9-1-2011

Blood, Brains, and Bludgeoning, But NOT Breasts: An Analysis and Critique of Brown v. Entertainment Merchants Association

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BLOOD, BRAINS, AND BLUDGEONING, BUT *NOT* BREASTS: AN ANALYSIS AND CRITIQUE OF *BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION*

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In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court held that a California statute banning the sale of extremely violent video games to minors was unconstitutional because it violated minors' First Amendment rights. This decision highlights the Court's inconsistent application of evidentiary standards required for States to regulate the sale of erotic (not obscene) content and the sale of violent content to children.

In *Brown*, the Court stated that unless California could prove a causal link between violent video games and harmful effects on children, it could not regulate the sale of even the most violent of games. However, this holding contradicts *Ginsberg v. New York*, where the Court did not require the State to proffer any evidence that erotic material was harmful to minors and ruled that the Constitution did not prevent the State from regulating the sale of "girlie" magazines to them.

Additionally, *Brown* represents a departure from the Court's standing precedents since it has never before allowed a vendor to assert the constitutional rights of children. In fact, the statute in *Brown* permitted parents to purchase any violent games for their children. Therefore, the Court allowed the vendor to assert this alleged right even contrary to the rights of parents. The Court ignored the deeply entrenched right of parents to direct the upbringing of their children, and instead recognized a minor's right to circumvent parental authority. The overall result, as Justice Breyer stated in his dissent, is that *Brown* has created "a serious anomaly in First Amendment law."

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I. INTRODUCTION

Ever since a first-person shooter video game allegedly inspired Eric Harris and Dylan Klebold to kill their classmates at Columbine High School in 1999,[1] legislatures across the country have tried to regulate the sale of violent video games to minors.[2] In response, the video game industry hastily challenged these statutes.[3] In each challenge, the statutes failed for being unconstitutionally vague in defining "violence" or for failing to demonstrate that the government's interest was sufficiently compelling to withstand strict judicial review.[4] Nevertheless, without a ruling from the Supreme Court, lawmakers continued in these efforts with wide bipartisan support, and the video game industry continued to challenge the laws.[5]

Finally, in April 2010, the Supreme Court granted certiorari to hear a challenge to California's violent video game statute in *Brown v. Entertainment Merchants Ass'n*.[6] There, the Ninth Circuit declared uncon-

1. *See Killer's Journal Shows Detailed Plan of Massacre*, HARLAN DAILY ENTER., Dec. 6, 2001, at 2 (quoting Eric Harris's journal as stating, "[i]t'll be like the LA riots, the Oklahoma bombing, WWII, Vietnam, Duke and Doom all mixed together. . . . I want to leave a lasting impression on the world."). "Duke" and "Doom" are references to the video games Duke Nukem and Doom; in both games the objective is to kill enemies to earn points. *Duke Nukem*, WIKIPEDIA, http://en.wikipedia.org/wiki/Duke_Nukem (last visited Mar. 2, 2011); *Doom*, WIKIPEDIA, http://en.wikipedia.org/wiki/Doom_(video_game) (last visited Mar. 2, 2011); *see also* Paul Duggan, Michael D. Sear, & Marc Fisher, *Shooter Pair Mixed Fantasy, Reality*, WASH. POST, Apr. 22, 1999, at A1 (detailing Harris and Klebold's obsession with fantasy violence). *But see* Greg Toppo, *10 Years Later, the Real Story Behind Columbine; Long-Held Views of the Attack and the Killers Prove Wrong*, USA TODAY, Apr. 14, 2009, at A1 (stating investigation revealed attack attributable to boys' mental illness rather than fantasy violence obsession).

2. *See generally* Jeffrey O'Holleran, Note, *Blood Code: The History and Future of Video Game Censorship*, 8 J. TELECOMM. & HIGH TECH. L. 571, 572 (2010); *see also Legislation Tracker*, GAMEPOLITICS.COM, http://www.gamepolitics.com/legislation.htm (last visited Mar. 2, 2012) [hereinafter *Legislation Tracker*].

3. *See* Seth Schiesel, *Courts Block Laws on Video Game Violence*, N.Y. TIMES, Aug. 21, 2007, at E1; *see also Legislation Tracker*, *supra* note 2.

4. *See, e.g.*, Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065 (D. Minn. 2006); Entm't Software Ass'n v. Swanson, 519 F.3d 768 (8th Cir. 2008); Interactive Digital Software Ass'n v. St. Louis Cnty., Mo., 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

5. *See* Lorraine M. Buerger, Comment, *The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?*, 37 LOY. U. CHI. L.J., 617, 663 (2006); *Legislation Tracker*, *supra* note 2.

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

stitutional a California statute banning the sale of certain violent video games to minors.[7] The Supreme Court's heavily anticipated hearing of "the single most important court case in gaming history,"[8] prompted the filing of nearly thirty amicus briefs, almost all in support of the video game industry.[9] The Entertainment Consumers Association staged a rally outside the courthouse on the day of oral arguments,[10] and even comedian Jon Stewart added his sardonic voice to the debate on his program, *The Daily Show*.[11]

After a decade of legal challenges to legislative efforts to restrict the sale of violent video games to children,[12] the Supreme Court ruled on June 27, 2011 that the California law was unconstitutional because violent video games fall within the purview of First Amendment protection for minors.[13] The gaming blogosphere hailed the decision as "the best possible outcome, both for the game industry and for the public at large . . . ."[14]

This article will analyze the Supreme Court's ruling in *Brown v. Entertainment Merchants Ass'n*. Part II will provide a general overview of First Amendment law. Part III will briefly describe the background of the California statute and the subsequent procedural history leading up to the Supreme Court's grant of certiorari. Part IV will summarize the Court's ruling, the concurring opinion of Justice Alito, and the dissenting opinions of Justices Thomas and Breyer. Part V will analyze the reasoning behind the various opinions and find that Justice Breyer is the only member of the Court to properly apply case precedent and to correctly conclude the statute

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7. *Id.*

8. Daniel Horowitz, *Supreme Court to Hear Schwarzenegger v. EMA; Single Most Important Case in Gaming History*, WORLD GAMING NETWORK (Sept. 10, 2010), http://www.world-gaming.com/component/content/article/6-general/1111-supreme-court-to-hear-schwarzenegger-v-ema-single-most-important-court-case-in-gaming-history.html.

9. *See* Docket of Brown v. Entm't Merchs. Ass'n, No. 08-1448, 131 S. Ct. 2729 (2011), *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-1448.htm.

10. Richard Mitchell, *ECA to Stage Washington Rally Prior to Supreme Court Battle*, JOYSTIQ (Oct. 14, 2010), http://www.joystiq.com/2010/10/14/eca-to-stage-washington-rally-prior-to-supreme-court-battle/.

11. *The Daily Show with Jon Stewart* (Comedy Central television broadcast Nov. 4, 2010), *available at* http://www.thedailyshow.com/watch/thu-november-4-2010/you-re-welcome---violent-video-games.

12. *See Am. Amusement Mach. Ass'n*, 244 F.3d 572 (recognizing video games as a protected form of expression for the first time in the federal courts); *see also* Kurtis A. Kemper, Annotation, *First Amendment Protection Afforded to Commercial and Home Video Games*, 106 A.L.R. 5th 337 (2003) (providing a historical overview of legal challenges to video game regulations).

13. *See Entm't Merchs. Ass'n*, 131 S. Ct. 2729.

14. Mark Methenitis, *LGJ: On Brown v. Entertainment Merchants Assn.*, JOYSTIQ (Jan. 12, 2012, 4:47 PM), http://www.joystiq.com/2011/07/04/lgj-on-brown-v-entertainment-merchants-assn/.

is constitutional. Part VI will address the Court's glaring omission: the Entertainment Merchants Association's lack of standing to assert the right at issue. Finally, Part VII will conclude that given the narrow 5-4 division of the Court on the ultimate issue in the case and the emerging social scientific research supporting a causative relationship between violent video games and negative cognitive and behavioral effects on children, a future challenge to a more narrowly crafted statute may earn the support of a majority of the Court.

A philosophical inquiry into problems that may be posed for society if children are desensitized to violence or exposed to erotica is beyond the scope of this article. Instead, the focus of this article is solely on the Court's inconsistent application of case precedent to minors' First Amendment rights, which, as Justice Breyer aptly indicated, has created a troubling "anomaly in First Amendment Law."[15]

II. FIRST AMENDMENT BACKGROUND

A. General First Amendment Jurisprudence

The First Amendment proclaims that "Congress shall make no law . . . abridging the freedom of speech . . . ."[16] At the core of the Amendment is the understanding that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[17] Despite its seemingly specific wording, First Amendment protection extends beyond mere "speech," and in *American Amusement Machine Ass'n v. Kendrick*, the Seventh Circuit recognized video games as a form of protected expression under the First Amendment.[18]

Since the First Amendment was incorporated in 1925,[19] and thereby made applicable to state governments, case law has developed to provide different degrees of protection for different types of speech.[20] The Court has stated that the Amendment's protection is not absolute and does not

15. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

16. U.S. CONST. amend. I.

17. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641(1994) [hereinafter *Turner*].

18. Bonnie B. Phillips, Note, *Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of the First Amendment Rights of Minors*, 36 IND. L. REV. 1385, 1388–89 (2003).

19. *See generally* Gitlow v. New York, 268 U.S. 652 (1925).

20. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.1 at 986 (3d ed. 2006).

include libelous speech or obscenity.[21] In reviewing legislative infringements upon the First Amendment, the Court will apply different levels of scrutiny to laws that are "content-based" and laws that are "content neutral."[22] "Content-based" laws, those regulating the content of speech, are presumptively invalid because they present a risk that the government will extract entire viewpoints from the public dialogue, effectively imposing a government prescribed orthodoxy.[23] Courts review "content-based" restrictions using strict scrutiny, which requires the government to use the least restrictive means possible to further a compelling government interest.[24] Laws that are "content neutral" pose a lesser risk of removing ideas or viewpoints from public discourse.[25] Accordingly, those laws are reviewed under the less stringent standard of intermediate scrutiny. A "content-neutral" law must be narrowly tailored to further a substantial government interest.[26] The law must "burden no more speech than necessary" in order to further the government interest.[27]

In determining whether or not a particular speech restriction is constitutional, courts will also look to see if the law is vague, because vague laws may deny due process.[28] For example, a law is unconstitutionally vague if a reasonable person is unable to decipher which speech is prohibited and which speech is permitted; as a result, he or she would be unable to comply with the law and it would be unconstitutionally vague.[29]

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21. Roth v. United States, 354 U.S. 476, 483 (1957).

22. *See, e.g.*, *Turner*, 512 U.S. 622. In *Turner*, the Court reviewed the constitutionality of "must-carry" provisions in the Cable Television Consumer Protection and Competition Act of 1992 ("CPCA"). *Id.* The CPCA was enacted by Congress to address a concern that "a competitive imbalance between cable television and over-the-air broadcasters was endangering the broadcasters' ability to compete for a viewing audience and thus for necessary operating revenues." *Id.* at 622. The Court held that despite the content neutrality of the provisions at issue, the government needed to provide stronger factual support for their economic necessity. *Id.*

23. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. Street Crime Victims Bd., 502 U.S. 105, 116 (1991) (stating content-based restrictions "[r]aise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *Turner*, 512 U.S. at 641 ("Government action that stifles speech on account of its message . . . contravenes this essential [First Amendment] right."); Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

24. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

25. *Turner*, 512 U.S. at 642.

26. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

27. Madsen v. Women's Health Ctr., 512 U.S. 753, 765 (1994).

28. *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

29. *See, e.g.*, *id.* (finding a law is fatally vague when someone "of common intelligence must necessarily guess at its meaning").

B. Categorical Exclusion for Obscenity

The First Amendment establishes a default rule that all speech is fully protected.[30] However, on a case-by-case basis, the Court has created a list of types of speech that are categorically excluded from First Amendment protection.[31] The existing categories of unprotected speech are obscenity,[32] incitement of illegal activity,[33] and fighting words.[34] The Court has also reduced the level of protection afforded to other categories of speech, including commercial speech and some sexually oriented speech that falls short of obscenity, holding that these types of speech are of "low value."[35] Statutes proscribing these forms of speech are reviewed using rational basis—the most deferential of all forms of judicial review.[36] Some scholars believe that these exclusions reflect the Court's own value judgments when it balances the State's proffered justifications for regulating certain speech with the Court's view of the value of that speech to society.[37] In *United States v. Stevens*, the Court stated that it would no longer add new categories of speech to the list of those that are not protected under the First Amendment.[38] The respondent in *Stevens* was indicted for selling dogfighting videos under a federal statute that criminalized "the commercial creation, sale, or possession of certain depictions of animal cruelty."[39] Legislative history reveals that Congress was primarily concerned with proscribing the proliferation of "crush videos" (sexual fetish videos that feature "the intentional torture and killing of helpless animals"), although dogfighting videos also falls under the statutory definition.[40] In invalidating the statute, the Court rejected the government's argument that the de-

30. U.S. CONST. amend. I.

31. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *Roth*, 354 U.S. at 483; Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

32. *Roth*, 354 U.S. at 483.

33. *Brandenburg*, 395 U.S. at 447–49.

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

35. *See, e.g.*, Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) (declaring unconstitutional a state law prohibiting pharmacists from advertising the prices of prescription drugs). *Compare* Young v. Am. Mini-Theaters, Inc., 427 U.S. 50, 70–71 (1976) *with* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54–55 (1986) (both cases upholding zoning ordinances applicable to adult movie theaters); New York v. Ferber, 458 U.S. 747, 765–66 (1982) (holding that the government may ban the exhibition, sale, or distribution of child pornography even if it does not meet the statutory definition of obscenity).

36. *See* CHEMERINSKY, *supra* note 20, at 540.

37. *Id.* at 987.

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

39. *Id.* at 1579.

40. *Id.* (citations omitted).

pictions at issue were of such low social value that they should be added as a category of unprotected speech.[41] The majority reasoned that protections of the First Amendment are not limited exclusively to speech that survives an "ad hoc balancing" of the costs and benefits of such speech to society, but instead, encompass all expression except that which has historically been unprotected.[42] In *Roth v. United States*, the Supreme Court held that First Amendment protection does not extend to obscenity because such speech is "utterly without redeeming social importance."[43] Following *Roth*, the Court struggled to define what kind of expressive material was obscene.[44] Accordingly, the Court's definition of obscenity evolved through a number of cases.[45] Finally, in 1957, in *Miller v. California*,[46] the Court formulated the basic test for obscenity that is still used today.[47] *Miller* holds that expressive material will be deemed "obscene" if

> (a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[48]

C. First Amendment Rights of Children

The Court has also found that some erotic speech that does not meet the *Miller* test may still be outside the realm of Constitutional protection

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41. *See id.* at 1585–86.

42. *Id.* at 1585.

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

44. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt to further 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.").

45. *See, e.g.*, *Roth*, 354 U.S. at 484 (defining obscene material as that "which deals with sex in a manner appealing to prurient interest"); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413, 418 (1966) [hereinafter *Memoirs v. Massachusetts*] (overruling *Roth* and finding material to be obscene when "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value").

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

47. CHEMERINSKY, *supra* note 20, at 1020–21; *see, e.g.*, United States v. Little, No. 08-15964 (11th Cir. 2010), *available at* http://www.ca11.uscourts.gov/unpub/ops/200815964.pdf.

48. *Miller*, 413 U.S. at 24 (internal citations omitted).

for children.[49] In *Ginsberg v. New York*, the Court reviewed a state statute that restricted the sale of "girlie" magazines to minors.[50] In order to prohibit the sale to minors of the content that was not prohibited for adults, the New York legislature modified the prevailing obscenity test for adults by restricting only pornographic material that would be "harmful to minors."[51] The statute defined material harmful to minors as

> nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
> (i) predominately appeals to the prurient, shameful, or morbid interest of minors, and
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
> (iii) is utterly without redeeming social importance for minors.[52]

Even though the "girlie" magazines were constitutionally protected speech for adults,[53] the Supreme Court held the same material was not protected for children.[54] Thus, the Court reviewed New York's "variable obscenity statute" by applying the same standard used for other statutes restricting unprotected speech—rational basis.[55] Justice Brennan, writing for the majority, articulated two justifications for limiting minors' access to sex-based content.[56] First, he said that the Constitution recognizes a parent's fundamental right to direct the upbringing of his or her child, and as a result, the legislature is reasonable in enacting laws that support a parent's fulfill-

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49. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (holding that a student's public speech containing "sexual innuendos," albeit not obscene, was not protected by the First Amendment in a public school setting because of a "concern on the part of parents, and school authorities acting *in loco parentis,* to protect children . . . from exposure to sexually explicit, indecent, or lewd speech").

50. *See* Ginsberg v. New York, 390 U.S. 629, 631–32 (1968) (involving magazines containing pictures depicting female 'nudity' showing "buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.").

51. *Id.* at 643 (modifying the obscenity statute articulated by the Court in *Memoirs v. Massachusetts*, 383 U.S. 413).

52. *Id.* at 646.

53. *See* Bellotti v. Baird, 443 U.S. 622, 636 (1979) (describing the magazines at issue in *Ginsberg* as "clear examples of constitutionally protected freedoms of choice [for adults]").

54. *See Ginsberg*, 390 U.S. 629.

55. *See id.* at 641 (the Court required only that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.").

56. *See id.* at 639.

ment of that responsibility.[57] Second, Justice Brennan said that the State has an "independent interest in the well being of its youth." He argued, "while the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them."[58]

Subsequent cases interpreting *Ginsberg* clarified and reaffirmed the interests articulated by Justice Brennan. In First Amendment challenges to broadcasting and Internet regulations, the Court has held that the state's interest in protecting children was a "compelling interest," meaning regulations in furtherance of that interest might survive strict judicial review.[59] In *Belotti v. Baird*, the Court declared, "the State is entitled to adjust its legal system to account for children's vulnerability."[60] The Court affirmed that as part of our constitutional commitment to "individual liberty and freedom of choice," the directing and upbringing of children rests first with the child's parents.[61]

Finally, in *FCC v. Pacifica Foundation*, the Court upheld FCC regulations prohibiting indecent speech (not obscene speech) over television and radio broadcasts.[62] The Court justified this First Amendment intrusion by saying, "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."[63] Collectively, these cases recognize that a child's right to access speech without parental consent is not coextensive with an adult's right to access the same material.[64]

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57. *Id.*; *see also* Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972).

58. *Ginsberg*, 390 U.S. at 640.

59. *See Sable Commc'ns of Cal., Inc.*, 492 U.S. at 126 ("We have recognized that there is a compelling interest in protecting the physical and psychological well being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.") (citing *Ginsberg*, 390 U.S. at 639–40; *Ferber*, 458 U.S. at 756–57; Reno v. ACLU, 521 U.S. 844, 869 (1997)).

60. *See Bellotti*, 443 U.S. at 635–39 (challenging a state statute regulating minors' access to abortions and holding that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding").

61. *Id.* at 638.

62. FCC v. Pacifica Found., 438 U.S. 726, 750–51 (1978).

63. *Id.* at 750.

64. *See generally Bellotti*, 443 U.S. 622; *Pacifica Found.*, 438 U.S. 726.

III. THE ACT, THE CHALLENGE, AND THE APPEAL

A. California Civil Code Sections 1746–1746.5: Background and Legislative History

Before 2005, the video game industry, like the film and recording industries, enjoyed the freedom of voluntary regulation via its own Entertainment Software Rating Board ("ESRB").[65] According to its website, the ESRB is "a non-profit, self-regulatory body . . . [that] assigns computer and video game content ratings, enforces industry-adopted advertising guidelines, and helps ensure responsible online privacy practices for the interactive entertainment software industry."[66] However, the ESRB may have an economic incentive to rate games with a lower label than their content may merit because it receives funding from the video game industry, and the industry sells more games with low ratings than with adults-only ratings.[67] While the ESRB "encourages" game retailers to display information about its rating system, and to "refrain from renting or selling adults-only games to minors" without parental consent, children can and do purchase adults-only rated video games.[68]

Dissatisfied with the gap in the ESRB's enforcement of its rating system, the California legislature decided to intervene.[69] In 2005, the lawmak-

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65. *About ESRB*, ESRB.ORG, http://www.esrb.org/about/index.jsp (last visited Mar. 20, 2012) [hereinafter *About ESRB*] (stating that the ESRB has been in place since 1994). By comparison, the recording industry self-regulates via the Recording Industry Association of America's Parental Advisory Label Program. *See Parental Advisory*, RIAA.COM, http://www.riaa.com/toolsforparents.php?content_selector=parental_advisory (last visited Mar. 20, 2012)). The film industry self-regulates via the Motion Picture Association of America's Classification and Rating Administration. *See The Movie Rating System*, FILMRATINGS.COM, http://www.filmratings.com/filmRatings_Cara/downloads/pdf/about/cara_about_voluntary_movie_rating.pdf (last visited Mar. 20, 2012).

66. *About ESRB*, *supra* note 65.

67. FTC, A REPORT TO CONGRESS, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FIFTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 19 (Apr. 2007), *available at* http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf.

68. *Id.* A survey by the National Institute on Media and the Family found that seven out of ten of the 600 children surveyed reported playing M-rated games, and sixty-one percent owned an M-rated game. *Id.* at 19 (internal citation omitted); Brown v. Entm't Merchs. Ass'n., 131 S. Ct. 2729, 2740–41 (2011) (citing FTC, REPORT TO CONGRESS, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN 30 (Dec. 2009), *available at* http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf (stating twenty percent of those under age 17 are still able to buy M-rated games)).

69. *See* Peter Cohen, *E3: Calif. Bill Proposes Video Game Sales Restrictions*, MACWORLD.COM (May 16, 2005, 12:00 AM), http://www.macworld.com/article/44821/2005/05/gamebill.html.

ers attempted to craft a statute restricting the sale of violent video games to children that would pass constitutional muster.[70] On October 7th of that year, Governor Arnold Schwarzenegger signed into law Assembly Bill 1179, codified at California Civil Code sections 1746–1746.5 ("Act").[71]

In passing the Act, the legislature made the following findings:

> (a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.
> (b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.
> (c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.[72]

The Act prohibited the sale or rental of video games to minors that were "violent."[73] The Act defined a "violent video game" as:

> (d)(1) . . . a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:
> (A) Comes within all of the following descriptions:
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.
> (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is espe-

70. *Id.*

71. *See California's Violent Video Game Law on Hold*, LODI NEWS-SENTINEL, Dec. 23, 2005, at 5.

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

73. CAL. CIV. CODE § 1746.1(a) (West 2011).

> cially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.[74]

If a game satisfied the statute's definition of "violent," the Act imposed the requirement that on the front face of the game's package, there should "be . . . a solid white '18' outlined in black . . . not less than 2 inches by 2 inches in size."[75] Violators of the Act, with the exception of sales clerks, who were exempt from liability, would be subject to a civil penalty of up to $1,000.[76] The Act included an affirmative defense for a defendant who "demanded, was shown, and reasonably relied upon evidence that a purchaser or renter of a violent video game was not a minor or that [relied on a game's label when] the manufacturer failed to label a violent video game as required pursuant to section 1746.2."[77] It did not restrict a minor's parent, grandparent, aunt, uncle, or legal guardian from buying or renting any game on behalf of a minor.[78]

The Act's definition of violence can be analyzed by examining each section. Section (d)(1) created a threshold requirement similar to the statutes in *Ginsberg v. New York* and *Miller v. California*.[79] The Act limited the encompassed content to games where the player may kill, maim, dismember, or sexually assault the image of a human being.[80] In addition to restricting the breadth of material covered by the statute, a threshold requirement also serves a notice function, and in this case, was intended to provide video game dealers with fair notice of the types of games that would be proscribed by the statute.[81]

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

75. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 954 (9th Cir. 2009), *aff'd sub nom. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 [hereinafter *Video Software Dealers*] (citing CAL. CIV. CODE § 1746.2 (West 2011)).

76. CAL. CIV. CODE § 1746.3 (West 2011).

77. CIV. § 1746.1(b).

78. *Id.* § 1746.1(c).

79. Ginsberg v. New York, 390 U.S. 629, 647 app. A (1968) (upholding a statute where the threshold limitations encompassed visual and literary representations and sound recordings containing "nudity, sexual conduct or sadomasochistic abuse" harmful to minors, or "detailed verbal description or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse" harmful to minors when taken as a whole); Miller v. California, 413 U.S. 15, 25 (1973) (suggesting a threshold limitation covering content such as "[p]atently offensive representations or description of ultimate sexual acts," or "masturbation, excretory functions, and lewd exhibition of the genitals").

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

81. *See Miller*, 413 U.S. at 27 (stating that the threshold requirements in the *Miller* test provided fair notice to pornography dealers of what materials might warrant prosecution).

Subsection (A) is a variation on the *Miller* obscenity test,[82] as it incorporated the same three prongs, but was adjusted to target violence as opposed to obscenity.[83] The Act replaced the word "prurient" from the *Miller* test[84] with the words "deviant or morbid," and also added the words "of minors" or "for minors" to the end of each prong.[85] In subsection (B), the legislature attempted to bolster the strength of the statute and avoid a vagueness fatality by borrowing language from federal death penalty instructions to define key terms such as "cruel," "depraved," "heinous," and "serious physical abuse."[86] The Act also provided factors to determine when a video game killing is particularly gruesome, including "infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and the helplessness of the victim."[87] However, these attempts proved futile since the State conceded on appeal that subsection (B) was overbroad.[88]

The Act operated in the same manner as many other state statutes that were enacted to protect children[89]—restricting only the sale or rental of violent games to minors.[90] It did not limit minors' use or possession of any video games, nor did it limit video game manufacturers' ability to produce or sell any games to adults.[91] As such, the Act operated in the same manner as laws restricting the sale of cigarettes, guns, ammunition, and pornography to children.[92]

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82. *See id.* at 24 (citations omitted) (holding that expressive material will be deemed "obscene" if "(a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value").

83. *See* CIV. § 1746(d)(1)(A).

84. *See Miller*, 413 U.S. at 24 (restricting the scope of the statute to works that "appeal to the prurient interest in sex").

85. CIV. § 1746(d)(1)(A).

86. *Video Software Dealers*, 556 F.3d at 954.

87. CIV. § 1746(d)(2)–(3).

88. *See Video Software Dealers*, 556 F.3d at 956.

89. *See, e.g.*, CAL. PENAL CODE § 308 (West 2008) (prohibiting the sale or furnishing of tobacco or smoking paraphernalia to minors); CAL. PENAL CODE § 12280(a)(2) (West 2009) (prohibiting the transfer, lending, sale, or furnishing of any assault weapon to a minor); CAL. PENAL CODE § 30300 (West 2011) (prohibiting the sale or supply of ammunition to a person under 18); CAL. PENAL CODe §§ 313–313.1 (West 2008) (prohibiting the sale, rental, or distribution of pornography to minors).

90. CIV. § 1746.1(a).

91. *See id.* § 1746.1(c).

92. *See, e.g.*, PENAL § 308 (prohibiting the sale or furnishing of tobacco or smoking paraphernalia to minors); PENAL § 12280(a)(2) (prohibiting the transfer, lending, sale, of furnishing

B. Procedural History

Prior to the Act's implementation, Plaintiff-Appellees Video Software Dealers Association and Entertainment Software Association (collectively "Video Dealers") filed suit seeking declaratory relief by alleging that the Act violated 42 U.S.C. § 1983 and their First and Fourteenth Amendment rights.[93] The Video Dealers prevailed when the district court granted summary judgment in their favor, permanently enjoining enforcement of the Act.[94] The State appealed the district court's ruling.[95]

On appeal, the Ninth Circuit was faced with a question of first impression when the State argued that the court should lower the standard for review for a content-based law restricting the sale of violent video games to minors.[96] Creating an analogy to *Ginsberg*, the State contended that the Act, like the statute in *Ginsberg*, restricted the sale to minors of speech that remains protected for adults.[97] The State argued that in *Ginsberg*, the Supreme Court analyzed the statute at issue using rational basis, and that the same level of review should be applied in *Entertainment Merchants Ass'n*.[98]

The Ninth Circuit rejected the State's argument and declined to apply rational basis review to the Act.[99] Instead, the Ninth Circuit limited *Ginsberg*'s reach by finding it to be "specifically rooted in the Court's First Amendment obscenity jurisprudence, which relates [only] to non-protected sex-based expression—not violent content . . . ."[100] To the State's disappointment, the Ninth Circuit reviewed the Act as it would any other content-based restriction using strict scrutiny.[101] As a result, the Ninth Circuit found that the State's asserted interest, preventing "psychological or neurological harm to minors who play violent video games,"[102] was not a compelling interest.[103] In reaching this conclusion, the Ninth Circuit dismissed evidence showing any effect that violent video games may have on minors'

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of any assault weapon to a minor); PENAL § 30300 (prohibiting the sale or supply of ammunition to a person under 18); PENAL §§ 313–313.1 (prohibiting the sale, rental or distribution of pornography to minors).

93. *Video Software Dealers*, 556 F.3d at 955.

94. *Id.* at 955–56.

95. *Id.* at 956.

96. *Id.* at 957–58.

97. *Id.* at 958 (citing *Ginsberg*, 390 U.S. at 636).

98. *Id.* at 959 (citing *Ginsberg*, 390 U.S. at 641).

99. See *Video Software Dealers*, 556 F.3d at 960.

100. *Id.* at 959.

101. *Id.* at 960.

102. *Id.* at 954.

103. *Id.* at 964.

psychological health.[104] The court believed that much of the evidence was correlative in nature and that a direct causal link between hostile and aggressive behavior in children and violent video games had not been proven.[105]

Moreover, the Ninth Circuit concluded the State had not demonstrated that the Act was narrowly tailored to further the State's proposed interest and that the State had not shown that less restrictive means were not available.[106] Instead, the State focused only on the "most effective" means of furthering its interest—imposing a financial penalty on retailers that violated the Act—rather than the "least restrictive" means, such as the ESRB, parental controls on gaming consoles, or educational campaigns.[107]

IV. *BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION*

The State of California appealed the Ninth Circuit ruling, and the Supreme Court granted certiorari.[108] On the last day of its 2010–2011 term, the Court, in alliances inconsistent with its typical liberal-conservative division, produced a fractured opinion.[109] The majority opinion, written by Justice Scalia and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, found California Civil Code sections 1746–1746.5 ("Act") unconstitutional.[110] The Chief Justice joined a concurring opinion written by Justice Alito that held that the Act failed on vagueness grounds.[111] However, his opinion did not address the broader issue of whether a more narrowly crafted statute might pass constitutional muster.[112] In separate dissents, Justices Breyer and Thomas upheld the Act as constitutional.[113]

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104. *Id.*

105. *Video Software Dealers*, 556 F.3d at 963–64.

106. *Id.* at 965.

107. *Id.*

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

109. *See* Frank LoMonte, *When It Comes to Government Infringement of Speech, "No" Means "No"*, LEARNING NETWORK: TEACHING & LEARNING WITH THE N.Y. TIMES (Sept. 13, 2011, 3:04 PM), http://learning.blogs.nytimes.com/2011/09/13/the-constitution-and-you-video-games-and-the-first-amendment/?scp=1&sq=brown%20v.%20entertainment%20 merchants%20association&st=cse (noting that the Court's decisions in First Amendment cases often depart from the usual conservative/liberal dichotomy).

110. *See generally Entm't Merchs. Ass'n*, 131 S. Ct. at 2742.

111. *Id.* (Alito, J., concurring).

112. *Id.* at 2742–51 (Alito, J., concurring).

113. *Id.* at 2751–61 (Thomas, J., dissenting), 2761–71 (Breyer, J., dissenting).

A. Scalia's Majority Opinion

The majority examined the Act not as a restriction on minors' First Amendment rights, but as a restriction on an entirely new category of speech—violence.[114] Accordingly, the Court rejected the argument that *Ginsberg v. New York* was the appropriate case precedent, stating instead that *Stevens* governed the outcome.[115] Reiterating the reasoning of *United States v. Stevens*, the majority argued against creating a new category of unprotected speech simply because the legislature believes that certain speech harms society.[116] Justice Scalia emphasized the absence of a history or tradition limiting children's access to depictions of gore.[117] He cited *Grimm's Fairy Tales*, *Snow White and the Seven Dwarfs*, *Hansel and Gretel*, Homer's *Odyssey*, Dante's *Inferno*, and *Lord of the Flies* as examples of culturally endorsed, violence-rich content for children.[118] Further, he dismissed the state's argument that the "interactive" nature of video games was a unique attribute, stating that for decades, young readers have been able to make decisions that determine the plot lines in "choose-your-own-adventure" novels "by following instructions about which page to turn."[119] Like the Ninth Circuit, the Court applied strict scrutiny and decided that the statute failed to address a compelling state interest.[120] The Court stated that the industry's current system of voluntary regulation, the Entertainment Software Rating Board ("ESRB"), was sufficient to ensure that seriously violent games were kept out of the hands of children, and that any remaining enforcement gap was not a compelling interest.[121] The Court also found that the Act was not narrowly tailored, but was, instead, simultaneously underinclusive and overinclusive.[122] The Act was underinclusive because it did not regulate other forms of violent media (for example, "Saturday morning cartoons") in the face of psychological studies that have shown video games and other types of violent media produce similar effects.[123] On the other hand, the Act was overinclusive because all children

114. *See id.* at 2735.

115. *See id.* at 2734.

116. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2734 (citing United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)).

117. *Id.* at 2736.

118. *Id.* at 2736–37.

119. *Id.* at 2737–38.

120. *Id.* at 2741.

121. *Id.*

122. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2741–42.

123. *Id.* at 2739–40.

would be prohibited from buying the games covered by the Act, including children whose parents do not disapprove of the games.[124]

B. Alito's Concurrence

Justice Alito's concurrence argued that the Act failed on vagueness grounds.[125] Alito stated that despite similarities in language and structure, the Act had departed from the *Ginsberg* statute in several key respects.[126] First, he said the Act's threshold requirements, which limited the Act's applicability exclusively to games where a player may "kill[], maim[], dismember[], or sexually assault[] an image of a human being," did not furnish sufficient notice to game manufacturers.[127] Because similar violent depictions have long been regarded as suitable for the entertainment of minors, manufacturers may not be able to easily ascertain which violent depictions would be encompassed by the Act.[128]

For the same reason, Alito found the Act's three-prong test did not provide fair notice of what material would be covered.[129] He stated that the Act's use of the terms "deviant" and "morbid" required an assumption that there are "generally accepted standards regarding the suitability of violent entertainment for minors" and that such standards are well known.[130] Alito emphasized that the long history of obscenity regulations, which helped to shape community standards about sexual content, was absent for violent content.[131] Consequently, a state law regulating violent content could not be based on community norms.[132]

After invalidating the Act on vagueness grounds, Justice Alito responded to the majority opinion.[133] Unlike the majority, Alito did not assume that video games were the same as choose-your-own-adventure novels.[134] Alito noted a difference between passively reading a work of literature or watching television and actively killing video game charac-

124. *Id.* at 2741.
125. *Id.* at 2742 (Alito, J., concurring).
126. *Id.* at 2743 (Alito, J., concurring).
127. *Id.* at 2745 (Alito, J., concurring) (citing CAL. CIV. CODE § 1746(d)(1) (West 2009)).
128. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2745 (Alito, J., concurring).
129. *Id.* at 2746 (Alito, J., concurring).
130. *Id.* at 2745 (Alito, J., concurring).
131. *Id.* at 2746 (Alito, J., concurring).
132. *See id.* at 2745–46 (Alito, J., concurring).
133. *See id.* at 2746 (Alito, J., concurring).
134. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2750 n.19 (Alito, J., concurring).

ters.[135] He described several video games with antisocial themes that depicted extremely heinous violence,[136] and cautioned that the majority was too quick to conclude that the interactive nature of video games does not distinguish them from other forms of media.[137] Unlike the majority, he left open the possibility that some regulation of the sale of violent video games to children might be warranted.[138]

Alito also expressed concern that the Court's opinion would be viewed by the video game industry as a declaration that government regulation of minors' access to violent games would never be permissible.[139] He argued that the majority's firm endorsement of violent games for children would dissolve the industry's incentive to self-regulate since the ESRB was implemented largely to stave off government regulation.[140]

C. Thomas's Dissent

Justice Thomas wrote a dissenting opinion that closely examined the original intent of the Constitution's ratifiers with regard to the rights of children.[141] While he acknowledged that *Stevens* prohibited the creation of new categorical exclusions, he noted that the Court had not foreclosed the possibility that there may be additional exclusions "that have been historically unprotected and . . . not yet identified . . . in our case law."[142] He

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135. *See id.* at 2750 (Alito, J., concurring).

136. *See id.* at 2749–50 (Alito, J., concurring). Alito recounts one game "in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech." *Id.* at 2749 (Alito, J., concurring) (citing Kayla Webley, *"School Shooter" Video Game to Reenact Columbine, Virginia Tech Killings*, TIME.COM (Apr. 20, 2011), http://newsfeed.time.com/2011/04/20/school-shooter-video-game-reenacts-columbine-virginia-tech-killings/). He cites another game where the objective is "to rape a mother and her daughters . . . ." *Id.* at 2749–50 (Alito, J., concurring) (citing Kyung 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?_s=PM:WORLD). In another game, "players engage in 'ethnic cleansing' and can choose to gun down African-Americans, Latinos, or Jews." *Id.* at 2750 (Alito, J., concurring) (citing Julia Scheeres, *Games Elevate Hate to Next Level*, WIRED (Feb. 20, 2002), http://www.wired.com/culture/lifestyle/news/2002/02/50523. In yet another game, "players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository." *Entm't Merchs. Ass'n*, 131 S. Ct. at 2750 (Alito, J., concurring) (citing Clive Thompson, *A View to a Kill: JFK Reloaded Is Just Plain Creepy*, SLATE (Nov. 22, 2004), http://www.slate.com/id/2110034).

137. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2742 (Alito, J., concurring).

138. *See id.* at 2751 (Alito, J., concurring).

139. *See id.* at 2747 (Alito, J., concurring).

140. *See id.* at 2747–48 (Alito, J., concurring).

141. *See id.* at 2751–61 (Thomas, J., dissenting).

142. *Id.* at 2759 (Thomas, J., dissenting) (quoting *Stevens*, 130 S. Ct. at 1586).

concluded that the Founders did not intend for the "freedom of speech" to encompass a right to speak to children by bypassing their parents, or a right of children to access speech.[143] Instead, the founding generation believed that speech must be closely regulated by a minor's guardian,[144] as the country's newly free and democratic society necessitated that children were properly guided into virtuous citizens.[145] The majority dismissed Thomas's arguments for lack of legal support,[146] but under his originalist interpretive methodology, the Act posed no constitutional problem and should have been upheld.[147]

D. Breyer's Dissent

Like Justice Thomas, Justice Breyer argued that the Act should be upheld.[148] However, Breyer departed from Thomas's originalist analysis and instead relied on precedents from *Ginsberg* and *Prince v. Massachusetts*.[149] Unlike the majority, Breyer did not dismiss *Ginsberg* as dealing exclusively with obscenity.[150] He argued that the First Amendment does not apply to children in the same way that it applies to adults.[151] Breyer furthermore believed that the issue before the Court was whether the State of California could regulate certain speech to protect children, not whether the Court should create a new categorical exclusion for depictions of violence.[152]

Breyer accepted that the Act, functioning as a content-based restriction, must survive strict scrutiny.[153] Relying on subsequent interpretations of *Ginsberg*, Breyer found that "protecting children from harm" had previously been recognized as a compelling government interest,[154] and that the

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143. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2752 (Thomas, J., dissenting).

144. *See id.* (Thomas, J., dissenting).

145. *See id.* at 2755 (Thomas, J., dissenting).

146. *See id.* at 2736 n.3.

147. *See id.* at 2751 (Thomas, J., dissenting).

148. *See id.* at 2761 (Breyer, J., dissenting).

149. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2762 (Breyer, J., dissenting) (citing Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (holding that the government may enforce child labor laws over religious exercise claims by Jehovah's Witnesses whose children wish to participate in proselytizing and suggesting the standard of review for regulations of minors is lower than that for adults)).

150. *See id.* at 2766 (Breyer, J., dissenting).

151. *See id.* at 2762 (Breyer, J., dissenting) (citing Ginsberg v. New York, 390 U.S. 629, 638 n.6 (1968)).

152. *See id.* at 2762–63 (Breyer, J., dissenting).

153. *See id.* at 2765–66 (Breyer, J., dissenting).

154. *Id.* at 2766 (Breyer, J., dissenting) (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

evidence that California offered was sufficient to prove that violent video games negatively affect children.[155] He argued that, although experts debate the conclusions of the scientific studies in the record, where conflict exists, the Court should defer to the conclusion of an elected legislature.[156]

Furthermore, Breyer found that the Act was narrowly tailored.[157] Unlike the majority, he argued that the enforcement gaps under the ESRB and the ineffectiveness of console filtering for tech-savvy teenagers was troubling.[158] Instead, a monetary penalty on vendors would be the most reasonable means of preventing children's access to violent games.[159] Also, Breyer shared Justice Alito's concern that the majority opinion would diminish the industry's incentive to self-regulate.[160]

Like Justice Alito, Breyer compared the language of the statute in *Ginsberg* with the threshold requirements of the Act.[161] In Breyer's view, the Act did provide fair notice to game manufacturers of the content that would be forbidden for minors.[162] He argued that the words "kill," "maim," and "dismember" are no less clear than the word "nudity"[163] and that the remainder of the Act was virtually identical to the *Miller* test.[164] Similarly, he noted that the word "deviant" served the narrowing function of the Act no worse than the words "prurient" and "shameful."[165]

Justice Breyer conceded that both the *Miller* test and the *Ginsberg* statute lack perfect clarity,[166] but stated, "that fact reflects the difficulty of the Court's long search for words capable of protecting expression without depriving the State of a legitimate constitutional power to regulate."[167] Breyer also rejected Scalia's survey of violence in classical literature as evidence of a cultural approval of violent content for children by emphasizing the diverse depictions of sex in other literary classics.[168] Despite the

155. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2768 (Breyer, J., dissenting) (citations omitted).

156. *See id.* at 2769–70 (Breyer, J., dissenting).

157. *See id.* at 2765 (Breyer, J., dissenting) (citing Reno v. ACLU, 521 U.S. 844, 874–79 (1997)).

158. *See id.* at 2770–71 (Breyer, J., dissenting).

159. *See id.* at 2761 (Breyer, J., dissenting).

160. *See id.* at 2770–71 (Breyer, J., dissenting).

161. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2763–64 (Breyer, J., dissenting).

162. *Id.* at 2763 (Breyer, J., dissenting).

163. *Id.* at 2763–64 (Breyer, J., dissenting).

164. *See id.* at 2764 (Breyer, J., dissenting).

165. *See id.* at 2764 (Breyer, J., dissenting).

166. *Id.* (Breyer, J., dissenting).

167. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2764 (Breyer, J., dissenting).

168. *See id.* at 2765 (Breyer, J., dissenting) ("[O]ne can find in literature as many (if not more) descriptions of physical love as descriptions of violence. Indeed, sex 'has been a theme in

ubiquity of erotica in American culture, the Court has held that certain sexual depictions are unprotected for minors and has had no difficulty delineating erotic content that is protected for children from that which is not.[169] Based on this historical understanding, Breyer did not find a vagueness-related difference between the *Ginsberg* statute and the Act.[170] Breyer concluded by saying that "the First Amendment does not disable government from helping parents make . . . a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children."[171]

V. JUSTICE BREYER IS RIGHT—THE ACT IS CONSTITUTIONAL

Stare decisis demands that the Supreme Court uphold California Civil Code sections 1746–1746.5 ("Act"). Because the record is replete with evidence to support a conclusion that deviant, violent video games are more harmful to minors than other forms of violent media,[172] the government may act to protect the well being of children, a long established compelling interest.[173] Additionally, the statute is the least restrictive means to achieve this purpose because the industries' proposed alternatives to government regulation, such as the Entertainment Software Ratings Board ("ESRB") and parental controls on gaming systems, are insufficient.[174] Finally, slight differences in the statutory language of the Act and other laws defining obscenity that the Court has upheld do not compel the conclusion that the Act is fatally vague.[175]

A. The Government Has a Compelling Interest in Protecting Children

The Supreme Court has declared that, while minors have some constitutional rights in common with adults, those rights "are not automatically coextensive with the rights of adults."[176] As Justice Breyer sug-

art and literature throughout the ages.' For every Homer, there is a Titian. For every Dante, there is an Ovid. And for all the teenagers who have read the original versions of *Grimm's Fairy Tales*, I suspect there are those who know the story of *Lady Godiva*." (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 246 (2002))).

169. *See id.* at 2763 (Breyer, J., dissenting); *see generally Ginsberg*, 390 U.S. at 646–47.

170. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2765 (Breyer, J., dissenting).

171. *Id.* at 2771.

172. *See generally* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2771–79 app. (2011).

173. *See generally id.*

174. *See id.*

175. *See id.* at 2763 (Breyer, J., dissenting).

176. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (citation omitted).

gested, the appropriate question in *Entertainment Merchants Ass'n* is not whether or not there is a historical tradition of regulating violent material.[177] The question instead is whether the state can regulate the sale of certain content to minors.[178]

Case precedent, including *Ginsberg v. New York*, reveals that a state may regulate minors' access to certain types of expressive content for their protection.[179] According to precedent, there are two interests that warrant government intrusion into children's First Amendment rights: (1) aiding parents with their parental responsibilities and (2) the state's independent interest in children's well being.[180]

1. The Government's Interest in Aiding Parents

With the proliferation of electronic media, parents need more help from the state to monitor the media their children access. When *Ginsberg* was decided in 1968,[181] children were not specifically targeted by the porn industry to buy pornographic magazines.[182] Today, advertisements for violent video games frequently appear where children may see them.[183] Also, since both parents often work outside the home, children today are more likely than those in 1968 to be unsupervised after school hours.[184] Given these factors, it is reasonable to assume that parents need the government's aid to help monitor the video games their children play, and the Act only reinforces this pa-

177. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2763 (Breyer, J., dissenting).

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

179. *See* Ginsberg v. New York, 390 U.S. 629, 639–40 (1968).

180. *Id.*

181. *See id.*

182. Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why* Miller *Should Survive* Lawrence, 15 GEO. MASON L. REV. 611, 642–43 (2008).

183. *See Killzone Ads Pulled from Canadian Bus Stops*, GEEKOLOGIE (Mar. 13, 2009), http://www.geekologie.com/2009/03/killzone_ads_pulled_from_canad.php (describing an incident where a teacher emailed Sony Canada after seeing an ad for Killzone 2 in the bus shelter near his school). Also, as a relevant anecdote, a particularly graphic advertisement for Grand Theft Auto III covered the side of midrise building in mid-city Los Angeles for several months in 2009, and for several months in 2010 Los Angeles Metro buses displayed ads for Call of Duty: Black Ops, an M-rated violent video game. *See Call of Duty: Black Ops*, HILLARYCOE.COM, http://www.hillarycoe.com/812553/Call-of-Duty-Black-Ops (last visited Mar. 20, 2012).

184. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2767 (Breyer, J., dissenting) ("Today, 5.3 million grade-school-age children of working parents are routinely left home alone." (citing Dept. of Commerce, Census Bureau, *Who's Minding the Kids? Child Care Arrangements: Spring 2005/Summer 2006*, p.12 (2010), *available at* http://www.census.gov/prod/2010pubs/p70-121.pdf)).

rental authority. Conversely, parents who want their children to play violent games can simply purchase the games for their children themselves.[185]

Justice Scalia found that the Act interfered with the rights of children whose parents or guardians "think violent video games are a harmless pastime."[186] However, the right of a child to access certain types of speech without parental consent is not a right deeply entrenched in history or tradition, nor ever recognized by the Court.[187] Scalia dismissed completely the one fundamental right in *Entertainment Merchants Ass'n* that does stand on firm constitutional footing:[188] the fundamental right of parents to direct the upbringing of their children.[189] He did not agree that the Act aided in the discharge of parental authority and said that states should not regulate children's access to violent content "*just in case* their parents [may] disapprove of that speech."[190] However, this type of government regulation of children's access to speech is exactly what the Court upheld in *Ginsberg* and many other cases.[191] In fact, the Court has upheld numerous broadcasting restrictions, which affect adults and children alike, all in the name of protecting children from speech of which their parents may disapprove.[192]

2. The State's Independent Interest in the Well Being of Children

The majority did not even acknowledge the state's "independent interest in the well being of its youth."[193] However, as Justice Breyer pointed

185. *See* CAL. CIV. CODE § 1746.1(c) (West 2011).

186. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2742.

187. *See id.* at 2760 (Thomas, J., dissenting) ("[T]his Court has never held, until today, that 'the freedom of speech' includes a right to speak to minors (or a right of minors to access speech) without going through the minors' parents.").

188. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 637–38 (1979) ("[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors" and "the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter."); *see also* CHEMERINSKY, *supra* note 20, at 792 (stating that a fundamental right is one that the government may not abridge unless it meets the requirements of strict scrutiny).

189. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2740.

190. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2740.

190. *Id.*

191. *See Ginsberg*, 390 U.S. at 639; *see also, e.g.*, United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 203 (2003); Ashcroft v. ACLU, 535 U.S. 564 (2002); Denver Area Educ. Telecomms. Consortium, Inc., v. FCC, 518 U.S. 727 (1996); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

192. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978); *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. 727; Info. Providers Coal. for Def. of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

193. *See generally Entm't Merchs. Ass'n*, 131 S. Ct. at 2732–42.

out, the Court has previously stated that an immature and developing child may be less able than an adult to determine for him or herself what material is appropriate or not, and as such is vulnerable to "negative influences."[194] Accordingly, the state has an interest in intervening to prevent such obstacles to a child's development into an upstanding citizen.[195]

Justice Scalia impliedly found that the Act did not implicate a state interest in the well being of children because he concluded that violent video games pose no risk to children.[196] He dismissed the state's evidence demonstrating the effects of violent video games because a direct causal link had not been proven.[197] Justice Scalia stated that "[b]ecause [the State] bears the risk of uncertainty [when regulating speech based on content], ambiguous proof will not suffice" to survive strict scrutiny.[198]

Despite Justice Scalia's contention that strict scrutiny applies,[199] the traditional justification for strictly reviewing content-based restrictions—to prevent the government from extracting entire viewpoints or ideas from the public dialogue—does not manifest in this context.[200] The Act would not remove any viewpoint or subject matter from the public dialogue, only from the hands of children whose parents did not buy the violent video games for them.[201] Nevertheless, the Act would still survive even if the Court were to decide that a level of review higher than that applied in *Ginsberg* would be appropriate, such as an intermediate level of review or even strict scrutiny. The evidence demonstrates a potential for risk to children posed by deviant violent games,[202] and protecting them from that risk is a compelling interest.[203]

By the time the Supreme Court heard the oral arguments in the case, there had been over 1,000 independent studies of violent video games that reached various conclusions.[204] Although these studies did not definitely prove a direct causal link between violent videos games and harm to mi-

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194. *Id.* at 2767 (Breyer, J., dissenting) (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

195. *See id.* at 2767 (Breyer, J., dissenting).

196. *See id.* at 2739.

197. *See id.* at 2738–39.

198. *Id.* at 2739.

199. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2738.

199. *Id.*

200. *Id.* at 2747 (Alito, J., concurring), 2766 (Breyer, J., dissenting).

201. *See* CIV. § 1746.1(c).

202. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2771–79 app.

203. *See id.* at 2771 (Breyer, J., dissenting).

204. *See id.* at 2769 (Breyer, J., dissenting).

nors, the Court has held that a "legislature can make a predictive judgment that such a link exists, based on competing psychological studies."[205] The Supreme Court has held that "Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon . . . [such a] . . . complex and dynamic [issue] . . . . And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."[206] Accordingly, the California legislature was entitled to rely on this evidence in passing the Act.

Unlike the majority, Justice Breyer examined both the studies in the record and outside studies and found that even though a definitive consensus had not been reached, the leading professional pediatric and psychiatric organizations had declared a relationship, some even a causal relationship, between violent video games and negative behavioral and cognitive effects in children.[207] Justice Breyer conceded that since the Court lacked the expertise necessary to definitively decide which studies were accurate, it should defer to the legislature's judgment.[208]

While the Court in *Ginsberg* did not require a single shred of evidence to restrict minors' access to pornographic material,[209] the Court in *Entertainment Merchants Ass'n* has mandated that the California legislature prove causation, a virtually impossible evidentiary standard,[210] in order to regulate the sale of violent games to children.[211] This extraordinarily heavy evidentiary burden is not only contradictory to the Court's opinion in

205. *Id.* at 2738 (citing Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994)).

206. *Turner Broad. Sys.*, 512 U.S. at 665–66 (citing Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985)).

207. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2769 (Breyer, J., dissenting) (citing American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians, the American Psychiatric Association, and the American Psychological Association).

208. *Id.* at 2770 (Breyer, J., dissenting); *see also id.* at 2742 (Alito, J., concurring) ("[W]e should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.").

209. *See Ginsberg*, 390 U.S. at 642 (stating legislatures do not need to show scientific evidence).

210. *What is the difference between causation and correlation?*, STATS.ORG, http://stats.org/in_depth/faq/causation_correlation.htm (last visited Mar. 20, 2011) ("In general, it is extremely difficult to establish causality between two correlated events or observances. In contrast, there are many statistical tools to establish a statistically significant correlation."); *see also Entm't Merchs. Ass'n*, 131 S. Ct. at 2747 (Alito, J., concurring) (acknowledging that proving a causal link is a "formidable (and perhaps insurmountable) obstacle").

211. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 964 (9th Cir. 2009).

Ginsberg, but also represents a departure from other case precedents.[212] Typically, the Court will grant at least some measure of deference to the legislature when there is conflicting scientific evidence in an area requiring particular expertise.[213]

Thus, the double standard in the evidentiary burden required to regulate minors' exposure to violent content and to erotic materials has created what Justice Breyer referred to as "a serious anomaly in First Amendment law."[214]

He asked:

> [W]hat 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 he actively, but virtually, binds and gags the woman, then tortures and kills her? . . . .
>
> This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and *without literary, artistic, or similar justification*, can prove at least as, if not more, harmful to children as photographs of nudity.[215]

In the context of this case, the state had two compelling interests—facilitating the parental role and protecting the well being of children.[216] Both interests are firmly established in case precedent such that the gov-

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212. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 163 (2007); Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997); *Nat'l Ass'n of Radiation Survivors*, 473 U.S. at 330 n.12; Jones v. United States, 463 U.S. 354, 364–65 n.13, 370 (1983); Marshall v. United States, 414 U.S. 417, 427 (1974); Lambert v. Yellowley, 272 U.S. 581, 597 (1926); Collins v. Texas, 223 U.S. 288, 297–98 (1912); Jacobson v. Massachusetts, 197 U.S. 11, 30–31 (1905).

213. *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 51–52 (1986) (holding in a First Amendment challenge to a zoning ordinance that the city of Renton was not required to present evidence of alleged "secondary effects" of adult theaters in its own city, but instead could rely on studies conducted by other cities, as long as the evidence was reasonably relevant to the city's objectives); *see Marshall*, 414 U.S. at 427 ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad."); *see also Carhart*, 550 U.S. at 163–64 (deferring to legislative judgment of the necessity of a particular method of abortion and stating that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty[;] . . . [m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.").

214. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

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

216. *Id.* at 2767 (Breyer, J., dissenting).

ernment may regulate minors' access to violent video games to further those interests.[217]

B. The Act is Narrowly Tailored

The Act does not "burden more speech than necessary" to achieve the government's objective.[218] It functions in the same way as many other statutes enacted to protect children.[219] It punishes only the sale of certain violent video games to children—not the possession (by children or adults) of such games.[220] Even in the First Amendment context, similar statutes have been upheld as narrowly tailored.[221]

The majority stated that the Act was not narrowly tailored, but was both underinclusive and overinclusive.[222] Justice Scalia held the Act was overinclusive because all children would be prohibited from buying the games covered by the Act, not only those whose parents did not want them to have the games.[223] While the Court has repeatedly recognized an interest in aiding parental authority,[224] it has never recognized the right of a child to bypass that authority in order to access speech.[225] Accordingly, this feature of the Act does not make it "overinclusive." The majority held the Act is underinclusive because it regulated only video games and not other forms of violent media.[226] Despite Justice Scalia's claim that the effects of violent video games on children are small and indistinguishable

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217. *Id.* at 2771 (Breyer, J., dissenting); *see also Ginsberg*, 390 U.S. at 639.

218. *See* CAL. CIV. CODE § 1746(d)(1) (West 2011); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 765 (1994) (stating that a content neutral injunction should be evaluated by asking "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest").

219. *See, e.g.*, CAL. PENAL CODE § 308 (West 2008) (prohibiting the sale or furnishing of tobacco or smoking paraphernalia to minors); CAL. PENAL CODE § 12280(a)(2) (West 2009) (prohibiting the transfer, lending, sale, of furnishing of any assault weapon to a minor); CAL. PENAL CODE § 30300(a)(1) (West 2011) (prohibiting the sale or supply of ammunition to a person under 18); CAL. PENAL CODe §§ 313–313.1 (West 2008) (prohibiting the sale, rental or distribution of pornography to minors).

220. *See* CIV. § 1746.1(a), (c).

221. *See, e.g.*, *Ginsberg*, 390 U.S. at 631–33 (affirming the lower court's decision that a statute prohibiting the sale of obscene materials to minors under the age of seventeen is constitutional).

222. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2741–42.

223. *Id.*

224. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944); *Ginsberg*, 390 U.S. at 639–40.

225. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2760 (Thomas, J., dissenting).

226. *Id.* at 2742.

from other forms of violent media,[227] evidence suggests that violent video games do have a greater affect on children than other forms of violent media.[228] Accordingly, the Court would be justified in creating another narrow carve-out, much like that created in *Ginsberg*,[229] which regulates only the sale of interactive violent media.

C. There Is No Less Restrictive Alternative

Precedent holds that a legislature may regulate protected speech when children are involved and if the means chosen are the least restrictive.[230] Studies show that the ESRB has fallen short in limiting children's access to deviant violent video games and that government intervention is needed.[231] Like the ESRB, parental controls are an insufficient alternative because technologically savvy children can run a Google search and learn how to bypass them.[232] Only a monetary penalty would truly incentivize the indus-

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227. *Id.* at 2739.

228. *See id.* at 2768–70 (Breyer, J., dissenting) (providing examples of studies that show how the effects of video games are different from traditional passive media forms) (citing Brad J. Bushman & Rowell Huesmann, *Aggression*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 851 (S.T. Fiske et al. eds., 5th ed. 2010) (stating that video games stimulate more aggression because "'[p]eople learn better when they are actively involved,' players are 'more likely to identify with violent characters,' and 'violent games directly reward violent behavior.'"); Hanneke Polman, Bram Orobio de Castro, & Marcel A.G. van Aken, *Experimental Study of the Differential Effects of Playing Versus Watching Violent Video Games on Children's Aggressive Behavior*, *in* 34 AGGRESSIVE BEHAVIOR 256–64 (2008) ("[F]inding greater aggression resulting from playing, as opposed to watching" violent game); Craig A. Anderson, Douglas A. Gentile, & Katherine E. Buckley, VIOLENT VIDEO GAME EFFECTS ON CHILDREN AND ADOLESCENTS: THEORY, RESEARCH, AND PUBLIC POLICY 136–37 (2007) (citing three studies finding greater effects from games as opposed to television)); *see also Entm't Merchs. Ass'n*, 131 S. Ct. at 2769 (stating that statements of expert public health associations agree that interactive games can be more harmful than "passive media" like television).

229. *Ginsberg*, 390 U.S. at. 636–38.

230. *Sable Commc'ns of Cal.*, 492 U.S. at 126 ("[T]he Government may . . . 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.")

231. *See* Cohen, *supra* note 69; *see also* FTC, A REPORT TO CONGRESS, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FIFTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 19 (Apr. 2007), *available at* http://www.ftc.gov/reports /violence/070412MarketingViolentEChildren.pdf (reporting that a survey by the National Institute on Media and the Family found that seven of ten of the 600 children surveyed reported playing M-rated games, and sixty-one percent owned an M-rated game) (citations omitted).

232. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2770 (Breyer, J., dissenting) (citing hockey14822, *How to Bypass Parental Controls on the Xbox 360*, YOUTUBE (Oct. 16, 2009), http://www.youtube.com/watch?v=CFIVfVmvN6k (type "how to bypass parental controls on Xbox 360" in the search box on youtube.com, click search, then select the first link shown).

try to refrain from selling the objectionable content to minors. In dicta, Justice Brennan stated in *Ginsberg* that society's interest in protecting children justifies any "*reasonable* regulation of the sale of material to them."[233] The Act is not only "*reasonable*," but it is also the "least restrictive" means.

D. The Act is Not Vague

The Act is based upon the *Miller* framework, some variation of which the Court has endorsed for over fifty years.[234] The only substantive difference between the *Miller* test and the Act is that the Act replaces the word "prurient" with the words "deviant or morbid," and the threshold requirements are directed towards depictions of "killing and maiming" rather than hardcore sex.[235] Justice Alito claimed that these differences made the Act fatally vague.[236] He argued that a long history of obscenity prohibition has shaped community norms to provide meaning to the phrase "patently offensive" with regard to sexually expressive material.[237] He found that because there was no similar regulation of violent content, there is a total lack of consensus about what violent content would be considered "low-value" by community standards.[238]

Difficulty in defining "'accepted norms' about depictions of sex" led the Court to adopt the "community standards" tool in the first place.[239] In *Roth v. United States*, the Supreme Court noted that many of the Court's decisions acknowledge that the terms defining obscenity are not precise.[240]

Furthermore, the Court stated that imprecise statutory terms alone do not violate due process; instead, "all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .'"[241]

Whether or not there is a cultural endorsement of violent content for children, the word "prurient"[242] is not somehow empowered with greater

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233. *Ginsberg*, 390 U.S. at 640 (citing People v. Kahan, 206 N.E.2d 333, 334 (1965)).

234. *See generally* Roth v. United States, 354 U.S. 476 (1957); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413 (1966); Miller v. California, 413 U.S. 15 (1973).

235. *Compare* CIV. § 1746(d)(1), *with Miller*, 413 U.S. at 24.

236. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2744–46 (Alito, J., concurring).

237. *Id.* at 2744 (Alito, J., concurring).

238. *Id.* at 2746 (Alito, J., concurring) (citing Edwards & Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1523 (1995)).

239. *Id.* at 2765 (Breyer, J., dissenting).

240. *See Roth*, 354 U.S. at 491.

241. *Id.* (quoting United States v. Petrillo, 332 U.S. 1, 7–8 (1947)).

242. *See Ginsburg*, 390 U.S. at 646–47.

capabilities of precision than the words "deviant" or "morbid."[243] Community standards operate identically in both instances to delineate what expressive sexual material is and is not obscene and what violent depictions are or are not appropriate for children.[244] As Justice Breyer pointed out, even games depicting the most heinous violence will still be protected, as long as they possess at least one of the redeeming attributes described in the third prong.[245] For games lacking any value whatsoever, a community could reach a consensus about which of those games were appropriate for children just as easily as it could reach a consensus about what hardcore sexual content was patently offensive to adults.[246] Accordingly, the Act's definition gives fair notice to video game manufacturers.[247]

VI. THE ENTERTAINMENT MERCHANTS ASSOCIATION DID NOT HAVE STANDING TO ASSERT THE RIGHT AT STAKE

Brown v. Entertainment Merchants Ass'n should not have been heard in a United States court because the Entertainment Merchants Association ("EMA") lacked standing to assert the rights of third parties not before the Court. In *Entertainment Merchants Ass'n*, no child appeared before the Court, yet the Court ruled that California Civil Code sections 1746–1746.5 ("Act") were unconstitutional "because [the Act] abridges the First Amendment rights of young people . . . ."[248] The Act specifically provided that a parent or guardian could purchase the games for their child.[249] With this understanding, the only right at issue is the right of a minor to purchase violent video games without parental consent. As Justice Thomas pointed out, no similar right of a child to circumvent parental authority in this manner has ever been recognized as a constitutional right.[250]

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243. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2763–64 (Breyer, J., dissenting).

244. *Id.* at 2764 (Breyer, J., dissenting).

245. *Id.* (stating that the third prongs of the *Miller* test and of the Act consider whether the work, when taken as a whole, is utterly without serious literary, artistic, political, or scientific value).

246. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 693 (3d Cir. 1991) (noting that when evaluating obscenity, the court balances inter alia whether the material offends contemporary community standards).

247. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2764 (Breyer, J., dissenting).

248. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011).

249. *See* CAL. CIV. CODE § 1746.1(c) (West 2011).

250. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2760 (Thomas, J., dissenting) ("[T]his Court has never held, until today, that 'the freedom of speech' includes a right to speak to minors (or a right of minors to access speech) without going through the minors' parents.").

None of the four opinions in the case addressed the issue of standing.[251] However, if the Court had conducted a standing analysis, it would have reached the conclusion that the EMA did not have standing in this case. Assuming *arguendo*, that there is a constitutional right to be free from parental control and that it is a right that could be pursued on *jus tertii* standing, the EMA still does not meet the requirements for *jus tertii* standing to assert this right on behalf of its child customers. Consequently, the Court based its ruling on the First Amendment rights of a party not before the Court.

Article III of the Constitution limits federal jurisdiction to "cases or controversies" where (1) the plaintiff has suffered or imminently will suffer an injury; (2) the injury is fairly traceable to conduct of the defendant; and (3) a court is able to redress the plaintiff's alleged injury.[252] In addition to these restrictions, courts may also employ the doctrine of standing as a prudential restraint when deciding whether or not to hear a case.[253] Generally, a plaintiff must assert his or her own rights in a matter in order to have standing.[254] On occasion, courts will make exceptions to the standing requirement and allow *jus tertii* standing, where third parties assert the rights of others if certain conditions are satisfied.[255] The Court considers three primary factors in granting *jus tertii* standing: (1) whether or not there is an injury in fact to a party; (2) whether or not a close relationship exists between the litigant and the third party; and (3) whether some obstacle impedes the third party from asserting his or her own rights in the matter.[256]

In *Entertainment Merchants Ass'n*, the EMA did satisfy the Article III requirements for standing to assert their own rights since the Act's financial penalty would have been imposed on them.[257] However, the Court did not base its ruling on the rights of the EMA but instead, impliedly conferred upon them *jus tertii* standing to assert the rights of minors.[258] However, the potential for injury arising from the financial penalty would have provided

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251. *See generally id.*

252. *See, e.g.*, Ne. Fl. Contractors v. Jacksonville, 508 U.S. 656, 663–64 (1993).

253. CHEMERINSKY, *supra* note 20, at 50 n.1.

254. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975).

255. Robert Allen Sedler, Comment, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 600 (1962).

256. *See, e.g.*, Caplin & Drysdale v. United States, 491 U.S. 617, 623 n.3 (1989); Campbell v. Louisiana, 523 U.S. 392, 396–400 (1998) (determining that a white defendant has standing to assert the equal protection rights of African Americans who were excluded from jury service).

257. *See* CAL. CIV. CODE § 1746.3 (West 2011).

258. *Entm't Merchs. Ass'n*, 131 U.S. at 2742 (ruling the Act unconstitutional "because it abridges the First Amendment rights of young people," not because of any possible violation of the Video Dealers' rights to manufacture or sell video games).

a basis for the EMA to meet the first *jus tertii* requirement of an "injury in fact." But, EMA is unable to meet the second and third requirements of *jus tertii* standing.

Based on the facts of the case, there was no "close relationship" between the EMA and the children whose First Amendment rights they assert.[259] The only possible basis for any relationship between the litigant and the third party would be that of a vendor/vendee relationship.[260] The Court has recognized that vendors may have standing to challenge acts that regulate buyers or the relationship of buyers and sellers.[261] While the Court has generally been inconsistent in allowing or disallowing third party standing for minors,[262] the Court had never allowed a vendor to assert the standing of children customers until *Entertainment Merchants Ass'n.*[263] The closest precedent for such a decision would be *Craig v. Boren*.[264]

In *Craig*, the Court allowed an alcohol vendor to have *jus tertii* standing to assert the Fourteenth Amendment rights of men between the ages of 18 and 21 who challenged the constitutionality of a state statute prohibiting the sale of beer to males under age 21 and females under age 18.[265] The petitioner was under 21 at the time the suit was filed, but since he was over 21 at the time the Court heard the case, the Court found his standing was moot.[266] Because the defendant in *Craig* waived the *jus tertii* issue, the Court's standing analysis does not provide precedent for future cases.[267]

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259. *See generally Entm't Merchs. Ass'n*, 131 U.S. 2729; *see also* Singleton v. Wulff, 428 U.S. 106, 115 (1976) (explaining that the litigant and third party must have the same or parallel interests to establish a "close relationship").

260. *See generally Entm't Merchs. Ass'n*, 131 U.S. 2729; *see also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9.3, at 742 (Richard D. Freer & Edward H. Cooper eds., 3d ed.) ("Vendors are routinely accorded standing to assert the constitutional rights of customers and prospective customers.").

261. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 194 (1976); Carey v. Population Servs. Int'l, 431 U.S. 678, 683–84 (1977) (conferring standing on the basis of the sensitive nature of the right at stake (personal privacy with regard to reproductive health) in addition to the vendor/vendee relationship).

262. *Compare* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (denying a father standing on behalf of his daughter to challenge the addition of the words "under God" in the Pledge of Allegiance as violating the Establishment Clause), *with* Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53 (1st Cir. 2004) (allowing a physician and three health centers to have standing to assert the rights of minors to challenge a statute requiring parental notification in order for a minor to obtain an abortion).

263. The Court did not address the issue of standing in *Ginsberg*. *See generally* Ginsberg v. New York, 390 U.S. 629 (1968).

264. *Craig*, 429 U.S. 190.

265. *Id.* at 192–93.

266. *Id.* at 192.

267. *Id.* at 193.

Nevertheless, it allowed the case to proceed on the vendor's claim of *jus tertii* standing, in part because the men affected by the law would not be able to challenge the law because they would be "of age" by the time a final decision was reached, making the constitutional violation capable of repeat, yet evading judicial review.[268] Since the petitioners' standing would always be moot by the time the final decision was reached, the Court decided instead to confer standing upon the vendor to avoid repetitive and time-consuming litigation.[269]

Had the standing issue not been waived in *Craig*, it may have provided sound precedent to confer standing in this case, except for one key difference—the petitioners in *Craig* were not minors.[270] While the relationship between a customer and vendor may be sufficiently close in some instances, the Court has never allowed a vendor to assert the rights of children against their parents, or even the rights of children as their own, without any alternative basis for finding a "close relationship."[271] *Jus tertii* standing to assert the rights of children requires a particularly close relationship and has been recognized for parents,[272] schools and teachers,[273] and medical providers,[274] but not vendors.

Because the Court has allowed parents to assert standing on behalf of their children when the state attempts to interfere with the parent/child relationship,[275] better precedent for *Entertainment Merchants Ass'n* would be *Pierce v. Society of Sisters*.[276] In *Society of Sisters*, a parochial school was allowed third-party standing to assert the rights of parents to challenge a compulsory public school attendance law.[277] The petitioners alleged that the law abridged the rights of parents to direct the upbringing of their chil-

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268. *Id.* at 193–94.

269. *Id.*

270. *Craig*, 429 U.S. at 192.

271. *See* Eisenstadt v. Baird, 405 U.S. 438, 445 (1972) (conferring standing not solely on basis of the vendor/vendee relationship, but also because Baird was a medical provider and "an advocate of the rights of persons to obtain contraceptives").

272. *See, e.g.*, Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 840–42 (1977).

273. *See, e.g.*, Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist., 638 F.2d 858, 863 (1982).

274. *See, e.g.*, *Planned Parenthood of N. New Eng.*, 390 F.3d 53; *Population Servs. Int'l.*, 431 U.S. 678.

275. *See, e.g.*, *Org. of Foster Families for Equality and Reform*, 431 U.S. at 840–42 (holding foster parents could not only raise their own rights, but could also raise the rights of their foster children).

276. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

277. *Id.* at 519.

dren.[278] The Court agreed and ruled that the statute created an unreasonable interference with constitutionally recognized parental rights.[279] By allowing the EMA to assert the rights of children against their parents, the Supreme Court essentially holds that the vendor/vendee relationship trumps the parent/child relationship.[280]

The Court has also ruled that where a child's parents fail to fulfill their parental role for whatever reason, the child is subject to the control of the state as *parens patriae*.[281] Based on this precedent, if anyone appearing before the Court in *Entertainment Merchants Ass'n* had a relationship with the third party sufficient to confer *jus tertii* standing, it would have been the State. Contrarily, the EMA has a purely economic interest that has nothing to do with the well being of children, and which may even present a conflict of interest. Accordingly, the Court should have denied the EMA *jus tertii* standing and the case should not have been heard.

VII. CONCLUSION

Given the Court's full endorsement of violent content for minors, the concomitant anomaly it has created in minors' First Amendment jurisprudence was not lost on Justices Alito and Roberts,[282] or Justice Breyer,[283] and it was certainly not lost on Jon Stewart either. Following the Court's decision, he played a clip on The Daily Show from the game Mortal Kombat that showed two men holding a woman by each of her legs and slowly ripping her in half from her groin through the top of her skull—blood and organs pouring out of her chest and abdominal cavities onto the floor.[284] He gibed satirically at the audience: "The Supreme Court has ruled 7-2 that the state of California has no interest in restricting the sale of this game to children. But, if while being disemboweled, this woman were to suffer, perhaps, a nip-slip . . . regulate away!"[285]

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278. *Id.*

279. *Id.* at 534–35.

280. *Entm't Merchs. Ass'n*, 131 U.S. at 2742.

281. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[The] rights of parenthood [are not] beyond limitation."); Schall v. Martin, 467 U.S. 253, 265 (1984) (stating that the state may act to guard its independent interest in the well being of children).

282. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2747 (2011) (Alito, J., concurring).

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

284. *The Daily Show With Jon Stewart: Episode #16086* (Comedy Central television broadcast June 30, 2011), *available at* http://gamepolitics.com/2011/07/01/daily-show-takes-scotus-video-game-ruling.

285. *Id.*

Given the 5-4 split of the Court on the ultimate issue of the state's ability to regulate the sale of violent content for children, a subsequent challenge to a more narrowly crafted statute, supported by stronger evidence of a causative relationship between violent video games and negative cognitive and behavioral effects on children, might win a majority of the Court's support.