

3-1-2012

## Protecting Protected Speech: Violent Video Game Legislation Post-*Brown v. Entertainment Merchants Ass'n*

Christopher Clements  
christopher.clements@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Communications Law Commons](#), and the [Juvenile Law Commons](#)

---

### Recommended Citation

Christopher Clements, *Protecting Protected Speech: Violent Video Game Legislation Post-Brown v. Entertainment Merchants Ass'n*, 53 B.C.L. Rev. 661 (2012), <http://lawdigitalcommons.bc.edu/bclr/vol53/iss2/6>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# PROTECTING PROTECTED SPEECH: VIOLENT VIDEO GAME LEGISLATION POST-*BROWN v. ENTERTAINMENT MERCHANTS ASS'N*

**Abstract:** Violent video games have drawn the ire of parents and commentators alike ever since their inception two decades ago. Following several tragic school shootings in the late 1990s, legislators began exploring ways to limit childhood exposure to violent media. Since then, multiple states have tried their hand at regulating the sale of violent video games to minors. None of these attempts, however, survived the constitutional challenges levied against them in court by entertainment trade groups. Most recently, in 2011, the Supreme Court held that California's attempt to legislate in this area was violative of the First Amendment. This Note argues that legislators should tread carefully in the wake of the Supreme Court's unequivocal ruling. Rather than attempt to self-categorize what is or is not appropriate for children, they should instead mandate that video game developers and retailers participate in the ubiquitous Entertainment Software Rating Board rating system.

## INTRODUCTION

Since their inception two decades ago, violent video games have caused quite a stir.<sup>1</sup> Concern reached a fever pitch following an outbreak of youth violence manifested as a series of school shootings in the late 1990s.<sup>2</sup> Partially blamed for the events, violent video games entered the realm of public discussion as parents clamored for a legislative solution.<sup>3</sup> Psychological studies conducted around the same time seemed to support the view that these games lead to increased aggression in the

---

<sup>1</sup>See Jeffrey O'Holleran, Note, *Blood Code: The History and Future of Video Game Censorship*, 8 J. TELECOMM. & HIGH TECH. L. 571, 580 (2010). Two of the first objectionably violent video games were *Mortal Kombat*, released in 1992, and *Night Trap*, released in 1993. *Id.*

<sup>2</sup>See Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 141 (2004). The atrocities committed at Columbine High School were just one example of several prominent school shootings that occurred between 1997 and 1998. *See id.*

<sup>3</sup>See Garry, *supra* note 2, at 141, 143–44; O'Holleran, *supra* note 1, at 584, 586. Video game censorship even became a talking point during the 2000 presidential elections. *See* O'Holleran, *supra* note 1, at 586.

children that played them.<sup>4</sup> In the years since, several states have either passed or considered passing laws that restrict the sale of violent video games to minors.<sup>5</sup> In every instance, organizations representing the video game industry have successfully challenged these laws in court.<sup>6</sup> In addition to discrediting the persuasiveness of the aforementioned studies, courts have repeatedly held these laws to be in violation of the First Amendment.<sup>7</sup>

The most recent attempt by a state to regulate the sale of violent video games occurred in California in 2005.<sup>8</sup> Following the long line of cases preceding it, the Entertainment Merchants Association (EMA), an entertainment trade group, successfully won invalidation of a law that sought to restrict the sale of violent video games to children.<sup>9</sup> California appealed to the U.S. Court of Appeals for the Ninth Circuit, where the law was similarly held to be in violation of the First Amendment.<sup>10</sup> Surprising both sides of the debate, the Supreme Court granted certiorari, marking the first time that the Court has heard a case considering the constitutionality of a violent video game law.<sup>11</sup> In its landmark 2011 decision, the Supreme Court resoundingly struck down California's attempt to regulate violent video game sales.<sup>12</sup>

This Note argues that current and future efforts to regulate violent video games should and will continue to fail constitutional scrutiny.<sup>13</sup> Legislators should instead focus on mandating that video game devel-

<sup>4</sup> See Jodi L. Whitaker & Brad J. Bushman, *A Review of the Effects of Violent Video Games on Children and Adolescents*, 66 WASH. & LEE L. REV. 1033, 1036–38 (2009).

<sup>5</sup> See, e.g., Garry, *supra* note 2, at 143–44 (discussing ordinances in Indianapolis, Indiana; St. Louis County, Missouri; and Seattle, Washington).

<sup>6</sup> See generally *Interactive Digital Software Ass'n v. St. Louis Cnty., Mo.*, 329 F.3d 954 (8th Cir. 2003) (considering the constitutionality of a law prohibiting the sale of violent video games to minors); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (concerning a violent video game ordinance enacted in Indianapolis, Indiana).

<sup>7</sup> See ENTMT SOFTWARE ASS'N, ESSENTIAL FACTS ABOUT VIDEO GAMES AND COURT RULINGS 1, available at <http://www.theesa.com/facts/pdfs/EFCourtsandRulings2010.pdf> [hereinafter ESSENTIAL].

<sup>8</sup> See CAL. CIV. CODE §§ 1746–1746.5 (West 2006); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), *aff'd sub nom.* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>9</sup> See *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1048 (N.D. Cal. 2005) (granting a preliminary injunction against the State of California), *aff'd*, 556 F.3d 950 (9th Cir. 2009), *aff'd sub nom.* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>10</sup> See *Schwarzenegger*, 556 F.3d at 967 (affirming the district court's permanent injunction).

<sup>11</sup> See *Schwarzenegger v. EMA, MEDIA COAL.*, <http://www.mediacoalition.org/VSDA-v-Schwarzenegger> (last visited Feb. 20, 2012) [hereinafter *Media Coalition Synopsis*].

<sup>12</sup> *Brown*, 131 S. Ct. at 2742.

<sup>13</sup> See, e.g., *Schwarzenegger*, 556 F.3d at 967.

operators and retailers participate in the exceedingly successful Entertainment Software Rating Board (ESRB) rating system.<sup>14</sup>

Part I of this Note introduces obscenity law and its progeny, variable obscenity.<sup>15</sup> Part II explores the difficulties inherent in regulating speech otherwise protected by the First Amendment, outlining both successful and failed efforts by state legislatures to shield children from explicit media.<sup>16</sup> Part III describes the arguments used by proponents of violent video game regulation and introduces California's recent attempt to regulate the purchase of violent video games, *Brown v. Entertainment Merchants Ass'n*.<sup>17</sup> Finally, Part IV scrutinizes the studies and statistics that the proponents of regulation rely on and explains why the California statute at issue in *Brown* violated the First Amendment of the Constitution.<sup>18</sup> It then articulates why *Brown* offers legislators the ideal opportunity to enact plausible reform that passes constitutional scrutiny.<sup>19</sup>

## I. THE SUPREME COURT'S TREATMENT OF OBSCENE SPEECH

This Part considers the history of obscenity jurisprudence, including the Supreme Court's creation of so-called "variable obscenity."<sup>20</sup> Section A follows the Supreme Court's decades-long process refining the definition of obscenity.<sup>21</sup> Section B introduces the doctrine of variable obscenity, which states that some material appropriate for adults may nevertheless be obscene to children.<sup>22</sup> Section C exhibits how difficult it is to expand upon the type of material covered by obscenity law.<sup>23</sup> Finally, Section D articulates the reservations Justice William Brennan developed with the very obscenity law he helped create.<sup>24</sup>

---

<sup>14</sup> See 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, 161 (2006).

<sup>15</sup> See *infra* notes 20–85 and accompanying text.

<sup>16</sup> See *infra* notes 86–140 and accompanying text.

<sup>17</sup> See *infra* notes 141–196 and accompanying text.

<sup>18</sup> See *infra* notes 197–221 and accompanying text.

<sup>19</sup> See *infra* notes 222–280 and accompanying text.

<sup>20</sup> See *infra* notes 25–85 and accompanying text.

<sup>21</sup> See *infra* notes 25–51 and accompanying text.

<sup>22</sup> See *infra* notes 52–65 and accompanying text.

<sup>23</sup> See *infra* notes 66–77 and accompanying text.

<sup>24</sup> See *infra* notes 78–85 and accompanying text.

### A. *Tracing the Shifting Definition of Obscenity*

Legislators who have attempted to restrict a minor's access to violent video games have argued that such material is obscene and thus devoid of First Amendment protection.<sup>25</sup> Accordingly, in order to understand the legal underpinnings of violent video game laws, it is important to explore the line where free speech ends and obscene speech unprotected by the First Amendment begins.<sup>26</sup> The First Amendment itself proclaims that "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>27</sup> Despite the simplicity of the Free Speech Clause's language, courts have continuously wrestled with its meaning.<sup>28</sup>

In the landmark 1954 Supreme Court decision, *Roth v. United States*, the Court articulated the reason why, despite the unconditional language of the First Amendment, some forms of speech do not receive full constitutional protection.<sup>29</sup> As Justice Brennan explained for the Court, at the time of the First Amendment's ratification, every single state made blasphemy or profanity a statutory crime.<sup>30</sup> In addition, at least one state made it a crime to publish some forms of obscene or profane materials.<sup>31</sup> Accordingly, Brennan reasoned, the First Amendment was never "intended to protect every utterance."<sup>32</sup> Over the course of the twentieth century, the Supreme Court carved out several exceptions to the First Amendment, including fighting words,<sup>33</sup> obscenity,<sup>34</sup> defamation,<sup>35</sup> and child pornography.<sup>36</sup>

<sup>25</sup> See, e.g., *Schwarzenegger*, 556 F.3d at 958.

<sup>26</sup> See *Roth v. United States*, 354 U.S. 476, 481–83 (1957).

<sup>27</sup> U.S. CONST. amend I.

<sup>28</sup> See *infra* notes 29–51 and accompanying text.

<sup>29</sup> See 354 U.S. at 481–83.

<sup>30</sup> *Id.* at 482.

<sup>31</sup> *Id.* at 483.

<sup>32</sup> *Id.* "[T]his Court has always assumed that obscenity is not protected by the freedoms of speech and press." *Id.* at 481.

<sup>33</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Fighting words refer to statements or phrases that incite a breach of the peace (such as fighting) by their very utterance. See *id.* The Supreme Court had afforded these words no First Amendment protection because of their limited social value relative to the improved order and morality gained by their censorship. *Id.*

<sup>34</sup> See *Miller v. California*, 413 U.S. 15, 23 (1973). Once again weighing the societal value of a particular form of speech, the Supreme Court has held that obscene material is unprotected by the First Amendment. See *id.* at 20. Aware of the dangers inherent in regulating speech, the Court limited obscene material to works that depict or describe sexual conduct. See *id.* at 24.

<sup>35</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974). Because of the damage that defamation can cause to an individual's character, the Court has held that society is

The unprotected utterance most often at question in video game violence litigation is that of obscenity—the very heart of *Roth*.<sup>37</sup> *Roth* involved the mail-order sale of erotic books, photographs, and magazines in violation of a federal obscenity statute criminalizing such behavior.<sup>38</sup> Although the facts of *Roth* were rather innocuous, it gave the Court the opportunity to clarify and update the nearly century-old common law definition of obscenity.<sup>39</sup> In doing so, the Court defined the test for obscenity as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>40</sup> In practice, this test required a jury to evaluate the materials in question and determine whether they would offend the conscience of the average member of their community by present-day standards.<sup>41</sup>

The Supreme Court narrowed the *Roth* obscenity test in the 1966 case *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*.<sup>42</sup> In *Memoirs*, the Court formally adopted two additions to the *Roth* obscenity test that had originated in the lower courts.<sup>43</sup> For material to be obscene under this new test, and thus unprotected by the First Amendment, material must not only “appeal to a prurient interest,” but also be “patently offensive” and “utterly without redeeming social value.”<sup>44</sup> In a practical sense, this new test narrowed the scope of obscenity by requiring proof that the material completely lacked social value—a huge challenge for the prosecution.<sup>45</sup> For example, in *Memoirs*, despite the fact that the book in question appealed to a prurient interest and was patently offensive, it could not be said that,

---

best served by limiting the First Amendment protection of defamatory speech. *See id.* at 341. In addition, false statements of fact provide little value to society relative to the societal gain achieved by their restriction. *See id.* at 340.

<sup>36</sup> *See* *New York v. Ferber*, 458 U.S. 747, 764 (1982); Garry, *supra* note 2, at 152.

<sup>37</sup> *See Roth*, 354 U.S. at 479; Jennifer Chang, Note, *Rated M for Mature: Violent Video Game Legislation and the Obscenity Standard*, 24 ST. JOHN’S J. LEGAL COMMENT. 697, 702–03 (2010).

<sup>38</sup> *Roth*, 354 U.S. at 480.

<sup>39</sup> *See id.* at 488–89.

<sup>40</sup> *Id.* at 489.

<sup>41</sup> *See id.* at 490 (“In this case . . . you . . . are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.”).

<sup>42</sup> *See* 383 U.S. 413, 418 (1966); *Roth*, 354 U.S. at 489.

<sup>43</sup> *See* 383 U.S. at 418.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 419.

considering all possible uses, it lacked societal value as a piece of dramatic literature.<sup>46</sup>

This test proved unworkable, however, given the high degree of proof necessary to characterize materials as lacking any “redeeming social value.”<sup>47</sup> In the 1973 Supreme Court case *Miller v. California*, the Court once again found itself evaluating standards of decency and sought to make the test for obscenity more concrete.<sup>48</sup> In doing so, the Court rejected the difficult-to-overcome test of “utterly without redeeming social value” as a constitutional standard, placing a new test in its stead.<sup>49</sup>

Thus, the test for obscenity became, and continues to be “(a) whether . . . the work . . . 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.”<sup>50</sup> This test gives greater deference to individual states in prescribing what materials are obscene.<sup>51</sup>

### B. *Nevertheless Harmful to Children: The Birth of Variable Obscenity*

Under the “variable obscenity” doctrine invoked by proponents of violent video game legislation, speech that does not meet the *Miller* test of obscenity may nevertheless be obscene to children; therefore, it may be without First Amendment protection.<sup>52</sup> The types of games that legislators have attempted to restrict minors from purchasing are not obscene in the traditional sense: they neither depict sexual conduct nor lack serious artistic value and they are unquestionably legal in the hands of adults.<sup>53</sup> Lawmakers contend, however, that despite their ac-

<sup>46</sup> See *id.* at 421.

<sup>47</sup> See *Miller*, 413 U.S. at 22.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 24.

<sup>50</sup> *Id.* (emphasis added) (internal citations omitted).

<sup>51</sup> See *id.* By prefacing part (b) of the test on the applicability of state law, the Court made it clear that states are free to define what constitutes sexual conduct autonomously and in keeping with local values. See *id.*

<sup>52</sup> See *Ginsberg v. New York*, 390 U.S. 629, 638 (1968). It should be noted that variable obscenity is merely a sub-category of obscenity and not a wholly new form of unprotected speech. See *Schwarzenegger*, 556 F.3d at 959.

<sup>53</sup> See, e.g., *Schwarzenegger*, 556 F.3d at 958.

ceptability for adults, these games are harmful and obscene to children.<sup>54</sup>

Because the state has an interest in protecting the welfare of children, the government is free to enact legislation that buoys parental supervision without violating First Amendment principles.<sup>55</sup> The 1944 Supreme Court decision *Prince v. Massachusetts* canonized this principle, as the Court described the need for “children [to] be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”<sup>56</sup> Part of this protection, the Court explained, is provided through the prohibition of speech “wholly inappropriate for children . . . to face.”<sup>57</sup> This child-centric principle reappeared several decades later as the Supreme Court grappled with shifting opinions over obscenity jurisprudence.<sup>58</sup>

In 1968, the Supreme Court decided *Ginsberg v. New York*, a landmark case that ushered in the “variable obscenity” doctrine.<sup>59</sup> In *Ginsberg*, a shop owner and his wife were prosecuted under a New York statute that made it illegal to sell so-called “girlie” magazines to children under the age of seventeen.<sup>60</sup> These magazines, which contained nude photographs of women, were not obscene for adults; the legislation only prohibited minors from purchasing them.<sup>61</sup> In fact, it was legal for parents to purchase these “girlie” magazines and then give them to their own children.<sup>62</sup> Regardless, because the magazines were held to be obscene to children and thus unprotected by the First Amendment, the Court reasoned that the ability to keep such material out of the hands of children only required the state to show that it was rational to characterize such material as harmful to minors.<sup>63</sup> The Court was not concerned with the lack of empirical studies depicting a causal link between viewing sexually explicit material and an impairment of child-

---

<sup>54</sup> See *id.* One state statute seeks to prevent the “psychological or neurological harm to minors who play violent video games.” *Id.* at 961.

<sup>55</sup> See *Ginsberg*, 390 U.S. at 640 (“[T]he State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ . . . .” (quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 165 (1944))).

<sup>56</sup> See 321 U.S. 158, 165 (1944).

<sup>57</sup> *Id.* at 170.

<sup>58</sup> See *Ginsberg*, 390 U.S. at 631.

<sup>59</sup> *Id.* at 638.

<sup>60</sup> *Id.* at 631.

<sup>61</sup> *Id.* at 634.

<sup>62</sup> *Id.* at 639.

<sup>63</sup> See *id.* at 641. This is an example of so-called “rational basis” judicial review. See *id.*

hood development.<sup>64</sup> It was enough, the Court reasoned, that such a link had yet to be disproven.<sup>65</sup>

C. *Stevens Attempts (and Fails) to Expand the Scope of Obscene Speech Beyond Sexual Material*

In the 2010 decision *United States v. Stevens*, the Supreme Court concluded that video depictions of violence towards animals did not constitute obscenity and steadfastly refused to create another categorical exception to First Amendment protection to cover them.<sup>66</sup> This case is illustrative of both the importance of the link between obscenity and sex and the difficulty inherent in creating a new category of unprotected speech.<sup>67</sup>

*Stevens* considered the constitutionality of a federal statute that criminalized the sale of certain depictions of animal cruelty.<sup>68</sup> The broadly worded statute applied to “any visual or auditory depiction ‘in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,’” though it was primarily intended to outlaw so-called “crush videos.”<sup>69</sup> These videos, which depict the torture and killing of animals, were said to appeal to a deviant, prurient interest.<sup>70</sup> Although the statute was intended to outlaw crush videos, this was not clear in the broad language of the statute; thus, at the time of the statute’s enactment, the government announced that it would only pursue limited types of claims.<sup>71</sup> Given the broad language of the statute in question, however, the *Stevens* Court grappled over the sale of videos depicting dogs hunting wild boars rather than the crush videos originally targeted.<sup>72</sup> In fact, because of the aforementioned breadth of the statute, the Court never fully answered whether a more narrowly con-

---

<sup>64</sup> *Ginsberg*, 390 U.S. at 641–42.

<sup>65</sup> *Id.* at 642.

<sup>66</sup> See 130 S. Ct. 1577, 1592 (2010).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.* at 1582.

<sup>69</sup> *Id.* at 1583 (internal citations omitted) (“The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. But crush videos rarely disclose the participants’ identities, inhibiting prosecution of the underlying conduct.”).

<sup>70</sup> See *id.*

<sup>71</sup> See Statement by President William J. Clinton upon Signing H.R. 1887, 34 WKLY. COMP. PRES. DOC. 2557, 2558–59 (1999).

<sup>72</sup> See 130 S. Ct. at 1583.

structed law would fall under the ambit of obscenity and therefore survive constitutional scrutiny.<sup>73</sup>

Since videos depicting hunting dogs are not sexual in nature, the Court could not simply uphold this law under the umbrella of obscenity.<sup>74</sup> Instead, the Court would have to create an entirely new category of speech (“depictions of animal cruelty”) unprotected by the First Amendment, something it was unwilling to do.<sup>75</sup> Accordingly, once the Court determined that the vast majority of the speech covered by the statute was afforded First Amendment protection, it evaluated Stevens’s assertion that the law was facially invalid.<sup>76</sup> Finding the scope of the statute to be “alarming” and impermissibly broad, the Court invalidated it as violative of the First Amendment.<sup>77</sup>

#### D. *Justice Brennan’s Criticisms of the Obscenity Test He Created*

Given that speech characterized as obscene instantly loses its First Amendment protection, it is unsurprising that the government in *Stevens* tried to leverage the ambiguous nature of obscenity in an attempt to uphold its challenged statute.<sup>78</sup> This potential to stretch the boundaries of obscene speech perhaps explains why Justice Brennan, the author of *Roth* in 1954, ultimately grew weary of what obscenity law had become and spent years working fervently toward a solution.<sup>79</sup> His dissent in the 1973 Supreme Court decision *Paris Adult Theater I v. Slaton* identified what he considered the primary problems with obscenity law and eventually called to disband it entirely in order to prevent the erosion of protected speech.<sup>80</sup> His concerns included (1) the lack of a clear standard for what constituted obscene speech, (2) the chilling of protected speech, and (3) the institutional stresses placed on the judiciary given the vagueness of their previous rulings.<sup>81</sup>

In *Paris*, Justice Brennan lamented the failure of the Supreme Court to create a workable method to distinguish protected speech from

---

<sup>73</sup> *Id.* at 1592.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *Id.* at 1588, 1592.

<sup>78</sup> *See Stevens*, 130 S. Ct. at 1592.

<sup>79</sup> *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 762 (1987) (Brennan, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

<sup>80</sup> *See* 413 U.S. at 83–91, 103 (Brennan, J., dissenting).

<sup>81</sup> *See id.* at 91. Speech is chilled when a statute’s language is so vague or overbroad that it censors legitimate speech activities rather than just the inappropriate speech targeted. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).

unprotected speech.<sup>82</sup> He blamed this shortcoming on the inability of the Justices to reach a consensus on any one standard.<sup>83</sup> He later admitted, however, that a single formula that achieves all of the intended goals of the Court does not exist.<sup>84</sup> Famously, the Court determined that, when it comes to obscenity, they “know it when [they] see it.”<sup>85</sup>

## II. OVERCOMING THE HURDLES INHERENT IN LEGISLATING PROTECTED SPEECH

This Part looks at the difficulties of regulating speech that falls outside the boundaries of obscenity and is otherwise protected by the First Amendment, including successes and failures by state legislatures to cull offensive forms of media.<sup>86</sup> Section A introduces the strict scrutiny standard of judicial review employed for content-based restrictions of speech.<sup>87</sup> Section B considers how enhanced accessibility permits upholding a statute that restricts media that is indecent but not obscene in order to protect the healthy development of children.<sup>88</sup> Finally, Section C contrasts the success of this indecent television restriction with the failure of a violent video game statute, invalidated for the very same reason that the television statute was upheld—the healthy maturation of children.<sup>89</sup>

### A. *Content-Based Restrictions (Generally) Require Strict Scrutiny Analysis*

Regulations and statutes that attempt to restrict forms of protected speech based on its content presumptively violate the First Amendment and are thus subject to strict scrutiny analysis.<sup>90</sup> A law is content based if, on its face, it differentiates between types of speech based on its content

---

<sup>82</sup> See 413 U.S. at 83.

<sup>83</sup> See *id.* at 83–84.

<sup>84</sup> See *id.* at 84.

<sup>85</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

*Id.*

<sup>86</sup> See *infra* notes 90–140 and accompanying text.

<sup>87</sup> See *infra* notes 90–106 and accompanying text.

<sup>88</sup> See *infra* notes 107–115 and accompanying text.

<sup>89</sup> See *infra* notes 116–140 and accompanying text.

<sup>90</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); O’Holleran, *supra* note 1, at 574.

or if its purpose is to suppress or laud one idea or viewpoint over another.<sup>91</sup> Because the freedom of speech promised by the First Amendment is intended to remove the specter of the government from controlling public discussion, laws that allow or disallow categories of speech based on their content presumptively violate that protection.<sup>92</sup>

For example, in the 2003 case *Interactive Digital Software Ass'n v. St. Louis County, Missouri*, the U.S. Court of Appeals for the Eighth Circuit held that an ordinance attempting to regulate “graphically violent” video games was content based and thus presumptively invalid.<sup>93</sup> *Interactive* involved the constitutional challenge of a local ordinance that made it unlawful to make graphically violent video games available to minors without their parents’ consent.<sup>94</sup> Just because the ordinance was presumptively invalid, however, did not mean that it necessarily violated the First Amendment.<sup>95</sup> It just means that courts will then review a content-based regulation of protected speech under “strict-scrutiny” analysis, which is an admittedly difficult hill to climb.<sup>96</sup>

To survive this test, the legislature bears the burden of demonstrating that the act is “narrowly tailored to promote a compelling Government interest.”<sup>97</sup> Furthermore, “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”<sup>98</sup> In *Interactive*, St. Louis County failed to satisfy strict scrutiny because it could not prove that violent video games adversely affect the mental well-being of children, obviating any need for the government to regulate their sale.<sup>99</sup> Furthermore, in light of existing and successful industry-led efforts to protect children from violent or otherwise explicit video games, it has thus far been impossible for states and municipalities to uphold laws that restrict a minor’s access to violent video games.<sup>100</sup>

---

<sup>91</sup> See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”).

<sup>92</sup> *Simon*, 502 U.S. at 116.

<sup>93</sup> 329 F.3d 954, 958 (8th Cir. 2003).

<sup>94</sup> *Id.* at 956.

<sup>95</sup> See *id.* at 958.

<sup>96</sup> See *id.* Strict scrutiny is the most rigorous level of judicial review applied by courts considering constitutional issues. See *id.*

<sup>97</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

<sup>98</sup> *Id.*

<sup>99</sup> *Interactive*, 329 F.3d at 960.

<sup>100</sup> See Guylyn Cummins, *Sex, Violence, and Videogames*, COMM. LAW., July 2010, at 2, 3.

In direct contrast to the difficulty of strict scrutiny analysis, courts considering regulations or statutes that aim to censor forms of unprotected speech such as obscenity simply apply the rational basis form of judicial review.<sup>101</sup> Rational basis review merely requires that the government action be “rationally related” to a “legitimate” government interest.<sup>102</sup> Under the rational basis test, legislation will stand so long as a single conceivable rationale for its creation exists.<sup>103</sup> In fact, the party seeking to remove the law carries the burden of negating every single basis put forth in support of the legislation in question.<sup>104</sup> The rational basis test is such a low bar to clear that it can be argued that laws subjected to it are presumptively valid, considering the amount of deference given to legislatures and the democratic process.<sup>105</sup> Because of this, proponents of violent video game legislation have attempted to align violent material with sexually explicit material in order to take advantage of the less rigorous review applied to obscene content.<sup>106</sup>

### B. *Successfully Restricting the Broadcast of Indecent Television*

Despite acknowledging the constitutional protection afforded to speech that is indecent but not obscene, the U.S. Court of Appeals for the D.C. Circuit upheld a content-based restriction of broadcast television programming in its 1995 decision in *Action for Children's Television v. FCC*.<sup>107</sup> The statute in question attempted to protect minors by restricting broadcasters to airing indecent programming between the hours of midnight and six in the morning.<sup>108</sup> Although “indecent programming” referred to material that was sexual in nature, it was not so objectionable as to rise to the level of “obscenity” that would strip it of its First Amendment protection.<sup>109</sup> The court justified its special treatment of broadcast programming by noting its unique accessibility to children compared to books and movies; this ultimately allowed the statute to survive the test of strict scrutiny.<sup>110</sup>

---

<sup>101</sup> See *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009), *aff'd sub nom.* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>102</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

<sup>103</sup> James F. Shekleton, *The Campus as Agora: The Constitution, Commerce, Gadfly Stonecutters, and Irreverent Youth*, 31 J.C. & U.L. 513, 535–36 (2005).

<sup>104</sup> *Id.* at 536.

<sup>105</sup> *See id.*

<sup>106</sup> *See Schwarzenegger*, 556 F.3d at 958.

<sup>107</sup> *See* 58 F.3d 654, 656–57 (D.C. Cir. 1995).

<sup>108</sup> *Id.* at 656.

<sup>109</sup> *See id.* at 657.

<sup>110</sup> *See id.* at 659–60.

The *Action* court relied on this enhanced accessibility when holding that “television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment.”<sup>111</sup> Quoting an earlier Supreme Court ruling, the *Action* court stated,

A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.<sup>112</sup>

The court’s justifications for allowing the broadcast restriction to stand were similar to the rationales other courts have utilized when *striking down* comparable restrictions aimed at protecting minors from objectionable media.<sup>113</sup> As such, there seems to be a philosophical split across the lower federal courts as to whether exposing children to objectionable media helps or hinders their development into healthy, mature adults.<sup>114</sup> Without the *Action* court’s presumption that preventing childhood exposure to objectionable media is a compelling government interest, legislation of this kind would not survive constitutional scrutiny.<sup>115</sup>

### C. Efforts to Regulate Violent Video Games Have Thus Far Fallen Flat

Although a long history of Supreme Court jurisprudence has stripped obscene speech of First Amendment protection, the judiciary has yet to carve out a similar exception for violent material.<sup>116</sup> Lower courts have been unwilling to analogize sexually explicit speech to vio-

---

<sup>111</sup> *Id.* at 660.

<sup>112</sup> *Id.* at 661 (quoting *New York v. Ferber*, 458 U.S. 747, 756–57 (1982)).

<sup>113</sup> See *infra* notes 128–129 and accompanying text.

<sup>114</sup> Compare *Action*, 58 F.3d at 661 (asserting that protecting children from objectionable media is necessary for their healthy development), with *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (holding that shielding children from objectionable media will impermissibly hamper their growth). Furthermore, given the advent and increased adoption of digital distribution (also known as “digital delivery”) for video games, it is no longer necessary to visit a physical store in order to access violent or sexually explicit titles. See Larry Downes, *High Court’s Violent-Game Sales Ruling: Why Now?*, CNET (Nov. 2, 2010, 1:44 PM), [http://news.cnet.com/8301-13578\\_3-20021524-38.html](http://news.cnet.com/8301-13578_3-20021524-38.html). Accordingly, it would not be difficult to imagine a judicial opinion that compared the ease of access to both digitally distributed video games and broadcast television. See *id.*

<sup>115</sup> See *Action*, 58 F.3d at 661.

<sup>116</sup> See Garry, *supra* note 2, at 145.

lent speech, perceiving the two as inherently different in the eyes of our society.<sup>117</sup> For example, in addition to declaring violent video game regulations content-based restrictions in *Interactive*, the Eighth Circuit refused to liken violence to obscenity.<sup>118</sup> Citing precedent extending full First Amendment protection to violent material found on television, in film, and in literature, the court stated that “[s]imply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults.”<sup>119</sup>

The strongest support for the *Interactive* decision came from a 2001 U.S. Court of Appeals for the Seventh Circuit case, *American Amusement Machine Ass’n v. Kendrick*.<sup>120</sup> Much like *Interactive*, *Kendrick* dealt with a local ordinance restricting a minor’s access to violent video games.<sup>121</sup> In *Kendrick*, the petitioners similarly attempted to analogize violence with sex, arguing that both were obscene and thus devoid of First Amendment protection.<sup>122</sup> Writing for the court, Judge Richard Posner felt otherwise, reiterating that violence and obscenity are distinct categories of speech.<sup>123</sup> Obscenity, the court explained, generally refers to sexually explicit material.<sup>124</sup> Violence, however, is not inherently sexual, nor is there any evidence that it appeals to a prurient interest such that it could pass the test for obscenity.<sup>125</sup>

Although the court acknowledged the similarities between obscenity laws and those that attempt to restrict violence, it remained steadfast in keeping the two areas of speech distinct.<sup>126</sup> Obscenity, the court elaborated, is undesirable not because of the ill effects it can have on individuals, but because it is impermissibly offensive to the community

<sup>117</sup> See *infra* notes 118–134 and accompanying text.

<sup>118</sup> See 329 F.3d at 958.

<sup>119</sup> See *id.*; see also *Winters v. New York*, 333 U.S. 507, 508, 518–19 (1948) (holding that pictures and stories of “deeds of bloodshed, lust or crime” are protected); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (holding that violence on television is protected under the First Amendment); *Sovereign News Co. v. Falke*, 448 F. Supp. 306, 394 (N.D. Ohio 1977) (“[V]iolence is . . . given the highest degree of [First Amendment] protection . . .”).

<sup>120</sup> See 244 F.3d at 576–77; Garry, *supra* note 2, at 145.

<sup>121</sup> See *Interactive*, 329 F.3d at 956; *Kendrick*, 244 F.3d at 573.

<sup>122</sup> *Kendrick*, 244 F.3d at 574. The ordinance in question forbade children from playing video game arcade machines that appealed to either a minor’s “morbid interest in violence” or their “prurient interest in sex.” *Id.* at 573. In court, the petitioners attempted to squeeze both violence and sex under the guise of obscenity, even though obscenity traditionally concerned itself with only sexual, not violent, material. *Id.* at 574.

<sup>123</sup> See *id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; *United States v. Thoma*, 726 F.2d 1191, 1200 (7th Cir. 1984).

<sup>126</sup> See *Kendrick*, 244 F.3d at 574.

at large.<sup>127</sup> Therefore, while it is true that violent images can be offensive, violent video game laws concern themselves with the alleged effects that the games can have on minors, not the level of offensiveness to the community.<sup>128</sup> Given the widespread acceptance of violence in all facets of life and entertainment, it cannot be said that society is offended by the violence found in video games.<sup>129</sup> Accordingly, the court concluded, if society ceased to find obscenity offensive, statutory restrictions to its dissemination would be subject to the same level of scrutiny that other forms of protected speech receive.<sup>130</sup>

Society's disparate treatment of violence was central to the court's conclusion that violent speech should be analyzed differently than obscene speech, which historically concerned sexually explicit material.<sup>131</sup> In making this point, the court referenced the violence found in classic works of literature such as the *Odyssey*, *War and Peace*, and Grimm's fairy tales.<sup>132</sup> Besides merely acknowledging historical examples of violence in cultural expression, the court went further, stating that "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."<sup>133</sup> "To shield children right up to the age of 18 from exposure to violent descriptions and images," the court warned, "would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."<sup>134</sup>

The argument that exposing children to objectionable images is essential to their maturation differs greatly from the fears expressed in the 1968 Supreme Court decision, *Ginsberg v. New York*, which warned, in concordance with prevailing child-rearing standards, that sexually explicit material would be harmful to the development of children.<sup>135</sup> The courts in *Kendrick*, *Ginsberg*, and *Action* all placed the emotional well-being of children at the forefront of their decision making, but they disagreed over whether exposing children to explicit material helps or hinders their development into emotionally and morally healthy adults.<sup>136</sup> Regardless, it seems clear that their judicial approach

---

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 575.

<sup>129</sup> *See id.* at 575–76.

<sup>130</sup> *Id.* at 576.

<sup>131</sup> *See id.* at 577.

<sup>132</sup> *See Kendrick*, 244 F.3d at 577.

<sup>133</sup> *See id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

<sup>136</sup> *See id.*; *Kendrick*, 244 F.3d at 577; *Action*, 58 F.3d at 660.

differs only by a matter of degree—the tide could conceivably shift if the medium or the message were to change.<sup>137</sup>

The Seventh Circuit, for example, remains open to the idea that violence in video games could one day reach the level of cultural disapproval historically reserved for sexually explicit content.<sup>138</sup> “If the games used actors and simulated real death and mutilation convincingly . . . , a more narrowly drawn ordinance might survive a constitutional challenge.”<sup>139</sup> Given the rapid evolution of video games and video game technology, that day may have already arrived.<sup>140</sup>

### III. THE CURRENT LANDSCAPE OF VIOLENT VIDEO GAME LAW

This Part describes the present state of violent video game regulation by evaluating current ratings and enforcement efforts and introducing the recent judicial proceedings in the Supreme Court.<sup>141</sup> Section A presents the independently regulated body responsible for rating video games based on their content, the ESRB.<sup>142</sup> Then, Section B discusses the procedural history and importance of California’s failed attempt to regulate violent video games, *Brown v. Entertainment Merchants Ass’n*.<sup>143</sup> Finally, Section C summarizes the Supreme Court’s landmark 2011 decision in *Brown*.<sup>144</sup>

#### A. *Protecting Children: Today’s Entertainment Software Ratings Board*

Parents of young children are not on their own when it comes to protecting their kids from unacceptably violent video games.<sup>145</sup> Rather, they have the assistance of the ESRB, a non-profit, self-regulatory body that assigns content ratings to video games.<sup>146</sup> Despite the voluntary na-

<sup>137</sup> See *Ginsberg*, 390 U.S. at 640; *Kendrick*, 244 F.3d at 577; *Action*, 58 F.3d at 660.

<sup>138</sup> See *Kendrick*, 244 F.3d at 579–80.

<sup>139</sup> *Id.*

<sup>140</sup> See Cummins, *supra* note 100, at 2.

<sup>141</sup> See *infra* notes 145–196 and accompanying text.

<sup>142</sup> See *infra* notes 145–156 and accompanying text.

<sup>143</sup> See *infra* notes 157–180 and accompanying text.

<sup>144</sup> See *infra* notes 181–196 and accompanying text.

<sup>145</sup> See *Frequently Asked Questions*, ENTMT’S SOFTWARE RATING BD., <http://www.esrb.org/ratings/faq.jsp> (last visited Feb. 20, 2012) [hereinafter *FAQ*].

<sup>146</sup> See *id.* Following a series of letters from consumers upset with the content of the 1993 video game “Night Trap,” Senator Joe Lieberman issued an ultimatum to the industry: voluntarily place warning labels on sexually or violently explicit video games or be forced by the government to do so. See O’Holleran, *supra* note 1, at 583. Shortly thereafter, the Entertainment Software Association formed the organization that would become the ESRB. See *FAQ*, *supra* note 145.

ture of the program, the ESRB issued some 1638 ratings in 2010 alone, rating virtually every video game sold at retail in the United States.<sup>147</sup>

Even with the wide reach of the ESRB, a 2005 study reported that seventy percent of American children aged nine- to eighteen-years-old had played video games rated “M” (for mature players seventeen and older).<sup>148</sup> Curiously, studies by the Federal Trade Commission (FTC) and the ESRB reported that eighty-nine percent of parents are involved in the purchase of a video game for their child and, seventy-five percent of parents regularly check the rating of a video game before purchasing it.<sup>149</sup> In addition, the most recent FTC mystery shopper study found that eighty percent of individuals under seventeen were turned away by retailers when attempting to purchase an M-rated video game.<sup>150</sup> Taken together, these studies paint a curious picture of children playing games deemed inappropriate for their age purchased predominantly by their own parents.<sup>151</sup>

The voluntary nature of the ESRB ratings, however, allows children under seventeen to legally purchase explicitly rated video games from retailers without policies to the contrary.<sup>152</sup> Commentators dissatisfied with the lack of *legislation* shielding children from violent video games point to psychological studies pronouncing the ill effects of exposing such materials to a young and impressionable audience.<sup>153</sup> One prominent psychologist who researches the effects of exposure to violent video games has concluded that exposure to violent video games increases physically aggressive behavior in some children.<sup>154</sup> Other research has revealed other undesirable effects of exposing children to violent video

---

<sup>147</sup> See *FAQ*, *supra* note 145.

<sup>148</sup> Whitaker & Bushman, *supra* note 4, at 1034.

<sup>149</sup> *Consumer Research*, ENTMT SOFTWARE RATING BD., <http://www.esrb.org/about/awareness.jsp> (last visited Feb. 20, 2012).

<sup>150</sup> *Id.* The FTC periodically conducts a study whereby children are sent to purchase M-rated games to test the compliance of participating retailers in keeping these games out of the hands of minors. See *id.*

<sup>151</sup> See Whitaker & Bushman, *supra* note 4, at 1034; *Consumer Research*, *supra* note 149.

<sup>152</sup> See *FAQ*, *supra* note 145. Note, however, that the vast majority of retailers have in-store policies prohibiting such sales. See *id.*

<sup>153</sup> See Whitaker & Bushman, *supra* note 4, at 1034; Ilana Lubin, Note, *Challenging Standard Conceptions of Tradition, Science and Technology in 2006: Why Laws Prohibiting the Sale of Violent Video Games to Minors Should Be Ultimately Upheld*, 13 *CARDOZO J.L. & GENDER* 173, 191 (2006).

<sup>154</sup> See Craig A. Anderson et al., *Longitudinal Effects of Violent Video Games on Aggression in Japan and the United States*, 122 *PEDIATRICS* 1067, 1067 (2008) (confirming earlier experimental studies that suggested an increase in physically aggressive behavior from playing violent video games); Whitaker & Bushman, *supra* note 4, at 1036–37; Lubin, *supra* note 154, at 191.

games, including increased aggressive thoughts, feelings, and physiological arousal, and decreased so-called “prosocial behavior.”<sup>155</sup> With these findings in hand, proponents of violent video game legislation have continuously sought to restrict the sale of such games to minors.<sup>156</sup>

### B. California’s Violent Video Game Law

One of the more recent and notable attempts to legislate against the sale of violent video games occurred in California and the debate over the law’s constitutionality has reached the halls of the Supreme Court.<sup>157</sup> The story began on October 7, 2005 when California Governor Arnold Schwarzenegger signed into law a bill restricting the sale of “violent video games” to minors.<sup>158</sup> Entertainment trade groups adversely affected by the laws’ passage, most notably the Video Software Dealers Association (VSDA) (today known as the EMA), immediately expressed their opposition.<sup>159</sup>

In its appeal of the district court ruling permanently enjoining the enforcement of the law, California neither disputed that, broadly speaking, video games are a form of expression eligible for First Amendment protection, nor disagreed with the characterization of the law as “content based.”<sup>160</sup> California, however, was not willing to concede that its statute would be subject to strict scrutiny, the standard of review for all content-based restrictions.<sup>161</sup> Rather, the State argued that their case was akin to the 1968 Supreme Court decision, *Ginsberg v. New York*.<sup>162</sup> *Ginsberg*, which ushered in the notion of “variable obscenity,” permitted the continued enforcement of a statute that forbade minors from purchasing magazines considered obscene for minors yet unobjectionable for adults.<sup>163</sup> California attempted to expand the variable obscenity doctrine to permit the prohibition of the sale of violent video

---

<sup>155</sup> See Whitaker & Bushman, *supra* note 4, at 1037–40. Prosocial behavior is an action taken with the intention of benefitting others, such as volunteering or donating. *Id.* at 1039.

<sup>156</sup> See Lubin, *supra* note 153, at 197–98.

<sup>157</sup> See *Media Coalition Synopsis*, *supra* note 11, at 1.

<sup>158</sup> CAL. CIV. CODE §§ 1746–1746.5 (West 2006); Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 953 (9th Cir. 2009), *aff’d sub nom.* Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729 (2011).

<sup>159</sup> See Entm’t Merchs. Ass’n v. Schwarzenegger, 130 S. Ct. 2398, 2398 (2010); *Schwarzenegger*, 556 F.3d at 953.

<sup>160</sup> *Schwarzenegger*, 556 F.3d at 958.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See *Ginsberg v. New York*, 390 U.S. 629, 643 (1968).

games to minors.<sup>164</sup> The State reasoned that, if it successfully likened violent video games to sexually explicit magazines, then violent video games would lose their First Amendment protection as pertained to minors.<sup>165</sup> If that were the case, instead of being subjected to strict scrutiny analysis, the law at issue in *Schwarzenegger* would be subject to the simpler to overcome rational basis test.<sup>166</sup> Given the disparity between strict scrutiny and rational basis standards of judicial review, it was imperative that California avoid strict scrutiny if its violent video game law was to survive.<sup>167</sup>

The Ninth Circuit rejected California's argument, however, pointing out that the *Ginsberg* Court was merely creating a sub-category of obscenity rather than a brand new category of unprotected speech.<sup>168</sup> Unlike the violence at issue in *Schwarzenegger*, the objectionable content in *Ginsberg* was sexually explicit, thus hitting on the very essence of obscenity jurisprudence.<sup>169</sup> The Ninth Circuit noted that this link between sex and obscenity was the lynchpin of *Ginsberg*.<sup>170</sup> "The Supreme Court," the Ninth Circuit observed, "has carefully limited obscenity to sexual content" and furthermore, "has consistently addressed obscenity with reference to sex-based material."<sup>171</sup>

Thus, the Ninth Circuit in *Schwarzenegger* ultimately declined to extend the "variable obscenity" classification to violent material, choosing instead to apply strict scrutiny in analyzing California's law.<sup>172</sup> Under this analysis, the court held that, despite the compelling interest shown in protecting the psychological well-being of children, the California law failed the requirements necessary to restrict what is constitutionally protected speech.<sup>173</sup> Specifically, because the State did not demonstrate how existing video game labeling standards and parental controls failed to achieve the law's desired purposes, it could not be said that the law employed the least restrictive means to achieve its goals.<sup>174</sup> In addition, the State fell short in its attempt to show the req-

---

<sup>164</sup> See *Schwarzenegger*, 556 F.3d at 958.

<sup>165</sup> *Id.*

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* at 959, 967.

<sup>169</sup> See *Ginsberg*, 390 U.S. at 646; *Schwarzenegger*, 556 F.3d at 959.

<sup>170</sup> *Schwarzenegger*, 556 F.3d at 959.

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* at 960.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 967.

uisite causal connection between violent video game-playing and children's psychological well-being.<sup>175</sup>

*Schwarzenegger* is hardly the first case of its kind,<sup>176</sup> but it is notable for what happened after the Ninth Circuit's decision.<sup>177</sup> On April 26, 2010, the Supreme Court granted California's petition for certiorari, making *Schwarzenegger*, renamed *Brown v. Entertainment Merchants Ass'n*, the first case concerning the restriction of video games that the Supreme Court has considered.<sup>178</sup> Advocates on both sides, including the legislative sponsor of the bill in question voiced their surprise over the Court's decision to hear the case.<sup>179</sup> Given the copious precedent backing *Brown's* appellate decision, onlookers were equal parts perplexed and worried over whether this decision would upend decades of violent video game jurisprudence.<sup>180</sup>

### C. *The Supreme Court Weighs In: Brown v. Entertainment Merchants Ass'n*

Despite fears of commentators, on June 27, 2011, the Supreme Court affirmed the Ninth Circuit's decision, finding California's violent video game statute to be an impermissible violation of the First Amendment.<sup>181</sup> The majority opinion, authored by Justice Antonin Scalia, relied primarily on the notion that only a small, pre-defined subset of speech lacks First Amendment protection.<sup>182</sup> These categories of speech (obscenity, incitement, fighting words, etc.) traditionally have found

<sup>175</sup> *Id.*

<sup>176</sup> See generally *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (concerning Louisiana's attempt to restrict the sale of violent video games to minors); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006) (invalidating Minnesota's attempt to penalize minors for purchasing explicitly rated video games); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006) (dismissing Michigan's claim that the interactive nature of video games makes them less worthy of First Amendment protection and issuing a permanent injunction against a bill which sought to prevent minors from purchasing violent video games); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (E.D. Ill. 2005) (finding Illinois's explicit video game statute to be overly broad and not the least restrictive way to enforce the state's goal); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (striking down a law that attempted to restrict the sale of video games that depict violence against law enforcement officers).

<sup>177</sup> See Cummins, *supra* note 100, at 2.

<sup>178</sup> See *Media Coalition Synopsis*, *supra* note 11, at 1.

<sup>179</sup> See Joan Biskupic, *Can States Keep Kids from Violent Video Games?*, USA TODAY, Oct. 28, 2010, at 1A.

<sup>180</sup> See, e.g., Cummins, *supra* note 100, at 2.

<sup>181</sup> *Brown*, 131 S. Ct. at 2742.

<sup>182</sup> See *id.* at 2733.

disfavor in our culture and in our courts.<sup>183</sup> Much like Judge Posner before him, Justice Scalia outlined how violence in media has no history of restriction in our society and steadfastly refused to add violence to the list of utterances unprotected by the First Amendment.<sup>184</sup>

Beyond this, Justice Scalia found California's attempt to circumvent First Amendment protection by only directing the law at children to be unprecedented and unacceptable.<sup>185</sup> He similarly dispensed with the notion that the interactivity of video games makes them unique as compared to other forms of media by noting the interactive nature of media as ancient as literature.<sup>186</sup> Ultimately, Justice Scalia opined, the danger of California's law is its apparent desire to restrict the *ideas* embedded in violent media rather than the negative effects it may have on the viewer.<sup>187</sup> Accordingly, after demonstrating why the First Amendment protects violent media, Justice Scalia subjected California's challenged legislation to strict scrutiny analysis.<sup>188</sup>

Strict scrutiny analysis requires that the law be justified by a compelling government interest and be narrowly tailored to serve that interest.<sup>189</sup> Failing to find a compelling interest in shielding minors from violent video games, Justice Scalia illuminated the shortcomings of the research studies on which California heavily relied.<sup>190</sup> These studies, rejected by every court that has considered them, simply failed to prove that there is a causal relationship between playing violent video games and an increase in aggressive behavior.<sup>191</sup> As such, the Supreme Court could have found the law to be an unconstitutional violation of free

---

<sup>183</sup> See *id.*; see also *New York v. Ferber*, 458 U.S. 747, 764 (1982) (denying First Amendment protection to child pornography); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (limiting First Amendment protection of defamatory speech); *Miller v. California*, 413 U.S. 15, 23 (1973) (holding that obscene speech lacks First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (preventing fighting words from receiving First Amendment protection).

<sup>184</sup> See *Brown*, 131 S. Ct. at 2736; *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

<sup>185</sup> See *Brown*, 131 S. Ct. at 2735–36.

<sup>186</sup> See *id.* at 2737–38.

<sup>187</sup> See *id.* at 2738.

<sup>188</sup> See *id.*

<sup>189</sup> Russel Morse, Note, *If You Fail, Try, Try Again: The Fate of New Legislation Curbing Minors' Access to Violent and Sexually Explicit Video Games*, 26 LOY. L.A. ENT. L. REV. 171, 194–95 (2006).

<sup>190</sup> See *Brown*, 131 S. Ct. at 2739; Jeffrey Rose-Steinberg, *Gaming the System: An Examination of the Constitutionality of Violent Video Game Legislation*, 35 SETON HALL LEGIS. J. 198, 216 (2010).

<sup>191</sup> See Rose-Steinberg, *supra* note 190, at 216.

speech without even considering the second prong of strict scrutiny analysis.<sup>192</sup>

Undeterred, however, Justice Scalia noted that the success of the ESRB undermined any suggestion that the California law was the least restrictive way of keeping violent video games out of the hands of minors.<sup>193</sup> Therefore, because California's law failed both steps of the strict scrutiny analysis, the Court, like so many lower courts before it, rejected another attempt by a legislature to restrict a minor's access to violent video games.<sup>194</sup> Indeed, in his concurring opinion, Justice Samuel Alito urged the Court to take caution when considering new forms of media, outlining the ways in which video games differ from older forms of entertainment.<sup>195</sup> He envisioned a time in the near future when video games become so immersive that comparisons to books or radio would become foolish.<sup>196</sup>

#### IV. *BROWN V. ENTERTAINMENT MERCHANTS ASS'N* SIGNALS THE NEED FOR LEGISLATORS TO ABANDON SIMILAR ATTEMPTS TO REGULATE VIOLENT VIDEO GAMES

This Part explains why legislative attempts to restrict minors from purchasing violent video games have run afoul of the First Amendment and offers legislators plausible ways to assist parents in keeping such games out of the hands of children.<sup>197</sup> Section A critically analyzes the studies and statistics proponents of violent video game legislation rely on to satisfy strict scrutiny analysis.<sup>198</sup> Section B then explains why laws of this nature should and will continue to fail, including a discussion of why obscenity law is a poor vehicle for regulating the exercise of violent speech.<sup>199</sup> Finally, Section C offers legislators a way to regulate the purchase of violent video games effectively and constitutionally by requiring that all retailers participate in and enforce the ESRB rating system.<sup>200</sup>

---

<sup>192</sup> See *id.*; see also *Brown*, 131 S. Ct. at 2739; Morse, *supra* note 189, at 193.

<sup>193</sup> See *Brown*, 131 S. Ct. at 2740–41.

<sup>194</sup> See *id.* at 2741.

<sup>195</sup> See *id.* at 2742 (Alito, J., concurring).

<sup>196</sup> *Id.* at 2748–49.

<sup>197</sup> See *infra* notes 201–280 and accompanying text.

<sup>198</sup> See *infra* notes 201–221 and accompanying text.

<sup>199</sup> See *infra* notes 222–262 and accompanying text.

<sup>200</sup> See *infra* notes 263–280 and accompanying text.

A. *Challenging the Claimed Adverse Effects of Exposing Children to Violent Video Games*

Despite the continued reliance by proponents of violent video game legislation on particular psychological studies, courts have been reluctant to accept the results.<sup>201</sup> In 2009's *Video Software Dealers Association v. Schwarzenegger*, the U.S. Court of Appeals for the Ninth Circuit flatly stated that the clinical evidence submitted by the defense did not support the inferences of psychological harm.<sup>202</sup> The court questioned the validity of the presented findings, noting that the author seemingly abandoned attempts to identify differences in susceptibility of various age groups to violent video games because "there was a hint that the aggressive behaviour results might be slightly larger for the 18 and over group."<sup>203</sup> Because of such flaws, the research has failed to maintain credibility in several other violent video game legislation cases as well.<sup>204</sup> Courts have routinely found research on the effects of violent video games on children either outright invalid or insufficient to establish the claimed causal link between aggression and violent video games.<sup>205</sup>

The persuasive power of other clinical studies has been diminished in the eyes of courts due to the same underlying problem: insufficient evidence to support the claimed causal relationship between exposing minors to violent video games and increasing aggression.<sup>206</sup> More broadly, Entertainment Software Association (ESA) research has concluded that the totality of the scientific record on this matter does not establish a causal relationship between violent video games and violent behavior.<sup>207</sup> In fact, one is just as likely to find empirical support for the contention that video games provide benefits to the children that play

<sup>201</sup> See Rose-Steinberg, *supra* note 190, at 216.

<sup>202</sup> 556 F.3d 950, 964 (9th Cir. 2009), *aff'd sub nom.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

<sup>203</sup> *Id.* at 963; see Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. OF ADOLESCENCE 113, 117 (2004).

<sup>204</sup> See *Schwarzenegger*, 556 F.3d at 963; Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 578 (7th Cir. 2001); Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065, 1069 (D. Minn. 2006); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 653 (E.D. Mich. 2006); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1063 (E.D. Ill. 2005).

<sup>205</sup> See *Schwarzenegger*, 556 F.3d at 963; *Kendrick*, 244 F.3d at 578; *Hatch*, 443 F. Supp. 2d at 1069; *Granholm*, 426 F. Supp. 2d at 653; *Blagojevich*, 404 F. Supp. 2d at 1063.

<sup>206</sup> See *Schwarzenegger*, 556 F.3d at 964; *Granholm*, 426 F. Supp. 2d at 653; *Blagojevich*, 404 F. Supp. 2d at 1063–65 (discussing a concession that a researcher's study did not demonstrate a causal relationship between high violence exposure and behavioral disorders).

<sup>207</sup> *Games and Violence*, ENTM'T SOFTWARE ASS'N, <http://www.theesa.com/facts/violence.asp> (last visited Feb. 20, 2012).

them.<sup>208</sup> For example, a 2005 study found that video games allow children to explore aggression in a safe setting, helping facilitate self-control of physiological arousal.<sup>209</sup> Another study from the same year found a strong correlation between playing video games and improved spatial abilities and reaction time.<sup>210</sup> These studies and other data paint a very different picture of the impact of video game violence than proponents of violent video game legislation portray.<sup>211</sup>

Furthermore, if it were true that violent video games increase aggression in the minors that play them, one would expect a steady uptick in youth violence correlating with the proliferation of violent video games.<sup>212</sup> That has not been the case, however, as there has been a seventy-five percent drop in the number of serious violent crimes committed by minors between twelve and seventeen years old between 1993 and 2007.<sup>213</sup> Although several factors have doubtless led to this decrease in the number of serious violent crimes committed by minors, it cannot be said that the presence of violent video games has been a catalyst for societal harm.<sup>214</sup>

Additionally, of the 1638 ratings assigned by the ESRB in 2010, only five percent, or approximately eighty-two video games were rated “M (Mature).”<sup>215</sup> In terms of sales, only seventeen percent of video games sold in 2009 were rated “M (Mature).”<sup>216</sup> These small numbers, coupled with the extremely telling mystery shopper figures collected by the

<sup>208</sup> Rose-Steinberg, *supra* note 190, at 217.

<sup>209</sup> *Id.*; see Dorothy E. Salonijs-Pasternak, *The Next Level of Research on Electronic Play: Potential Benefits and Contextual Influences for Children and Adolescents*, HUM. TECH., Apr. 2005, at 5, 10, <http://www.humantechnology.jyu.fi/articles/volume1/2005/salonijs-pasternak-gelfond.pdf>.

<sup>210</sup> ANTON LAGER & SVEN BREMBERG, SWEDISH NAT’L INST. OF PUB. HEALTH, HEALTH EFFECTS OF VIDEO AND COMPUTER GAME PLAYING—A SYSTEMIC REVIEW 10, 13 (Gary Watson trans., 2005). Spatial ability refers to the capacity to manipulate two-dimensional and three-dimensional figures with the mind. See *id.* at 10.

<sup>211</sup> See *Sales and Genre Data*, ENTMT SOFTWARE ASS’N, <http://www.theesa.com/facts/salesandgenre.asp> (last visited Feb. 20, 2012).

<sup>212</sup> See *Games & Violence*, *supra* note 207. Since the early 1990s, violent youth crime has decreased while the popularity and use of video games has increased. *Id.*

<sup>213</sup> See *Key Facts at a Glance*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/glance/cv2.cfm> (last revised Mar. 20, 2012) (“The serious violent crimes included are rape, robbery, aggravated assault, and homicide.”); *Key Facts at a Glance—Trends in Offending Rates by Age*, BUREAU JUST. STAT., <http://www.bjs.gov/content/glance/tables/offagetab.cfm> (last revised Mar. 20, 2012) (decreasing from 1,108,000 incidents in 1993 to 277,000 incidents in 2007).

<sup>214</sup> See Morse, *supra* note 189, at 194–95.

<sup>215</sup> *Rating Category Breakdown*, ENTMT SOFTWARE RATING BD., <http://www.esrb.org/about/categories.jsp> (last visited Feb. 20, 2012).

<sup>216</sup> *Sales and Genre Data*, *supra* note 211.

FTC—which found that eighty-seven percent of children under seventeen were turned away by retailers when attempting to purchase M-rated video games—and the high level of awareness of the ESRB rating system among parents of children who play video games suggests that the current system is extremely effective at keeping violent video games out of the hands of minors.<sup>217</sup>

Some counter that the number of children under the age of eighteen that have played an M-rated game is far too high to claim that the ESRB rating system is working effectively.<sup>218</sup> The most plausible way to reconcile these conflicting arguments, however, is a bitter pill for critics of violent video games to swallow.<sup>219</sup> Data confirms that parents are likely purchasing M-rated games for their children.<sup>220</sup> Because of this, there is little legislators can do, outside of completely banning the sale of violent video games, to keep them out of the hands of children.<sup>221</sup>

### B. *Why Violent Video Game Laws Should and Will Continue to Fail Constitutional Scrutiny*

Given the intense scrutiny levied against the psychological studies proffered as evidence of the harmful effects that violent video games have on the children, there is little opportunity or incentive for judicial efforts to sanction regulation of the sale of violent video games to children.<sup>222</sup> Even in the absence of a sweeping declaration from the Supreme Court, States should resist the urge to replicate California's efforts for the reasons outlined below.<sup>223</sup>

#### 1. Violent Video Game Laws Will Continue to Fail Strict Scrutiny Analysis

Because the current ESRB-rating system is a less restrictive means of preventing children from directly purchasing violent video games, future attempts to legislate in this area will continue to fail strict scrutiny analysis.<sup>224</sup> In order to survive strict scrutiny analysis of a content-based restriction, States must demonstrate their compelling interest in

---

<sup>217</sup> See *Consumer Research*, *supra* note 149.

<sup>218</sup> See Whitaker & Bushman, *supra* note 4, at 1034.

<sup>219</sup> See *id.*; *Consumer Research*, *supra* note 149.

<sup>220</sup> See Whitaker & Bushman, *supra* note 4, at 1034; *Consumer Research*, *supra* note 149.

<sup>221</sup> See Whitaker & Bushman, *supra* note 4, at 1034; *Consumer Research*, *supra* note 149.

<sup>222</sup> See *Schwarzenegger*, 556 F.3d at 964.

<sup>223</sup> See *infra* notes 224–262 and accompanying text.

<sup>224</sup> Morse, *supra* note 189, at 193.

restricting a minor's access to violent video games and prove that their method of so doing is narrowly tailored to accomplish that goal.<sup>225</sup> Past efforts by States to regulate violent video games have failed both prongs of this test.<sup>226</sup>

In seeking to shield minors from violent video games, state laws have continually advanced two general interests: (1) preventing aggressive behavior that may lead children to harm others, and (2) preventing undesirable neurological damage to the children exposed to violent video games.<sup>227</sup> As previously explained, courts have been critical of States' efforts to proffer evidence of these adverse effects.<sup>228</sup> Most damningly, a 2005 Michigan District Court opinion found there to be an equivalent amount of data disproving a link between exposure to violent video games and an increase in aggression as there was supporting such a link.<sup>229</sup> In a subsequent decision, the court also criticized the broad focus of the studies presented, many of which considered all forms of violent media rather than solely video games.<sup>230</sup> Accordingly, without sufficient evidence of the dangers of exposing minors to violent video games, states will be unable to show that there is a compelling interest for restricting access to such games.<sup>231</sup>

Furthermore, even if States were successful in showing a causal connection between playing violent video games and increasing aggression, the current breed of state laws would still fail strict scrutiny analysis.<sup>232</sup> In addition to needing to further a compelling interest, state laws must be narrowly tailored to achieve their intended purpose.<sup>233</sup> States have the burden of proving that there are no "less restrictive alternatives [that] would be at least as effective in achieving the [State's interest]."<sup>234</sup> Current efforts to regulate violent video games have ignored

<sup>225</sup> See *id.*

<sup>226</sup> See, e.g., *Schwarzenegger*, 556 F.3d at 967 ("[T]he State has not produced substantial evidence that supports the Legislature's conclusion. . . . Even if it did, the Act is not narrowly tailored to prevent that harm. . . .").

<sup>227</sup> See 720 ILL. COMP. STAT. 5/12A-5(d)-(h) (1993); MICH. COMP. LAWS § 722.685 (2005).

<sup>228</sup> See *Kendrick*, 244 F.3d at 578-79; *Interactive Digital Software Ass'n v. St. Louis Cnty., Mo.*, 329 F.3d 954, 959 (8th Cir. 2003); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004).

<sup>229</sup> *Morse*, *supra* note 189, at 194 (citing *Granholtm*, 404 F. Supp. 2d at 982).

<sup>230</sup> See *Granholtm*, 426 F. Supp. 2d at 653.

<sup>231</sup> See *Morse*, *supra* note 189, at 195.

<sup>232</sup> See *id.* at 197.

<sup>233</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002).

<sup>234</sup> *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

the elephant in the room, the ESRB, to their detriment.<sup>235</sup> In addition to the fact that the ESRB rates virtually every video game sold at retail in the United States, parents have an array of additional electronic parental controls at their disposal to help them decide which games are appropriate for their children.<sup>236</sup> These mechanisms are already in place and have coalesced to achieve the very result that States seek through legislation.<sup>237</sup> As such, it cannot be said that the burden of statutory intervention is less restrictive than methods already in place.<sup>238</sup> Accordingly, because both the requisite elements will remain unsatisfied, laws regulating the sale of violent video games to minors will continue to fail strict scrutiny analysis.<sup>239</sup>

## 2. Obscenity Law Is Fundamentally Flawed

Obscenity law suffers from several significant faults that render it a poor vehicle for video game legislation.<sup>240</sup> Despite this, States seeking to restrict the sale of violent video games have begun to ask courts to liken violence to obscenity.<sup>241</sup> Their goal in doing so is to create a First Amendment exception for violent speech aimed at minors similar to the variable obscenity exception.<sup>242</sup> The comparison seems logical, but courts have resisted, adamant that the legal term “obscenity” refers only to sexually explicit materials.<sup>243</sup> There may be, however, a more pragmatic reason that courts have dodged requests to expand obscenity jurisprudence: obscenity law has devolved into an unwieldy, ad-hoc mess.<sup>244</sup>

As discussed previously, Justice William Brennan, author of *Roth v. United States* identified three issues plaguing obscenity jurisprudence: (1) the lack of clear standards defining obscenity, (2) the chilling effect on speech, and (3) the stress placed on the judiciary.<sup>245</sup> Although he

---

<sup>235</sup> See, e.g., *Schwarzenegger*, 556 F.3d at 967 (“[T]here remain less-restrictive means of forwarding the State’s purported interests, such as the improved ESRB rating system . . .”).

<sup>236</sup> See *id.*

<sup>237</sup> See *id.* at 965; *Consumer Research*, *supra* note 149.

<sup>238</sup> See *Schwarzenegger*, 556 F.3d at 967.

<sup>239</sup> See *id.*

<sup>240</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 91 (1973) (Brennan, J., dissenting).

<sup>241</sup> See, e.g., *Schwarzenegger*, 556 F.3d at 967 (“We decline the State’s invitation to apply the variable obscenity standard . . . to the Act . . .”).

<sup>242</sup> See *id.*

<sup>243</sup> See *id.* at 960. “[W]hen used in the context of the First Amendment, the word ‘obscenity’ means material that deals with sex.” *Maleng*, 325 F. Supp. 2d at 1185.

<sup>244</sup> See *Dean*, *supra* note 14, at 150.

<sup>245</sup> See *Paris*, 413 U.S. at 91 (Brennan, J., dissenting).

was unable to overturn the rulings that shaped the obscenity law he grew to resent, Justice Brennan's well-articulated fears served as a cautionary tale to current and future justices.<sup>246</sup> There is little doubt that the same problems would afflict the video game industry should efforts to treat violent speech as a category of obscenity succeed.<sup>247</sup>

The lack of a clear standard defining obscenity, the first of Justice Brennan's worries, chills protected speech by failing to provide adequate notice of what constitutes prohibited speech.<sup>248</sup> The constant threat of legal punishment is significant enough that it deters the exercise of speech that exists at the margins of legality, illuminating the necessity for narrowly tailored guidelines.<sup>249</sup> As Justice Brennan noted, "First Amendment freedoms need breathing space to survive . . ."<sup>250</sup> If allowed to stand, violent video game laws, like that at issue in *Schwartzegger*, would impermissibly scare retailers from selling all video games potentially in violation of the law to minors.<sup>251</sup>

Additionally, because of the difficulties in separating protected speech from unprotected speech, vague obscenity laws ultimately place a huge burden on the judicial system to sort out all of the cases at the margins.<sup>252</sup> The fact-intensive nature of these cases, coupled with their sheer volume, creates an undesirable environment of unpredictability.<sup>253</sup> Violent video game laws would likely inundate the courts with challenges to the categorization of a game as lawful or unlawful under the First Amendment.<sup>254</sup> Such a result would be absurdly inefficient, particularly given the effectiveness of the ESRB rating system.<sup>255</sup> Ultimately, obscenity jurisprudence is just a poor vehicle for regulating the sale of violent video games to minors.<sup>256</sup>

---

<sup>246</sup> *See id.*

<sup>247</sup> Dean, *supra* note 14, at 151.

<sup>248</sup> *See Paris*, 413 U.S. at 86 (Brennan, J., dissenting).

<sup>249</sup> *Id.* at 90.

<sup>250</sup> *Id.*

<sup>251</sup> *See* Dean, *supra* note 14, at 153.

<sup>252</sup> *See Paris*, 413 U.S. at 91 (Brennan, J., dissenting) ("Our subsequent experience demonstrates that almost every case is 'marginal.' And since the 'margin' marks the point of separation between protected and unprotected speech, we are left with a system in which almost every obscenity case presents a constitutional question of exceptional difficulty.").

<sup>253</sup> *See id.* at 92.

<sup>254</sup> *See* Dean, *supra* note 14, at 153–54.

<sup>255</sup> *See Consumer Research*, *supra* note 149.

<sup>256</sup> *See* Dean, *supra* note 14, at 154.

### 3. The High Cost of Litigation Is a Disservice to Taxpayers

That no State has been successful in asserting control over the sale of violent video games to minors should be a red flag to legislators, presuming that their goal in enacting such legislation is truly to protect children rather than to garner votes for reelection by taking a tough stance against a sensationalized topic.<sup>257</sup> The courtroom jousting between states and entertainment advocacy groups has led to a supreme waste of time and taxpayer dollars.<sup>258</sup>

For example, the U.S. District Court for the Northern District of Illinois, in its 2005 decision in *Entertainment Software Ass'n v. Blagojevich* striking down a violent video game regulation as unconstitutional, awarded the video game industry \$510,000 dollars for attorney's fees alone.<sup>259</sup> In total, \$2,158,916 dollars of state and local taxpayer dollars have been paid directly to the entertainment industry for legal fees associated with litigating video game violence cases.<sup>260</sup> And, these figures do not even factor in the salaries paid to and productivity lost by government employees involved in litigating what has repeatedly proven to be a losing cause.<sup>261</sup> Accepting the unconstitutionality of violent video game legislation would greatly benefit the many States—not to mention taxpayers shouldering the burden—facing shrinking budgets and soaring debt.<sup>262</sup>

#### C. How to Regulate Violent Video Games Effectively and Constitutionally

Rather than try in vain to construct laws that prevent minors from purchasing violent video games, legislators should work in tandem with the video game industry to utilize and bolster the tools currently available to parents, such as ESRB rating.<sup>263</sup> Indeed, just because current violent video game laws are unconstitutional and likely to fail in court

---

<sup>257</sup> See ESSENTIAL, *supra* note 7, at 1 (“Courts have ruled 12 times in eight years that computer and video games are protected speech . . .”).

<sup>258</sup> See Rose-Steinberg, *supra* note 190, at 213–14.

<sup>259</sup> *Id.* at 213; see also *Blagojevich*, 404 F. Supp. 2d at 1051 (invalidating Illinois's attempt to restrict the sale of sexually explicit and violent video games).

<sup>260</sup> ESSENTIAL, *supra* note 7, at 1.

<sup>261</sup> See Rose-Steinberg, *supra* note 190, at 214.

<sup>262</sup> See *id.*

<sup>263</sup> See *Schwarzenegger*, 556 F.3d at 967; Gregory Kenyota, Note, *Thinking of the Children: The Failure of Violent Video Game Laws*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 785, 810 (2008) (“[T]he states should support the self-regulation efforts of the video game industry rather than try to undermine it.”).

does not mean that a successful form of regulation will never emerge from the rubble.<sup>264</sup>

Legislators should first relinquish attempts to bracket violent video games with obscene speech in what has now proved to be a failed effort to leverage the so-called “variable obscenity” doctrine to their advantage.<sup>265</sup> The judiciary has been steadfast in its insistence that obscene speech refers only to sexual materials.<sup>266</sup> Moreover, obscenity law has its own deficiencies that hamper its applicability.<sup>267</sup> Further attempts to shoehorn regulation of violent video games into obscenity jurisprudence are likely to fail and consequently would drain taxpayer dollars.<sup>268</sup>

Secondly, proponents of violent video game regulation need to abandon flawed studies in favor of more credible research.<sup>269</sup> Courts across the country and at all levels have been critical of the methodology and conclusions of many studies on the effects of violent video games; as a result, these flawed studies do little to legitimize the concerns of legislators.<sup>270</sup> That is not to say, however, that future efforts to prove a link between a minors’ exposure to violent video games and increased aggression will suffer from the same deficiencies.<sup>271</sup> Researchers must simply take the time to produce better, more persuasive studies.<sup>272</sup>

The best way to accomplish the goals of violent video game legislation would be to embrace and expand the current efforts of the ESRB.<sup>273</sup> Although the ESRB is currently voluntary, virtually every game sold at retail is rated by the ESRB.<sup>274</sup> Publishers whose games are rated by the ESRB are bound by industry-accepted advertising guidelines that

<sup>264</sup> See, e.g., *Schwarzenegger*, 556 F.3d at 967.

<sup>265</sup> *Id.* (“We decline the State’s invitation to apply the variable obscenity standard . . . to the Act . . .”).

<sup>266</sup> See *Kendrick*, 244 F.3d at 574; *United States v. Thoma*, 726 F.2d 1191, 1200 (7th Cir. 1984) (“[D]epictions of torture and deformation are not inherently sexual and, absent some expert guidance as to how such violence appeals to the prurient interest of a deviant group, there is no basis upon which a trier of fact could deem such material obscene.”).

<sup>267</sup> See *Paris*, 413 U.S. at 91 (Brennan, J., dissenting). Justice Brennan’s concerns included (1) the lack of a clear standard for what constituted obscene speech, (2) the chilling of protected speech, and (3) the institutional stresses placed on the judiciary given the vagueness of their previous rulings. See *id.*

<sup>268</sup> See *ESSENTIAL*, *supra* note 7, at 1.

<sup>269</sup> See *Dean*, *supra* note 14, at 160.

<sup>270</sup> See *Schwarzenegger*, 556 F.3d at 963; *Kendrick*, 244 F.3d at 578; *Hatch*, 443 F. Supp. 2d at 1069; *Granholm*, 426 F. Supp. 2d at 653; *Blagojevich*, 404 F. Supp. 2d at 1063.

<sup>271</sup> See *Dean*, *supra* note 14, at 160–61.

<sup>272</sup> See *id.*

<sup>273</sup> See *id.* at 161.

<sup>274</sup> *FAQ*, *supra* note 145 (“[V]irtually all games that are sold at retail in the U.S. and Canada are rated by the ESRB.”).

regulate the placement of ratings and restrict where M-rated games can be promoted.<sup>275</sup> Additionally, the ESRB can already levy corrective action against publishers that violate the disclosure requirements of the rating system, including refusing to rate a publisher's future games.<sup>276</sup>

By making ESRB ratings a prerequisite to sale, legislators would guarantee that parents have all of the information necessary to make educated video game purchasing decisions.<sup>277</sup> Enforcement of ESRB ratings in the retail environment would ensure that children are unable to purchase video games deemed inappropriate for their age without a parent.<sup>278</sup> In sum, "the best rating system in the entertainment media" is already in place to achieve the very results desired by zealous legislators fearful of exposing minors to violent video games.<sup>279</sup> By merely making what is already universally accepted mandatory, legislators can make sure that parents are the ultimate arbiters of the media their children consume.<sup>280</sup>

#### CONCLUSION

Past efforts to legislate the sale of violent video games have proven costly and misguided. This is because obscenity law—and its progeny, variable-obscenity—are poor vehicles for the legislation regulation of violent video games. Courts across the country have resoundingly discredited studies attempting to depict a causal link between exposing minors to violent video games and an increase in aggression. The focus, therefore, should shift to the lone bright spot that has emanated from the exaggerated fear over violent video games: the ESRB. The ESRB has a proven, successful method of screening and rating video games for explicit content, which educates parents that purchase these games. Accordingly, despite the fears of commentators that *Brown* could have undone years of violent video game jurisprudence, it instead rightfully

---

<sup>275</sup> See *id.* ("The ESRB's Advertising Review Council (ARC) diligently monitors industry compliance, and in the event that a game publisher is found to have inappropriately labeled or advertised a product, the ESRB is empowered to compel corrective actions and impose a wide range of sanctions . . .").

<sup>276</sup> See *id.* ("Examples of corrective actions include the re-labeling of product inventory and unsold product at retail or, potentially, a product recall.").

<sup>277</sup> See Dean, *supra* note 14, at 161.

<sup>278</sup> See *id.*

<sup>279</sup> See Press Release, Senator Joe Lieberman, Kohl, Lieberman Commend New Voluntary Computer and Video Game Ratings Improvements (June 26, 2003), <http://lieberman.senate.gov/index.cfm/news-events/news/2003/6/kohl-lieberman-commend-new-voluntary-computer-and-video-game-ratings-improvements>.

<sup>280</sup> See Dean, *supra* note 14, at 161.

codified decades of case law, resulting in a clear mandate against similar restrictions of free speech.

CHRISTOPHER CLEMENTS