to protect with the enactment of a statute.[96] For example, a statute that prohibits animal slaughter, but is so targeted that it only restricts the slaughter in the manner performed by a particular religion, is underinclusive.[97]

Laws that are aimed at limiting minors' access to violent video games are often derived from the test in *Miller v. California*, which sought to clarify and refine the definition of obscenity.[98] The *Miller* Test has been used for decades to determine if a form of expression is obscene, and thus not protected by the First Amendment.[99] Generally, the *Miller* Test is a three-prong test that can be used to determine if whether expression can be labeled as obscene.[100] The *Miller* Test is not as difficult to pass as strict scrutiny, and the Government has a much lower burden to prove in order to pass the test.[101] However, this test is the standard used for free speech cases involving obscenity. In *Ginsburg v. New York*, the Court upheld the constitutionality

90. *See* Volokh, *supra* note 73, at 2422 (discussing how a law is not narrowly tailored if it is overinclusive by restricting speech that does not serve the government interest, and a law is not narrowly tailored if there are less restrictive means to reach the ends).

91. *See* City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (holding that a law which prohibits an entire medium of speech, in this instance yard signs, is so overinclusive that it cannot be said to be narrowly tailored).

92. *See* Volokh, *supra* note 73, at 2422.

93. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978).

94. *Id.*

95. *See* Volokh, *supra* note 73, at 2431–32.

96. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993) (holding that a statute aimed at outlawing animal sacrifice in religious ceremonies is underinclusive, as the statute was aimed at discriminating against the Santeria religion, which uses animal sacrifice in its religious rituals).

97. *Id.*

98. Miller v. California, 413 U.S. 15, 36–37 (1973).

99. *Id.* at 24 (outlining the *Miller* Test which states, "[t]he basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (quoting Roth v. United States, 354 U.S. 476, 483 (1957) (internal quotations omitted))).

100. *Id.*

101. Zachary B., *The Miller Test and the Value of Obscene Speech*, Yale Law & Technology (Oct. 15, 2012), http://www.yalelawtech.org/uncategorized/the-miller-test-and-the-value-of-obscene-speech/.

of a New York statute that altered the *Miller* Test by adding the word "to minors" to each section of the test.[102] The Court reasoned that the law was narrowly tailored in that it served its purpose of protecting minors.[103] Thus, New York was successful in passing a law that banned the sale of "girly magazines" to minors by determining that these pornographic magazines were classified as obscene and not protected by the First Amendment.[104]

III. The Court's Reasoning

In *Brown v. Entertainment Merchants Association*, the Supreme Court declared that California's violent video game act was unconstitutional because it violated the First Amendment's Free Speech Clause.[105] The Court determined that (1) violent video games qualify for first amendment protection,[106] (2) new categories of unprotected speech may not be added,[107] and (3) California did not satisfy its burden of proof by showing both that the law was justified by a compelling government interest and that it was narrowly tailored to serve that interest.[108]

A. Violent Video Games Qualify for First Amendment Protection

The Supreme Court began its analysis by recognizing that video games qualify for First Amendment Protection.[109] The Court has long recognized that the Free Speech Clause protects forms of entertainment such as books, plays, and movies.[110] This protection extends to video games, because the Freedom of Speech does not vary depending on medium.[111] Further, "[g]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[112]

102. 390 U.S. 629, 635 (1968) (determining that material that is constitutionally protected and may be distributed to adults is not always protected when it is distributed to minors).

103. *Id.* at 637.

104. *Id.*

105. 131 S. Ct. 2729, 2741–42 (2011).

106. *Id.* at 2733.

107. *Id.* at 2734.

108. *Id.* at 2738.

109. *Id.* at 2733.

110. *Id.*

111. *Id.*; *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (holding that the principle of freedom of speech does not vary when new and different media of speech are involved).

112. *Brown*, 131 S. Ct. at 2733 (citing Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002)).

B. New Categories of Unprotected Speech May Not Be Added to the Already-Existing List Absent a Historical Precedent That the Speech Is Unprotected

The Court noted that there exist few categories of speech that are an exception to Freedom of Speech protection: obscenity, incitement, and fighting words.[113] These classes are all well-defined and narrowly-tailored, and "the prevention and punishment of which have never been thought to raise any Constitutional problem."[114] The Court relied on the holding in *Stevens* that new categories of unprotected speech may not be added to this list absent a history of exclusion from First Amendment protection, when the Court declined to afford First Amendment protection to the depiction of animal cruelty.[115] The Court concluded that *Stevens* controlled this instant case.[116] In both cases, the legislature modeled statutes after obscenity regulation,[117] but obscenity only covers depictions of "sexual conduct" and not depictions of animal cruelty or violent video games.[118] Although the definition of obscenity can be adjusted, the Court has long determined that the definition of obscenity does not include the depiction of violent acts.[119] The Court determined that the California Act attempted to create an entirely new category of speech aimed at protecting children.[120] The Court recognized that the legislature has a legitimate power to protect children, but "[it] does not include a free-floating power to restrict the ideas to which children may be exposed."[121]

Next, the Court examined other media that depict violent acts protected by the Free Speech Clause.[122] *Grimm's Fairy Tales, Snow White*, *The Odyssey*, *The Inferno*, and *Lord of the Flies* are all books containing violence that are regularly consumed by minors and are protected by the First Amendment.[123] However, the Court

113. *Id.*; *see also* Brandenburg v. Ohio, 395 U.S. 444 (1969); Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

114. *Id.* (citing *Chaplinsky*, 315 U.S. at 571–72).

115. *Brown*, 131 S. Ct. at 2734; United States v. Stevens, 130 S. Ct. 1577, 1592 (2010).

116. *Brown*, 131 S. Ct. at 2734.

117. *Id.*

118. *Id.* at 2734–35; *see also* Miller v. California, 413 U.S. 15, 24 (1973).

119. *Brown*, 131 S. Ct. at 2736; Winters v. New York, 333 U.S. 507, 517–19 (1947).

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

121. *Id.*

122. *Id.* at 2736–37.

123. *Id.*; DANTE ALIGHIERI, THE DIVINE COMEDY, Inferno, Cantos XXXIV, ls. 56–59 (Tom Griffith ed., Reverend H. F. Cary trans., Wordsworth Classics of World Literature 2009) (1472) (depicting the main character's journey through hell, and containing a particularly graphic scene in which Satan is gnawing the bodies of "the traitors," including Brutus, Cassius, and Judas Iscariot); WILLIAM GOLDING, LORD OF THE FLIES 163 (Penguin 3rd ed. 1999) (describing a violent scene in which young boys stranded on an island turn against each other, which eventually leads to the brutal death of one of the boys being crushed by a boulder pushed by another boy); JACOB GRIMM & WILHELM GRIMM, THE COMPLETE FAIRY TALES OF THE BROTHERS GRIMM 53–59 (Jack Zipes trans., 3rd ed. 2003) (containing the story of *Hansel & Gretel*, in which two young children burn a cannibalistic witch in a wood stove stating, "[t]he ungodly witch to be burned to ashes"); HOMER, THE ODYSSEY (Lillian E. Doherty ed., Oxford Readings in Classic Studies 2009) (1488) (depicting many scenes with violence including Odysseus blinding the Cyclops with a wooden stake and Odysseus shooting all of his lover's suitors

recognized that these and other works depicting violence such as dime novels, radio shows, movies, television, and song lyrics have all encountered resistance over the years.[124] California argued that video games are different because of their interactive qualities.[125] The Court rejected this stating that violent, interactive literature has been around since the 1960s with choose-your-own-adventure novels.[126] The Court asserted that video games are not a different degree or kind of interactive technology that is different than other media such as literature,[127] citing Judge Posner's statement that "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."[128] Finally, the Court dismissed Justice Alito's position that video games are extremely violent.[129]

C. California Did Not Satisfy Its Burden of Proof by Showing That Either the Law Was Justified by a Compelling Government Interest and That It Was Narrowly Tailored to Serve That Interest

The Court held that the Act imposed a restriction on the content of the speech.[130] Thus, the Act had to pass strict scrutiny by demonstrating a compelling government interest and be narrowly tailored to serve that interest in order to be constitutional.[131] The Court admitted that the Act had a compelling state interest to protect youth,[132] but California did not meet its burden of showing that the law was justified by this compelling government reason.[133] California relied on evidence and studies by psychologists to show a connection between exposure to violent video games and harmful effects to children, but this evidence was not compelling.[134] Although the studies showed a slight correlation in miniscule effects, such as children making louder noises after playing violent video games,[135] the Court

with a bow and arrows). Grimm's Fairy Tales also contain the story of *Snow White* in which an evil Queen is forced to dance in a pair of hot iron shoes until she drops dead. GRIMM & GRIMM, *supra* 264–73.

124. *Brown*, 131 S. Ct. at 2737 (discussing that in the 1800s, dime novels were blamed for juvenile delinquency, motion pictures were accused of easily influencing minors and leading them to prison, and other media such as the radio and comic books were long thought to foster violent behavior of youths).

125. *Id.*

126. *Id.* at 2737–38. Choose-your-own-adventure novels are books that offer various choices to the author that may all result in alternate endings of the story.

127. *Id.* at 2737–38.

128. *Id.* (citing Am. Amusement Mach. Assn. v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).

129. *Brown*, 131 S. Ct. at 2742–51 (Alito, J., concurring).

130. *Brown*, 131 S. Ct. at 2738 (majority opinion).

131. *Id.*

132. *Id.* at 2741.

133. *Id.* at 2738.

134. *Id.* at 2739.

135. *Id.*

determined that the studies did not demonstrate a true connection between playing violent video games and aggressive actions by minors.[136] Thus, the Court reasoned California could not show that the Act was narrowly tailored to meet its burden of showing that the Act was justified by a compelling legislative interest with supporting evidence.[137]

The Act was not narrowly tailored because it was both underinclusive and overinclusive.[138] The Act was underinclusive, because it singled out video game sellers instead of restricting sellers of all types of violent material, and California did not show a compelling reason why it chose to do this.[139] Further, the Act was underinclusive, because it allowed minors to have access to these video games as long as one parent consented without providing any information on how the parent-child relationship was to be identified.[140] Lastly, the Court determined that the Act was overinclusive[141] because it restricted all minors from purchasing violent video games when not all minors have parents who actually care if their children play violent video games.[142]

The Court ended by stating that this is one statute in a long series of attempts to censor violent entertainment from children that have failed.[143] The Court stated that it does not intend to imply that protecting minors from violence was not a valid concern of the court,[144] but it was only the role of the Court to determine whether California's Act was unconstitutional.[145] California showed a legitimate legislative concern that it sought to protect, but the Act was not narrowly tailored to fully address these concerns.[146]

D. Concurrence of Justice Alito

Justice Alito concurred with the majority that this particular law was not framed with the precision that the Constitution demands and it could not be sustained.[147] Justice Alito concluded that the Act failed to provide the fair notice that the

136. *Id.* (citing Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009)) (stating that "the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated [appropriate for all ages], or even when they 'vie[w] a picture of a gun'").

137. *Id.* at 2738.

138. *Id.* at 2740.

139. *Id.*

140. *Id.*

141. *Id.* at 2741.

142. *Id.* at 2742.

143. *Id.* at 2741.

144. *Id.*

145. *Id.*

146. *Id.* at 2742.

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

Constitution required.[148] However, he strongly cautioned the Court not to prematurely conclude that violent video games are the same as any other type of media, such as books.[149]

Justice Alito elaborated on his point that violent video games are constantly-developing and have emerging characteristics that the Court too quickly dismissed as nothing new and hastily concluded that all types of literature are interactive.[150] He provided examples from particularly violent video games and discussed how the interactive experiences in these games are quite different than reading about a violent murder in a book.[151] Thus, Justice Alito only went so far as to declare the Act unconstitutional and did not want to "squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem."[152]

E. Dissent of Justice Thomas

In his dissent, Justice Thomas concluded that the First Amendment has not historically protected "speech to minor children bypassing their parents."[153] Justice Thomas extensively examined how speech to minor children has been protected throughout history and concluded that the issue was largely up to the discretion of the parent with a variety of laws aimed at preserving parental control of minors.[154] He concluded that because this category of speech has never been constitutionally protected, California's violent video game act does not implicate the First Amendment and was not facially unconstitutional.[155]

F. Dissent of Justice Breyer

Justice Breyer would have upheld the statute as facially constitutional but rejected the challenges of the violent video game industry.[156] Justice Breyer agreed that the Court correctly held that the Act cannot pass the strict scrutiny that the Constitution demands,[157] but he recognized the difficulty of mounting a facial attack on an activity that involves action and speech.[158] He discussed how he would have

148. *Id.* at 2746.
149. *Id.* at 2742.
150. *Id.* at 2748.
151. *Id.* at 2748–50 (discussing various video games that are currently on the market in which the goals and themes of some of these games include murdering in particularly violent fashions, raping women and children, ethnic cleansing, and reenacting the assassination of President Kennedy and the massacre at Columbine High School).
152. *Id.* at 2751.
153. *Id.* at 2751 (Thomas, J., dissenting).
154. *Id.* at 2752–60.
155. *Id.* at 2761.
156. *Id.* at 2761 (Breyer, J., dissenting).
157. *Id.* at 2762.
158. *Id.*

applied both strict scrutiny and a vagueness requirement to this case.[159] Justice Breyer emphasized that California's statute provides fair notice and is not overly vague.[160]

IV. Analysis

The Court correctly concluded that the Act did not pass the strict scrutiny required of laws that place restrictions on speech.[161] However, in reaching this result, the Court too quickly determined that violent video games are equivalent to other media of protected speech and failed to explore the possibility that this relatively new medium of speech may pose new and different challenges.[162] If a state wishes to pass a law restricting minors' access to violent video games, the law must be narrowly tailored so that it can pass strict scrutiny,[163] and one way to do this would be to model it after other successful statutes, such as the New York statute that restricts minors access to obscenity.[164]

A. The Court Reached the Correct Result That the Act Regulating Content of Violent Video Games Did Not Pass Strict Scrutiny and Was Unconstitutional

The Court correctly held that laws aimed at restricting the sale of violent video games are an unconstitutional restriction on content.[165] It was previously decided that content-based restrictions on speech must past strict scrutiny to be considered constitutional, and the California Act did not pass this level of scrutiny.[166] The government attempted to argue the compelling interest of protecting minors from harm resulting from playing violent video games, but California's evidence was insufficient to show the Court that violent video games and harm to minors are directly related.[167] The studies presented were inconclusive and showed a small

159. *Id.* (referring to the Court's vagueness doctrine, which states that a law restricting speech is overinclusive when it is too general and not narrowly tailored to target the specific classification of speech the law seeks to prevent).

160. *Id.* at 2763.

161. *Infra* Part IV.A.

162. *Infra* Part IV.B.

163. *Infra* Part IV.C.

164. *Infra* Part IV.C.

165. *Brown*, 131 S. Ct. at 2733 (majority opinion) ("Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices . . . and through features distinctive to the medium . . . [t]hat suffice[] to confer First Amendment protection."); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (holding that the protections of the First Amendment do not vary for a new or different medium of communication).

166. *Brown*, 131 S. Ct. at 2733; R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (holding that for a statute to pass strict scrutiny, it must have a compelling government interest and be narrowly drawn to serve that interest).

167. *Brown*, 131 S. Ct. at 2738; *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 826–27 (2000) (holding that even if the government interest of protecting children is compelling, a law must comport with the First Amendment and infringe on the freedom of speech by the least-restrictive means).

causal connection between violent video games and "loud noises" or "increased agitation" for several minutes after playing a violent video game.[168] Thus, the Court correctly determined that the evidence was simply not strong enough to support a compelling government interest. Further, the Court reached the correct outcome that the Act was not narrowly tailored in the least restrictive way possible.[169] The Act is overinclusive in the fact that it assumes all parents with children who wish to play violent video games actually care that their children are playing these games.[170] The Court notes that there are some children that may be restricted from buying these games who have parents that do not care if their children are playing violent videogames, thus, the act is overinclusive.[171] The Court correctly held the Act to be underinclusive by the fact that it excludes portrayals of violence aimed at children other than violence in video games.[172]

B. In Reaching This Result, the Court Too Quickly Assumed That Violent Video Games Are the Same as Other Media of Speech That Portray Violence, and Instead the Court Should Have Deferred to the Legislature

In his concurrence, Justice Alito questions the wisdom of the Court's decision and recognizes the important need for the Court to "proceed with caution" in an "effort to understand the new technology . . . [that] may have important societal implications that will become apparent only with time."[173] Justice Alito stated, "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."[174] This argument stems from the Justices' beliefs that violent video games are the same as other media of speech.[175] Instead of quickly dismissing video games as being similar to other media depicting violence,[176] the Court should have deferred to the legislature and its studies in determining that video games present a new and different challenge than other forms of media available to minors that depict violence.[177]

168. *Brown*, 131 S. Ct. at 2739.
169. *Id.* at 2738.
170. *Id.* at 2741.
171. *Id.*
172. *Id.* at 2742.
173. *Id.* (Alito, J., concurring).
174. *Id.*
175. *Id.*
176. *Id.* at 2737–38 (majority opinion) ("California claims that video games present special problems because they are 'interactive,' in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to.").
177. *See infra* footnotes 178–213 and accompanying text.

Video games are a relatively new technology, and have advanced rapidly over the past decades.[178] Although the first "video game" was released in 1958,[179] they did not gain commercial popularity until the first arcade games were released in the 1970s, followed by the first video game consuls in the same decade.[180] In the last four decades, video games have advanced from simple games like *Pong* to games where interactive worlds, which look almost indistinguishable from reality can be created, manipulated, and altered by the player.[181] The array of options available to a player in a violent video game are far greater than those in a "choose-your-own-adventure-book," which the Court argues is similar to a violent video game.[182] All of the options of one of these adventure books are contained between the two covers of the short volume, while the possibilities available to a minor playing a modern video game are virtually endless.[183]

One of the most distinct differences between violent video games and other medium of speech available to minors is the interactivity that video games provide.[184] Reading a book or listening to the radio requires the user to use his imagination to develop a mental picture of the world being described, while video games provide visualizations for the user.[185] Although television and movies provide displays, they do not possess the interactive element that video games allow.[186] Even DVDs sold with the capability of watching alternate endings are limited by the options made available by the creator.[187]

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178. Mark Claypool & Robert W. Lindeman, *Panel Discussion, IMGD 1001: Game Development Timeline at the Worcester Polytechnic Institute*, WORCESTER POLYTECHNIC INST., http://web.cs.wpi.edu/~imgd1001/a08/slides/imgd1001_04_GameDevTimeline.pdf (last visited Apr. 16, 2013) (providing a timeline of the development of video games and advancements in video game technology over the last several decades).

179. *See* Kristin Kalning, *The Anatomy of the First Video Game*, MSNBC (Oct. 23, 2008), http://www.msnbc.msn.com/id/27328345/ns/technology_and_science-games/t/anatomy-first-video-game (describing the first video game, "Tennis for Two," that predates "Pong" and "Space Invaders").

180. John Anderson, *Who Really Invented the Video Game*, CREATIVE COMPUTING VIDEO & ARCADE GAMES, Spring 1983, at 8, *available at*,http://www.digitpress.com/library/magazines/ccvag/ccvag_spring83.pdf.

181. *Id.*

182. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

183. *See* James Dunkelberger, *The New* Resident Evil*? State Regulation of Violent Video Games and the First Amendment* 2011 BYU L. REV. 1659, 1675 (2011) (discussing how there is an ever-increasing range of choice as video games continue to develop); *see also History of CYOA*, CHOOSE YOUR OWN ADVENTURE, http://www.cyoa.com/pages/history-of-cyoa (last visited Mar. 5, 2013) (describing the format of Choose Your Own Adventure books and general statistics about the books).

184. *See* Dunkelberger, *supra* note 183, at 1674–79 (describing how video games have a level of interactivity that is not present in other media of speech).

185. *Brown*, 131 S. Ct. at 2748 (Alito, J., concurring) ("These games feature visual imagery and sounds that are strikingly realistic, and in the near future video-game graphics may be virtually indistinguishable from actual video footage." (footnote omitted)).

186. *See generally* Dunkelberger, *supra* note 183, at 1674–79 (discussing the ever-increasing interactivity of video games).

187. *See generally* Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

Specifically, violent video games provide a wide array of options that are new and much different than other forms of "speech."[188] Some of the newest interactive video games allow the player to experience a virtual word complete with sight, sound, touch, and smell, which goes even further beyond what a person can experience from the media of television or movies that are considered to be protected by the First Amendment.[189] Recent design platforms and their extensions such as Microsoft's Kinect allow the user to play without the use of a gamepad by measuring the player's full body movements.[190] Further, certain platforms of the game Resident Evil 4 provide users with a chainsaw-shaped controller so that they can better simulate attacking and cutting up zombies in the game.[191] Artificial intelligence allows for unscripted interaction between the game player and characters in the video games.[192] There is currently no magazine, book, television show, or movie that allows for the consumer to experience all of sensory options at one time while acting out tasks involving all five senses in unscripted and practically uncontrolled environments. These examples help to show that video games differ materially from protected mediums of speech such as books, movies, and television.[193]

The Court should have deferred to the legislature or evidence produced by experts in the video game industry before determining that violent video games are virtually the same as other mediums depicting violence that is aimed at minors.[194] What the Court terms as Justice Alito's attempt to describe violent video games to disgust the Court,[195] is actually just a statement of the astounding examples of violence that are present in some of these graphic video games.[196] Minors have

188. *See generally* Robert Bryan Norris, Jr., Note, *It's All Fun and Games Until Someone Gets Hurt:* Brown v. Entertainment Merchants Association *and the Problem of Interactivity*, 13 N.C. J.L. & Tech. On. 81, 85 (2011) (discussing the advancements in video game technology and how it is different than other traditional media of speech).

189. *Id.* (stating that technologically advanced video games of today are employing the use of every sense of the user during gameplay).

190. *Id.* at 87.

191. *Id.* at 87–88.

192. *Id.* at 89–91 (discussing how artificial intelligence and physics have helped video game developers create extremely advanced and interactive video games).

193. *Id.* at 96–101 (describing various ways in which video games are different than the other previously-protected media of speech).

194. *See id.* at 95–96 (discussing how the Court's sweeping statement about how video games don't pose any different challenges than other media of speech further complicated the problem of how these violent video games should be treated).

195. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2749 (2011) (Alito, J., concurring) (noting the extreme violence in some of these video games, Justice Alito stated, "[i]n some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.").

196. *Id.* at 2738 (majority opinion).

access to video games that allow the user to act out the killings at Columbine High School,[197] rape women,[198] and engage in forms of "ethnic cleansing" by gunning down members of a particular race or ethnicity.[199]

Evidence and studies conducted by experts in the video game industry have shown that video game violence is quite different from violence depicted in other media such as television or books.[200] There were thirty-one amici curiae briefs filed in the *Brown* case, and some of these were studies conducted by psychologists and other experts measuring the effects of violent video games on children.[201] The main brief in support of the government, known as the "Gruel Brief," authored by thirteen highly recognized media violence experts around the world, focused on how violent video games can increase violent behavior in children.[202] The Gruel Brief specifically focused on the correlation between violent behavior, nightmares, outburst, and an increased violence toward women.[203] The main brief supporting VSDA and ESA, known as the "Millett Brief," was endorsed by eighty-two psychologists and determined that there was no significant statistical increase in violent behavior of children who played violent video games.[204] Unfortunately, there is very little statistical evidence provided in either brief about the actual impact that violent video games have on children, further supporting the fact that there is simply not enough information about the effects of this relatively new technology.[205]

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197. Kayla Webley, *"School Shooter" Video Game to Reenact Columbine, Virginia Tech Killings*, TIME (Apr. 20, 2011), http://newsfeed.time.com/2011/04/20/school-shooter-video-game-reenacts-columbine-virginia-tech-killings/.

198. Kayung Lah, *'RapeLay' Video Game Goes Viral Amid Outrage*, CNN (Mar. 30, 2010), http://articles.cnn.com/2010-03-30/world/japan.video.game.rape_1_game-teenage-girl-japanese-government.

199. Julia Scheers, *Games Elevate Hate to Next Level*, WIRED (Feb. 20, 2002), http://www.wired.com/culture/lifestyle/news/2002/02/50523.

200. *See infra* notes 201–13 and accompanying text.

201. *See, e.g.*, Brief of International Game Developers Association and Academy of Interactive Arts and Sciences as Amici Curiae in Support of Respondent, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08–1448), 2010 WL 3641066; Brief of Microsoft Corporation as Amicus Curiae in Support of Respondents, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08–1448), 2010 WL 3641068; Brief The Reporters Committee for Freedom of the Press, The American Society of News Editors, The First Amendment Project, The National Press Photographers Association, The Radio-Television Digital News Association, The Society of Professional Journalists, and Student Press Law Center as Amici Curiae in Support of Respondents, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08–1448), 2010 WL 364107.

202. Brief of Amicus Curiae of California State Senator Leland Y. Yee, Ph.D, The California Chapter of The American Academy of Pediatrics, and the California Psychological Association in Support of Petitioners at 3, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08–1448), 2010 WL 2937557.

203. *Id.* at 11–12.

204. Brief of Social Scientists, Medical Scientists, and Media Effects Scholars as Amici Curiae in Support of Respondents, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08–1448), 2010 WL 3697191, at *1, *35.

205. *See generally id.* (providing minimal statistical and empirical evidence to either prove or disprove that violent video games have an impact on the behavior of minors); Brief of Amici Curiae of California State Senator Leland Y. Yee, Ph.D, The California Chapter of The American Academy of Pediatrics, and the California Psychological Association in Support of Petitioners, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08–1448), 2010 WL 2937557.

Another recent study examined the impact of a virtual reality program, Virtual Iraq, on soldiers returning from war and instances of post-traumatic stress disorder (PTSD).[206] The Virtual Iraq program involves patients wearing a headset and being exposed to sounds, images, smells, and vibrations that are controlled by a doctor to simulate some of the experiences soldiers experienced while in Iraq or Afghanistan.[207] The therapy sessions last for one hour, and after the patients talk about their experiences with a doctor and psychologist.[208] The goal of the program is to reduce the instances of PTSD in members of the U.S. military returning from combat.[209] A study of the results of Virtual Iraq determined that around 80% of program participants demonstrated a statistical and clinical reduction in PTSD, anxiety, and depression.[210] Although this study offers some statistical evidence about the impact of video game violence on individuals, it does not specifically address the impact that violent video games could have on children.[211] Other than a handful of studies that attempt to measure the effects of video game violence on individuals, there is very little empirical evidence about their impact on minors.[212] Thus, the relatively new technology of video games should have been studied further before the Court made the sweeping assertion that violent video games are essentially the same as other media of speech and should be treated accordingly.[213]

C. If a State Wishes to Regulate Violent Video Game Distribution to Minors, the Statute Must Be Narrowly Tailored to Specific Depictions of Violence and Obscenity

The only current regulation on video games is the self-regulatory Entertainment Software Rating Board (ESRB) system.[214] California's Act was the latest of many failed attempts to impose a mandatory rating system aimed at prohibiting minors from purchasing violent video games without parental permission.[215] In order for a state to succeed in getting a statute to pass the strict scrutiny that the Constitution

206. Nic Fleming, *Virtual Iraq: Soldiers Treated With Video Games*, TELEGRAPH (Feb. 19, 2007, 12:01 AM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1543157/Virtual-Iraq-Soldiers-treated-with-video-games.html.

207. *Id.*

208. *Id.*

209. *Id.*

210. Albert Rizzo et al., *Development and Clinical Results from the Virtual Iraq Exposure Therapy Application for PTSD*, 13 (2011), http://psychology.unt.edu/~tparsons/pdf/Parsons%20(Rizzo)_Development%20and%20Clinical%20Results%20from%20the%20Virtual%20Iraq%20Exposure%20Therapy.pdf.

211. *Id.*

212. *See supra* Part IV.B.

213. *See supra* Part IV.B.

214. STEPHEN LINDSAY, VIDEO GAME SYSTEMS UNCOVERED 51–55, E-book; *see also* ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/index-js.jsp (last visited Feb. 5, 2013); *ESRB Ratings Guide*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings_guide.jsp (last visited Mar. 5, 2013).

215. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2748 (2011).

demands, it will have to take a different approach than those that have been previously attempted.

As discussed previously, *Ginsberg* upheld as constitutional an act which regulated the sale of pornographic materials to minors and expanded the definition of obscenity to include pornography distributed to minors.[216] The statute in question expanded on the original and often-criticized *Miller* Test.[217] Although California attempted to similarly extend on the statute in *Miller* as it was done in *Ginsberg*, the Court declared that the Act sought to create an entirely new category of unprotected speech.[218] There is great irony in the fact that the justice system will protect expression that allows a minor to actively participate in the violent murder and dismemberment of a body, but if the victim happens to be topless, the Government's interest in protecting minors suddenly supersedes First Amendment protection.[219]

In order to combat this, states should seek to more closely align statutes aimed at regulating violent video games with the way that the statute in *Ginsburg* only altered the obscenity statute in *Miller* by adding the words "to minors."[220] States could begin by attempting to regulate violent video games that contain pornography and appeal to the "prurient interest" or depict acts of sexual violence.[221] As mentioned, many of the violent video games discussed by Justice Alito, and countless more contain not just violence but interactive scenes with nudity and violent rape, which could be targeted by states in future laws that attempt to restrict violent video game sales to minors.[222] If a state were to more narrowly tailor a statute to protect the interest of minors by restricting violent video games that contain obscenity, the statute would have a greater chance of passing the strict scrutiny that laws restricting the content of speech must pass.

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

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

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

219. *See id.*, 131 S. Ct. at 2771 (Breyer, J., dissenting) (stating "*Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which eh actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless?" (footnote omitted)).

220. *Brown*, 131 S. Ct. at 2763 (Breyer, J., dissenting) (quoting the New York statute in *Ginsberg* in which "[t]he Court there considered a New York law that forbade the sale to minors of a 'picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity . . . ,' *that* 'predominately appeals to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,' *and* 'is utterly without redeeming social importance for minors'"); *Ginsberg*, 390 U.S. at 646–47.

221. *See supra* note 64 and accompanying text.

222. *See supra* notes 106, 132–35 and accompany text (discussing several examples that Justice Alito presented in his concurrence of particularly violent video games).

Conclusion

In *Brown v. Entertainment Merchants Association*, the Supreme Court held that California's Act regulating violent video game sales to minors without parental permission was unconstitutional.[223] The Court correctly concluded that California's Act does not pass the strict scrutiny that is required of laws that attempt to regulate expression protected by the First Amendment.[224] However, the Court too quickly dismissed the possibility that video games are unlike other media of speech.[225] The Court should not have broadly dismissed violent video games as being akin to other mediums depicting violence and should have deferred to the experts in the industry and the legislature before making such a sweeping generalization.[226]

223. *See supra* Part IV.
224. *See supra* Part IV.A.
225. *See supra* Part IV.B.
226. *See supra* Parts IV.B–C.