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Garrett Mathew-James Mott

GAME OVER FOR REGULATING VIOLENT VIDEO GAMES? THE EFFECT OF *BROWN V. ENTERTAINMENT MERCHANTS ASS'N* ON FIRST AMENDMENT JURISPRUDENCE

*Garrett Mathew-James Mott**

As early as 1976, video games started to incorporate aspects of violence, such as striking enemies with a vehicle or using explosives to destroy a structure. Still, initially, courts were reluctant to assign the same constitutional protections to video games that they had granted to other protected media like motion pictures and written and musical works. But as technology progressed, courts, too, matured, becoming more open to the notion that video games should be a form of protected expression. Yet, some courts lost sight of the First Amendment's vision and reconsidered their earlier decisions in which they upheld the constitutionality of video game expression. This prompted the U.S. Supreme Court, in the first case that dealt with the First Amendment's protection of video games, to remedy nearly four decades of confusion and unify the law in Brown v. Entertainment Merchants Ass'n. *After the Court's decision in* Brown*, it is safe to assume that, at society's current level of technological progress, courts are likely to hold that children's use of video games is expressive conduct that the First Amendment protects. But if technology becomes "too advanced" and mechanics such as virtual reality, three-dimensional space, and infrared movement simulators become the technological norm, the Court may have to reexamine its reasoning in* Brown *before too long.*

* J.D. Candidate, May 2012, Loyola Law School Los Angeles; B.A., University of Southern California. I would like to thank Aaron Caplan and John Nockleby, Professors of Law at Loyola Law School Los Angeles, for their invaluable guidance, mentorship, insight, and patience; Tiffany Lee, Blythe Golay, and Calista Wu for their friendship and support; Stephen Dorn for his thoughtful critiques; and the editors and staff of the *Loyola of Los Angeles Law Review* for their diligent efforts toward publishing this Comment. I would also like to thank my family and, of course, my beautiful wife Lauren for her love and encouragement.

> *"Prose is an art form, movies and acting in general are art forms, so is music, painting, graphics, sculpture, and so on. Some might even consider classic games like chess to be an art form. Video games use elements of all of these to create something new. Why wouldn't video games be an art form?"*
>
> —Sam Lake, *Max Payne* writer[1]

I. INTRODUCTION

On June 27, 2011, the U.S. Supreme Court decided *Brown v. Entertainment Merchants Ass'n*,[2] in which it addressed the extent to which the First Amendment protects *violent video games*. While news coverage surrounding controversial violent video games has recently increased, the debate is decades old.[3] As early as 1976, with the advent of *Death Race*—a coin-operated video-arcade game that was inspired by the cult film *Death Race 2000*[4]—video games incorporated aspects of violence into the gameplay mechanic—a set of defined rules or objectives that are intended to produce an enjoyable game-playing experience[5]—such as striking enemies with a vehicle or using explosives to destroy a structure.[6] In *Death Race*, players controlled an on-screen vehicle with a steering wheel and accelerator pedal, and the objective was to crush creatures who were fleeing the vehicle.[7] When they were struck, the creatures screamed

1. BOYS & GIRLS CLUBS OF AM., GAMETECH PROGRAM GUIDE 3 (2009), *available at* http://www.myclubmylife.com/Arts_Tech/Pages/gametech_program-guide.pdf; *see* Keith Stuart, *Alan Wake Writer Sam Lake on the Creative Process: Part One*, THE GUARDIAN (May 4, 2010, 2:30 AM), http://www.guardian.co.uk/technology/gamesblog/2010/apr/30/alan-wake-remedy-sam-lake.

2. 131 S. Ct. 2729 (2011).

3. Shankar Vedantam, *It's a Duel: How Do Violent Video Games Affect Kids?*, NAT'L PUB. RADIO (July 7, 2011), http://www.npr.org/2011/07/07/137660609/its-a-duel-how-do-violent-video-games-affect-kids; *see infra* notes 21–23 and accompanying text.

4. *See* April MacIntyre, *Roger Corman's Cult Classics: Sneak Peek of New DVD Collection*, MONSTERS & CRITICS (Apr. 30 2010, 2:58 AM), http://www.monstersandcritics.com/dvd/news/article_1552138.php/Roger-Corman-s-Cult-Classics-Sneak-Peek-of-new-DVD-collection.

5. CARLO FABRICATORE, GAMEPLAY AND GAME MECHANICS DESIGN: A KEY TO QUALITY IN VIDEOGAMES 7 (2007), *available at* http://www.oecd.org/dataoecd/44/17/39414829.pdf.

6. DEATH RACE (Exidy 1976).

7. *Death Race*, THE INT'L ARCADE MUSEUM, http://www.arcade-museum.com/game_detail.php?game_id=7541 (last visited Feb. 25, 2012).

and vanished; in their places appeared two-dimensional tombstones, which players had to avoid.[8] While the visual effects were blocky and primitive,[9] *Death Race* set off a media firestorm.[10] The National Safety Council called the game "sick" and "morbid," and *60 Minutes* evaluated the game's psychological impact on children.[11]

With the proliferation of read-only memory (ROM) cartridge systems (in the 1970s), 32-bit microchips (in the 1980s), and liquid crystal displays (in the 1990s), representations of violence in video games became increasingly realistic.[12] Current video games have started to mimic human expression through artificial intelligence.[13] Actuality has become so intertwined with fantasy that some users have described the violent video game experience as "some of the most exciting, angry and satisfying action you'll ever have."[14] Academic studies have attempted to causally connect violent video games and the rate of violence associated with players.[15]

Therefore, legislators have sought to impose regulatory controls on the sale of violent video games. Illinois, Louisiana, and Michigan

8. *Id.*

9. For a more quantitative illustration, a standard arcade game operates with a central processing unit (CPU) clock speed of three megahertz. The PlayStation 3, a seventh-generation video game console, operates at more than one-thousand times the CPU clock speed of an arcade game, at 3.2 gigahertz. *See Sony's Technology Highlights: Cell High-Performance Processor*, SONY GLOBAL, http://www.sony.net/SonyInfo/technology/technology/theme/cell_01.html (last visited Feb. 25, 2012).

10. Chris Kohler, *How Protests Against Games Cause Them to Sell More Copies*, WIRED (Oct. 30, 2007, 3:40 PM), http://www.wired.com/gamelife/2007/10/how-protests-ag/.

11. Brian Deuel, DEATH RACE—A MORBID TALE: A RECOLLECTION OF STORIES FROM GAMING'S PAST, http://atari.vg-network.com/arc101_1.html (last visited July 25, 2011).

12. HOW IT WORKS: SCIENCE AND TECHNOLOGY 952 (Marshall Cavendish ed., 3d ed. 2003); Mingxia Gu, *The History of Liquid Crystal Display (LCD)*, KENT STATE UNIV., http://www.personal.kent.edu/~mgu/LCD/lcd_history.htm (last visited Feb. 25, 2012); *History of Microprocessors*, COMPUTER NOSTALGIA, http://www.computernostalgia.net/articles/Historyof Microprocessors.htm (last visited Feb. 25, 2012).

13. *See* Julian M. Bucknall, *How Artificial Intelligence Mimics the Human Brain*, TECHRADAR (Dec. 27, 2009), http://www.techradar.com/news/world-of-tech/how-artificial-intelligence-mimics-the-human-brain-657976.

14. Tom Ivan, *Crysis 2 Review*, COMPUTERANDVIDEOGAMES.COM, http://www.computer andvideogames.com/292287/crysis-2-review-9/10-in-oxm/ (last visited July 25, 2011).

15. Craig A. Anderson & Nicholas L. Carnagey, *Causal Effects of Violent Sports Video Games on Aggression: Is It Competitiveness or Violent Content?* 45 J. EXPERIMENTAL SOC. PSYCHOL. 731 (2009). In 2009, eighteen-year-old Devin Moore, apparently influenced by *Grand Theft Auto*, wrestled away a police officer's firearm; shot him, his partner, and the emergency dispatcher in the head; and drove away in a stolen police cruiser. Rebecca Leung, *Can a Video Game Lead to Murder?*, CBSNEWS (Feb. 11, 2009, 7:33 PM), http://www.cbsnews.com/ stories/2005/03/04/60minutes/main678261.shtml.

have enacted laws that were intended to prohibit minors from obtaining violent video games; however, courts ultimately invalidated the laws, holding that the laws imposed unconstitutional restraints on free speech.[16] *Brown* arose from the California legislature's attempt to draft legislation that it believed would withstand judicial scrutiny.[17] The legislature was wrong.

This Comment chronicles the major court cases that involved the rejection and the eventual acceptance of video games as a form of expressive conduct before it turns an analytical eye toward the Court's decision in *Brown*, its first major foray into the world of video games. Part II provides an overview of the cases that preceded *Brown* in which courts typically aligned themselves with municipalities and reasoned that video games were nothing more than "technologically advanced pinball machines."[18] But Part II continues to show that, as technology progressed, the courts became more open to the proposition that video games are a form of protected expression.[19] Thus, Part III details the Court's decision in *Brown*, and Part IV predicts the impact that the case will have on future litigation in this context.

II. FIRST AMENDMENT JURISPRUDENCE ON VIDEO GAMES BEFORE *BROWN*

"Congress shall make no law . . . abridging the freedom of speech . . . ."[20] Before *Brown*, Courts infrequently encountered laws that regulated violent video games, and their decisions differed substantially.[21] This inconsistency was due in part to the Supreme

16. 720 ILL. COMP. STAT. § 5/12A-15 (2005), *invalidated by* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); LA. REV. STAT. § 14:91.14 (2006), *invalidated by* Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006); MICH. COMP. LAWS § 722.671, *invalidated by* Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 655–56 (E.D. Mich. 2006).

17. Doug Mataconis, *Supreme Court: Government Cannot Ban Violent Video Games for Children*, OUTSIDE THE BELTWAY (June 27, 2011), http://www.outsidethebeltway.com/supreme-court-government-cannot-ban-violent-video-games-for-children/.

18. Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605, 610 (Mass. 1983).

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

20. U.S. CONST. amend. I.

21. *Compare Kendrick*, 244 F.3d at 576–77 (holding that "[c]hildren have First Amendment rights" to play video games), *and* Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279

Court's silence on the subject.[22] In the 1980s and 1990s, courts consistently refused to apply First Amendment protection to video games.[23] Following Judge Posner's opinion in *American Amusement Machine Ass'n v. Kendrick*[24] and the 2002 decision *Wilson v. Midway Games, Inc.*,[25] courts began protecting video games because of their communicative and expressive elements.[26] This ultimately led to *Brown*.

A. First Generation Video Games (1980s): A "Far Cry" from Protected Expression

In the 1980s, courts first encountered cases that dealt with regulations on video games that were different from regulations on other media.[27] Those foundational cases, including *America's Best Family Showplace Corp. v. City of New York*,[28] concluded that early video games were incapable of expression and thus not protected by the First Amendment.[29] While those cases permitted regulations on public video arcades[30] because of their size, their hours of operation, or the nature of their clientele, the underlying analysis was clear: video games' lack of sophisticated aural, visual, or kinesthetic experiences were barriers to First Amendment protection. One example of a video game that apparently lacked the expressive conduct that the courts required was the iconic yet rudimentary video

(D. Colo. 2002) (holding that video games are categorically protected by the First Amendment, eschewing the standard in *Wilson*), *with* Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (holding that whether video games are protected under the First Amendment should be determined by case-by-case analysis), *and* Am.'s Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (holding that video games "cannot be fairly characterized as a form of speech protected by the First Amendment").

22. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 958 n.11 (9th Cir. 2009) (remarking that the "Supreme Court has not specifically commented on whether video games contain expressive content protected under the First Amendment").

23. *See, e.g.*, *Showplace*, 536 F. Supp. 170; *Marshfield*, 450 N.E.2d 605.

24. 244 F.3d 572 (7th Cir. 2001).

25. 198 F. Supp. 2d 167 (D. Conn. 2002).

26. *See Kendrick*, 244 F.3d at 577; *Wilson*, 198 F. Supp. 2d at 180–81.

27. *See* Malden Amusement Co. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983); *Showplace*, 536 F. Supp. at 174; City of Warren v. Walker, 354 N.W.2d 312, 317 (Mich. Ct. App. 1984); City of St. Louis v. Kiely, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983).

28. 536 F. Supp. 170 (E.D.N.Y. 1982).

29. Thomas Henry Rousse, *Electronic Games and the First Amendment: Free Speech Protection for New Media in the 21st Century*, 4 NW. INTERDISC. L. REV. 173, 211 (2011).

30. The general distinction between "arcades" and video games became important later in *Brown* because of the private home setting in which players now play video games.

game *PONG*.[31] In that game, the player used a joystick to maneuver a stick to hit a small circle across a two-dimensional screen.[32]

In 1982, the *Showplace* court held that, in a case where the operator of an arcade establishment violated a city ordinance, for entertainment to be accorded First Amendment protection, the entertainment must contain an element of information or a communicated idea.[33] Thus, the court determined that while motion pictures communicated a range of ideas by affecting viewers' attitudes and behavior, video games were mere entertainment.[34]

One year later, the Supreme Judicial Court of Massachusetts, in *Caswell v. Licensing Commission*,[35] continued to apply the precedent in *Showplace*, holding that, where a prospective proprietor was prevented from building a coin-operated arcade, "any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential" and video games thus did not deserve First Amendment protection.[36]

Yet there was hope that courts would soon protect video games as expressive speech.[37] The court in *Marshfield Family Skateland, Inc. v. Town of Marshfield*,[38] which followed *Showplace* and denied First Amendment protection to one game, stated in dicta: "We recognize that in the future video games which contain sufficient communicative and expressive elements may be created."[39] Still, for

31. PONG (Atari 1972).

32. *PONG*, THE INT'L ARCADE MUSEUM, http://www.arcade-museum.com/game_detail.php?game_id=9074 (last visited Feb. 25, 2012).

33. *Showplace*, 536 F. Supp. at 173–74 (citing Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557–58 (1975) (holding that a prohibition on the staging of an allegedly obscene musical was an improper prior restraint)) ("[A] video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element.").

34. Two other cases from Massachusetts confronted the same issues that were posed in *Showplace*: *Caswell v. Licensing Commission for Brockton*, 444 N.E.2d 922 (Mass. 1983), and *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605 (Mass. 1983). The courts in those two cases concluded that the operators of arcade entertainment centers failed to demonstrate that video games "import sufficient communicative, expressive, or informative elements to constitute expression protected under the First Amendment." *Caswell*, 444 N.E.2d at 926–27. Video games were simply "technologically advanced pinball machines." *Marshfield*, 450 N.E.2d at 610.

35. 444 N.E.2d 922 (Mass. 1983).

36. *Id.* at 927.

37. *See Marshfield*, 450 N.E.2d at 609–10.

38. 450 N.E.2d 605 (Mass. 1983).

39. *Id.* at 609–10.

nearly a decade, courts remained convinced that video games did not feature expressive conduct that was sufficient to entitle them to First Amendment protection.

B. The "Half-Life" Period (1990s)

The 1990s included substantial innovation in video game platform design, graphics, and gameplay mechanics, when the industry designed its most prolific, profitable, and playful genres, including first-person shooter and real-time strategy games.[40] At the same time, an evolution emerged in video game jurisprudence and in video games generally.[41] The technological revolution began to chip away at the court rulings of the 1980s.

In 1991, the Seventh Circuit in *Rothner v. City of Chicago*,[42] after "confess[ing] an inability to comprehend fully the video game of the 1990s,"[43] held that an ordinance that prevented minors from playing video games on school days was a legitimate time, place, and manner restriction.[44] The court did, however, assume for the sake of argument that video games were in fact protected by the First Amendment.[45] Thus, the dicta in *Marshfield* materialized in *Rothner*,

40. Edwin Evans-Thirlwell, *Feature: The History of First-Person Shooters*, VIDEO GAMES DAILY (Oct. 26, 2009), http://videogamesdaily.com/features/200910/feature-the-history-of-first-person-shooters/; TDA, *The History of Real Time Strategy, Part 1: The Past Is Prologue*, GAMEREPLAYS.ORG (May 9, 2008, 6:38 AM), http://www.gamereplays.org/portals.php?show=page&name=the_history_of_real_time_strategy_pt1&st=1. The first-person shooter refers to a genre of video games that are played from the point of view of the character and that generally feature the use of weapons like firearms to defeat enemies. Jay Gamon, *Geek Trivia: First Shots Fired*, TECHREPUBLIC (May 24, 2005, 7:00 AM), http://www.techrepublic.com/article/geek-trivia-first-shots-fired/5710539. On the other hand, the real-time strategy game is characterized by resource accumulation and base building, and its primary mode of play is in real time (in contrast to turn-based play). *See* Dan Adams, *The State of the RTS*, IGN (Apr. 7, 2006), http://pc.ign.com/articles/700/700747p1.html.

41. *E.g.*, HEROES OF MIGHT AND MAGIC (3DO 1995) (requiring awareness of enemy forces); SIMCITY (Maxis 1989) (requiring mathematical computation to build cities). *Compare* Rothner v. City of Chicago, 929 F.2d 297, 303 (7th Cir. 1991) (assuming, but not deciding, that video games implicate the First Amendment), *with* Am.'s Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (reasoning that video games do not implicate the First Amendment).

42. 929 F.2d 297 (7th Cir. 1991).

43. *Id.* at 303.

44. *Id.* at 303–04.

45. *Id.*

which became the first decision that hinted at the possibility of extending First Amendment protection to video games.[46]

C. "Counter-Strike" by the Seventh Circuit (Early 2000s)

Another decade passed before courts finally granted video games constitutional protection.[47] During that time, the industry created some of its most recognizable products,[48] many of which featured modifications and customizable content that allowed players to creatively express their own personalities through the games.[49]

In 2001, the Seventh Circuit revisited its decision in *Rothner* in *Kendrick*, where an Indianapolis ordinance limited minors' access to violent video games.[50] Judge Posner analogized violent video games to violent literature such as *Dracula*, or the novels of Edgar Allen Poe, which children are often required to read, and found the ordinance unconstitutional in violation of the First Amendment.[51]

Yet, Judge Posner—in a similar manner to Justice Alito's warning in *Brown*[52]—cautioned the victorious video game manufacturers[53] that technological advances alone do not confer First Amendment protection; it is the aggregation of technological progress *and* the storytelling mechanism of a video game that entitles it to First Amendment protection.[54]

46. *See* Neil G. Hood, Note, *The First Amendment and New Media: Video Games as Protected Speech and the Implications for the Right of Publicity*, 52 B.C. L. REV. 617, 630 (2011).

47. *See, e.g.*, Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

48. Chris Kohler, *Review:* Ocarina of Time 3D *Reminds Us Why* Zelda *Is Best Game Ever*, WIRED (June 17, 2011, 1:00 PM), http://www.wired.com/gamelife/2011/06/ocarina-of-time-3d-review/.

49. *See, e.g.*, THE SIMS (Maxis 2000) (allowing players to control an avatar, resembling a person of their own creation, with no finite objective; instead, the player is encouraged to control the avatar to make choices in an interactive environment).

50. *Kendrick*, 244 F.3d at 573.

51. *Id.* at 577–78 ("Self-defense, protection of others, dread of the 'undead,'" fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young. . . . We are in the world of kids' popular culture. But it is not lightly to be suppressed.").

52. *See infra* discussion Part III.B.2.

53. *Kendrick*, 244 F.3d at 579–80.

54. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2736–38 (2011); *Kendrick*, 244 F.3d at 579–80.

D. Out of "Crysis": Expanding First Amendment Protections for Video Games (Late 2000s)

By the late 2000s, video game technology had reached a new level of sophistication. Massively multiplayer online role-playing games[55] became a dominant genre during the mid to late 2000s.[56] Voice over internet protocols let players verbally communicate in real time with other players.[57] Players assumed the unique attributes of the characters that they controlled, and they spoke in the languages of their characters.[58] The rise of this fully immersive, socialized community influenced the next decade of court decisions.

Wilson v. Midway Games, Inc.[59] arose out of a tragedy in which a teenager killed his friend with a kitchen knife.[60] The mother of the deceased young man claimed that the killer was so addicted to the video game *Mortal Kombat*[61] that he believed that he was a character in the game.[62] Citing *Kendrick* and distinguishing *Showplace*, a federal court in Connecticut concluded that video games "that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment."[63] The court highlighted *Kendrick*'s requirement that examinations of games be performed on a case-by-case basis.[64]

Conversely, some courts used a more categorical approach. For example, in *Sanders v. Acclaim Entertainment, Inc.*,[65] a case involving the victims of the tragic 1999 shooting at Columbine High School, a federal court in Colorado supported the Seventh Circuit's

55. *What Is an MMORPG?*, THEGAMEGURU, http://thegameguru.me/games-ive-played/what-is-an-mmorpg/ (last visited Feb. 29, 2012).

56. Brian D. Ng & Peter Wiemer-Hastings, *Addiction to the Internet and Online Gaming*, 8 CYBERPSYCHOLOGY & BEHAV., no. 2, 2005, at 110–13.

57. Laura Milligan, *17 Ways VoIP Has Improved My Gaming Experience*, VOIP NEWS (Jan. 30, 2008), http://www.voip-news.com/feature/17-ways-voip-improves-gaming-013008/.

58. ANDREW ROLLINGS & ERNEST ADAMS, ANDREW ROLLINGS AND ERNEST ADAMS ON GAME DESIGN 347 (2003).

59. 198 F. Supp. 2d 167 (D. Conn. 2002).

60. *Id.* at 169.

61. MORTAL KOMBAT (Midway Games 1992).

62. *Wilson*, 198 F. Supp. 2d at 170.

63. *Id.* at 180–81. (citing Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).

64. *Id.* at 181.

65. 188 F. Supp. 2d 1264 (D. Colo. 2002).

conclusion in *Kendrick* but held that video games are a type of expression that may receive First Amendment protection.[66]

The Connecticut and Colorado decisions highlighted courts' inconsistent articulations of the constitutional standards for video games. Thus, the Supreme Court finally acted to remedy nearly four decades of confusion when it heard a case from California.

III. *BROWN V. ENTERTAINMENT MERCHANTS ASS'N*

The Supreme Court's opinion in *Brown* arrived after the aforementioned winding legal and technological history and at the end of a more immediate legislative and judicial path. Thus, this Part first recounts the actions of the California legislature and the lower federal courts before it discusses the Supreme Court's decision.

A. "Terminated": AB 1179, the District Court's Holding, and the Ninth Circuit's Opinion

Brown began when, to counteract increasing public complaints and legislative attempts to regulate the video game industry, the Entertainment Software Association (ESA) instituted a voluntary, self-regulated body that classifies a particular game's content on a scale from "Early Childhood" to "Adults Only."[67] The body, the Entertainment Software Rating Board (ESRB), consults with a wide range of child development and academic experts to create a parent-informed ratings system that allows consumers to make educated decisions when they select video games.[68]

But California State Senator Leland Yee, who earned a Ph.D. in child psychology, was not convinced of the ESRB's voluntary program's effectiveness and argued that the government should restrict violent video game sales.[69] The spark that he needed came on June 9, 2005, when the ESRB changed the rating of the popular

66. *Id.* at 1279.

67. *Frequently Asked Questions*, ENTM'T SOFTWARE RATING BD., http://www.esrb.org/ratings/faq.jsp#1 (last visited July 25, 2011).

68. Mike Snider, *Game Industry Put Focus on Ratings Years Ago*, USA TODAY (June 28, 2011, 8:25 PM), http://www.usatoday.com/tech/gaming/2011-06-28-video-game-ratings_n.htm.

69. Ben Fritz, *Lawmaker Defends Law Banning Sale of Violent Video Games to Minors*, L.A. TIMES, Apr. 29, 2010, at B3.

game *Grand Theft Auto: San Andreas*[70] from "Mature" to "Adults Only" because of the game's explicit sexual content, thus causing retailers to return the game to its developer.[71] Certain that state regulation was necessary, Senator Yee said that "playing violent games leads to increased physiological arousal, increased aggressive thoughts, increased aggressive feelings, increased aggressive behaviors, and decreased pro-social or helping behaviors."[72]

Subsequently, the California legislature passed a bill that Senator Yee had sponsored: California Assembly Bill (AB) 1179 (the "Act"),[73] which banned the sale of violent video games to minors and required stricter labels than those in the ESRB's ratings system are.[74] The ESA and the Video Software Dealers Association (VSDA)—now known as the Entertainment Merchants Association (EMA)—feared that the law would restrict the sale of titles that the ESRB otherwise labeled as appropriate for younger players.[75]

Almost immediately,[76] the VSDA filed suit in federal district court against various state officials (the "Defendants"), requesting an injunction based on the ground that the Act was facially unconstitutional.[77] The Defendants argued that a court should analyze the Act under *Ginsberg v. New York*[78]—the 1968 case in which the Supreme Court found that a New York law that restricted the sale of any sexually explicit picture to a minor was well within the state's power to protect minors, even though such a restriction of sales to adults would have been invalid[79]—and uphold the law.[80] But

70. GRAND THEFT AUTO: SAN ANDREAS (Rockstar North 2005).

71. Jane Pinckard, *ESRB Revokes "M" Rating for GTA*, 1UP.COM (July 20, 2005), http://www.1up.com/news/esrb-revokes-rating-gta.

72. Bill Analysis AB 1179, 2005 S., Reg. Sess., at 6 (Cal. 2005) (statements by Sen. Leland Yee).

73. AB 1179, 2005 S., Reg. Sess. (Cal. 2005) (codified as CAL. CIV. CODE § 1746(d) (West 2009)).

74. CIV. § 1746(d), *invalidated by* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

75. *See* Gene Hoffman, *How the Wrong Decision in* Schwarzenegger v. EMA *Could Cripple Video Game Innovation*, XCONOMY (Sept. 27, 2010), http://www.xconomy.com/san-francisco/2010/09/27/how-the-wrong-decision-in-schwarzenegger-v-ema-could-cripple-video-game-innovation/.

76. Complaint at 1, Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (No. 05-4188).

77. *Schwarzenegger*, 401 F. Supp. 2d at 1039.

78. 390 U.S. 629 (1968).

79. *Id.* at 637, 639–40.

the district court was unwilling to accept the analogy to *Ginsberg* because "[n]either the Supreme Court nor the Ninth Circuit has ever extended the *Ginsberg* analysis beyond sexually-obscene material," and it granted the injunction.[81] The Ninth Circuit affirmed after subjecting the statute to strict scrutiny and holding it to be presumptively invalid as a content-based restriction on speech.[82]

B. The Supreme Court's Opinion: A "Call of Duty"

In a case that produced a majority opinion, a concurrence, and two dissents, *Brown* saw the Justices in allegiance on one important issue: as a distinctive form of expressive conduct, video games, they agreed, fall within the ambit of the First Amendment.[83] From there, however, the differently reasoned opinions evinced a more divided Court than the 7–2 outcome suggests.[84]

1. The Majority Opinion: Protecting a New Form of Media

In Justice Scalia's majority opinion, the Court unequivocally held that video games qualify for First Amendment protection.[85] Like books, plays, and movies, video games "communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)."[86] The majority reasoned that the basic principles of

80. Governor and Attorney General's Motion for Summary Judgment at 1–2, *Schwarzenegger*, 401 F. Supp. 2d 1034 (No. 05-4188).

81. *Schwarzenegger*, 401 F. Supp. 2d at 1045.

82. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 958 (9th Cir. 2009) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.")) (noting that strict scrutiny requires the demonstration (1) that the state has a compelling interest and (2) that the regulation is the least restrictive means for achieving that interest), *aff'd*, 131 S. Ct. 2729 (2011).

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

84. *Brown v. EMA: Too Good to Be True for Video Games?*, LAW360 (Aug. 8, 2011, 1:46 PM), http://www.law360.com/articles/261385/brown-v-ema-too-good-to-be-true-for-video-games-.

85. *Brown*, 131 S. Ct. at 2733–42.

86. *Id.* at 2733.

the First Amendment "do not vary" with a new and different communication medium.[87]

The majority, echoing Judge Posner's argument in *Kendrick*, reminded the Defendants that the books American children read "contain no shortage of gore."[88] Indeed, in the classic tale of *Hansel and Gretel*, two children are taken captive by a witch who seeks to eat them.[89] Hansel and Gretel escape by shoving the witch in an oven, leaving her to scream in pain while she "burned to ashes."[90] Likewise, high-school reading lists contain epic tales that are filled with bloody encounters: Homer's Odysseus blinds the Cyclops by grinding out his eye with a heated stake;[91] in William Golding's *Lord of the Flies*, a child named Piggy is savagely beaten *by other children* while they are marooned on an island.[92]

The majority's reliance on present-day video games' literary and thematic devices appears to preclude the application of *Brown* to first-generation video games like *PONG* and thus did not necessarily abrogate *Showplace*, *Caswell*, and *Marshfield*. Rudimentary games like *PONG* do not have the immersive storyline that most current games possess, let alone a basic plot or setting.[93]

The majority made this assertion clear by referring to Judge Posner's discussion of interactive literature in *Kendrick*: "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own."[94] In *PONG*, the player controls a few movements of an unidentified

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

88. *Id.* at 2736.

89. THE BROTHERS GRIMM, HANSEL AND GRETEL (1812).

90. *Id.*

91. *Brown*, 131 S. Ct. at 2736 (citing HOMER, THE ODYSSEY 125 (S. Butcher & A. Lang trans.) (1909) ("Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar.")).

92. *Id.* at 2737 (citing WILLIAM GOLDING, LORD OF THE FLIES 208–09 (1997)).

93. William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, *in* THE GAME BEHIND THE VIDEO GAME 113–14 (2011), *available at* http://cmcs.rutgers.edu/GBVG_Proceedings_v1.pdf. Indeed, the setting in *PONG* is a black and white, two-dimensional tennis court, and the objective is to simply win more points than your opponent. *PONG*, *supra* note 32.

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

character.[95] Now, in *Crysis 2*, for example, the player assumes the role of a Force Recon Marine, codenamed "Alcatraz," whose mission is to infiltrate a destroyed New York City that has been evacuated due to an alien infestation.[96] The majority's holding that California's law was unconstitutional because even violent video games are entitled to First Amendment protection suggests that the technological progression—from the eight-bit, two-dimensional simulator in *PONG* to the dynamic, expressive medium in *Crysis 2*—was on the Court's mind.

2. The Concurring Opinion: Justice Alito's Warning

The gory and inhumane methods of killing that are present in some video games troubled the concurrence, which Justice Alito authored (and Chief Justice Roberts joined).[97] Still, he sided with the EMA: "Although the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands."[98] Justice Alito was particularly concerned with the vague definition of "violent video games."[99] He wrote that the Act, while it adhered to the standards in *Ginsberg*, relied on "undefined societal or community standards."[100] On the other hand, in *Ginsberg*, "hard core" sexual depictions were considered "offensive representations" in the community.[101] Thus, Justice Alito contrasted obscenity with violence: society "has long regarded many depictions of killing and maiming as suitable features of popular entertainment."[102]

But the most important aspect of Justice Alito's opinion was his reference to technological advances in video game mechanics. Courts, after all, have struggled to understand rapidly evolving technology even while they have continued to take pride in careful

95. *See supra* text accompanying note 32.

96. A. Garner, *Crysis 2 Review*, VGAMERNEWS (Oct. 5, 2011), http://vgamernews.com/articles/786/crysis-2-review/.

97. *Brown*, 131 S. Ct. at 2749 (Alito, J., concurring).

98. *Id.* at 2742.

99. *Id.* at 2743.

100. *Id.* at 2745.

101. *Id.* at 2744.

102. *Id.* at 2745.

examination and dispute resolution. Justice Alito recognized this dichotomy and cautioned future courts that will decide these issues:

> In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar.[103]

In the final sentence of his opinion, Justice Alito wrote, "If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us[,]" thus leaving open the possibility that it may not be "game over" for all violent-video-game legislation.[104] But Alito did not point to a particular type of legislation that would have been appropriate, forcing legislators to speculate about how to properly draft a violent-video-game statute.

3. The Dissenting Opinions: Protecting Children

The dissenting opinions came in two distinct flavors: the first, written by Justice Thomas, was grounded in the argument that First Amendment rights are not extended to speech that is aimed at children;[105] the second, written by Justice Breyer, maintained that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[106]

Citing *Chaplinsky v. New Hampshire*,[107] Justice Thomas reasoned that the First Amendment does not extend to all speech: "The practices and beliefs of the founding generation establish that

103. *Id.* at 2742.

104. *Id.* at 2751.

105. *Id.* at 2752 (Thomas, J., dissenting).

106. *Id.* at 2762 (Breyer, J., dissenting) (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

107. 315 U.S. 568 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."); *id.* at 571–72.

'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians."[108] Justice Thomas cited minimum-age labor laws, voting laws, military service, motor-vehicle laws, gambling laws, and jury duty as evidence of society's age-based restrictions on minors.[109]

Justice Thomas expounded on his assertion that the founders did not intend for children to have free access to speech:

> The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents.[110]

In contrast, Justice Breyer's opinion was emphatically broad: citing *Prince v. Massachusetts*[111] and *Ginsberg* he reasoned that

> [t]his Court has held that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults." And the "regulatio[n] of communication addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults."[112]

Like Justice Alito, Justice Breyer contended that the majority opinion was too dismissive of the potential harm that games can cause

108. *Brown*, 131 S. Ct. at 2751 (Thomas, J., dissenting). Interestingly enough, Justice Thomas, in another dissenting opinion, accepted the same view that the First Amendment does not protect minor speech. In *Morse v. Frederick*, a student held an "offensive" sign outside of his high school. 551 U.S. 393, 401 (2007). There, Justice Thomas concluded that "the First Amendment, as originally understood, does not protect student speech in public schools." *Id.* at 410–11. If parents do not like it, "they can send their children to private schools or homeschool them; or they can simply move." *Id.* at 420. *See also* Aaron Caplan, *Visions of Public Education in* Morse v. Frederick, J. EDUC. CONTROVERSY, Winter 2008 (discussing the educational philosophy of the Supreme Court in *Morse*).

109. *Brown*, 131 S. Ct. at 2760 (Thomas, J., dissenting).

110. *Id.* at 2752.

111. 321 U.S. 158 (1944) (holding that the government has broad authority to regulate the actions and the treatment of children; parental authority is not absolute).

112. *Brown*, 131 S. Ct. at 2762 (Breyer, J., dissenting) (citations omitted) (quoting Ginsberg v. New York, 390 U.S. 629, 638 n.6 (1968); *Prince*, 321 U.S. at 170).

minors.[113] Justice Breyer believed that where the majority found only correlation, he found causation in many of the scientific studies.[114]

Justice Breyer also worried that the majority opinion "reduce[d] the industry's incentive to police itself" by using the ESRB.[115] Breyer's foremost concern was that the majority's opinion modified Court precedent:

> [T]oday the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?[116]

The four opinions, while they offered a diverse and unique perspective on the history of video game jurisprudence, collectively forecast the possibility that video games may not be protected by the First Amendment in the future.

IV. ANALYSIS: THE IMPACT OF *BROWN V. ENTERTAINMENT MERCHANTS ASS'N*

After the decision, Senator Yee, who initiated the eight-year litigation in *Brown*, harshly disapproved of the Court's holding, claiming that "[i]t is simply wrong that the video game industry can be allowed to put their profit margins over the rights of parents and the well-being of children."[117] He planned to review the dissents in *Brown* "in hope of finding a way to reintroduce the law in a way it

113. *Id.* at 2762–63.

114. *Id.* at 2768 ("Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period.").

115. *Id.* at 2770.

116. *Id.* at 2771.

117. Brett Molina, *Author of Violent Video Games Law Blasts Supreme Court Decision*, GAMEHUNTERS (June 27, 2011, 2:39 PM), http://content.usatoday.com/communities/gamehunters/post/2011/06/author-of-violent-video-games-law-blasts-supreme-court-decision/1; *U.S. Supreme Court Puts Corporate Interests Before Protecting Kids*, SENATOR LELAND YEE, PH.D. (June 27, 2011), http://dist08.casen.govoffice.com/index.asp?Type=B_PR&SEC={EFA496BC-EDC8-4E38-9CC7-68D37AC03DFF}&DE={25F3EB3A-3F71-4121-9107-1D6B06F65872}.

would be constitutional."[118] Indeed, the question now is whether California, or any state for that matter, can ever draft a violent-video-game law that would satisfy the Court.

A. The Legal Effects of the Decision and Predictions of the Future

In the wake of *Brown*, it is safe to assume that video games will not be classified among the unprotected categories of speech (such as obscenity, fighting words, or incitement).[119] Also, after the decision, courts are likely to hold that the First Amendment protects expression that is directed at children (despite Justice Thomas's disagreement).[120] However, categorical protection under the First Amendment is not the end of the inquiry. The five majority Justices found that the Act failed the test for strict scrutiny because of the conflicting studies regarding harmful effects, the over- and under-inclusiveness of the statute, and the less-restrictive alternative that the industry's voluntary rating system offered.[121] Yet Alito's warning that the Court should proceed with caution when it applies rigid constitutional principles to rapidly evolving technology is a reminder of the Court's tendency to reverse its decisions following a change in society with the passage of time.[122]

Indeed, the 2010s are beginning to usher in a new era, called the "eighth generation," of technological advancements in video gaming:

118. Chris Pereira, *Senator Yee Hopes to Reintroduce Videogame Violence Law*, 1UP (June 27, 2011), http://www.1up.com/news/senator-yee-hopes-reintroduce-videogame-violence-law.

119. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

120. *Brown v. EMA: Too Good to Be True for Video Games?*, *supra* note 84.

121. *See supra* Part III.B.1.

122. *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (quantitatively researching the ideological shifts of Supreme Court Justices over time). *Compare* Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers* and finding a constitutional protection of sexual privacy), *with* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that state sodomy laws were constitutional); *compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (questioning the right of a woman to terminate her pregnancy in the "early stages"), *with* Roe v. Wade, 410 U.S. 113 (1973) (establishing a right of privacy that extends to a woman's right to choose whether to abort her child); *compare* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overruling *Plessy* and finding racial segregation in schools unconstitutional), *with* Plessy v. Fergusson, 163 U.S. 537 (1896) (upholding the constitutionality of state laws requiring racial segregation).

gaming without controllers,[123] glasses-free 3-D,[124] and virtual reality.[125] If virtual reality, three-dimensional space, and infrared movement simulators are used instead of joysticks and buttons, the Court may have to reexamine its reasoning in *Brown* in the future. Surely, Homer's Cyclops and Golding's Piggy do not actually come to life on the page; they, like characters in all written works, are visually constructed using the imagination of the human brain. But with virtual reality and an increasingly developed artificial intelligence, users will *see*, in three dimensions, the corpses of the people they kill in the games they play.[126] Users will *smell* the odors of the battlefield and *hear* the screams of their victims in pristine quality.[127] Users will *move* the instruments of war through remote muscle sensors, using their hands as killing machines instead of simply mashing buttons on a controller.[128] This is not the backdrop that the majority had when it made its decision. But it may have been the backdrop for Justice Alito, who seemed astutely aware that in the future video game technology may merge fantasy with reality.[129]

On the other hand, it is possible that Alito's warning sounds a premature alarm. In 1994, the world was introduced to the so-called first-person shooter game with *Doom*,[130] and it was shocked by the game's gore, satanic imagery, and blood.[131] But by the late 2000s,

123. Some consoles have motion sensing input devices that allow users to control and interact with the video game by using only gestures or spoken commands. *See Xbox Unveils Entertainment Experiences That Put Everyone Center Stage*, MICROSOFT NEWS CENTER (June 1, 2009), http://www.microsoft.com/presspass/press/2009/jun09/06-01e3pr.mspx.

124. Glasses-free 3-D, or more accurately "autostereoscopy," is a method of displaying stereoscopic vision (binocular perception with 3-D depth) without the use of special glasses. *See* 2 Dr. Nick Holliman, *3D Display Systems*, *in* HANDBOOK OF OPTOELECTRONICS (John P. Dakin & Robert G. W. Brown eds., Taylor & Francis 2006), *available at* http://www.dur.ac.uk/n.s.holliman/Presentations/3dv3-0.pdf.

125. David Derbyshire, *Revealed: The Headset That Will Mimic All Five Senses and Make the Virtual World as Convincing as Real Life*, DAILY MAIL (Mar. 5, 2009), http://www.dailymail.co.uk/sciencetech/article-1159206/The-headset-mimic-senses-make-virtual-world-convincing-real-life.html.

126. *See id.*

127. *See id.*

128. *See* Jeremy Hsu, *The Future of Video Game Input: Muscle Sensors*, LIVE SCI. (Oct. 28, 2009), http://www.livescience.com/5836-future-video-game-input-muscle-sensors.html.

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

130. DOOM (id Software 1994).

131. Winda Benedetti, *From "Doom" to "Rage," First-Person Shooters Grow Up*, MSNBC (Oct. 5, 2011), http://ingame.msnbc.msn.com/_news/2011/10/05/8163502-from-doom-to-rage-first-person-shooters-grow-up.

Battlefield: Bad Company 2,[132] *Call of Duty: Black Ops*,[133] and *Left 4 Dead 2*[134] made *Doom*'s "violence" look like the cartoonish violence of *Super Mario Bros*.[135] "When you look at it now it's almost kind of silly," remarked Tim Willits, the creator of *Doom*, during a 2011 interview.[136] Just as the controversy of *Death Race* in 1976 faded and the shock that *Doom* created in 1994 is now largely forgotten, the passage of time may eventually desensitize society to technology's new representations of violence in video gaming.

Justice Alito's warning can be juxtaposed with the dicta in *Showplace*[137]: one sounded the trumpet for the charge of video games into the protected speech arena, and the other ominously predicted their eventual demise. Thus, video games, as they are presently created, are protected, but video games that are either too primitive or too "advanced" may ultimately not be protected.

B. The "Vehicle" of First Amendment Protection for Video Games

Because video game technology (animation and programming) and the ways in which video game technology is used to enhance the game-play mechanic (use of a joystick, motion-sensitive pad, or infrared control) have evolved over time, courts' views regarding certain types of restrictions on video games have changed from critical to accepting and may eventually return to critical.[138] Along the way, thematic questions have developed[139]: whether historical restrictions on rudimentary video games are not abrogated following *Brown*; whether a video game's animation and programming are more or less instrumental in a court's evaluation of the video game than human interaction with the video game is; and whether the

132. BATTLEFIELD: BAD COMPANY 2 (Electronic Arts 2010).
133. CALL OF DUTY: BLACK OPS (Treyarch 2010).
134. LEFT 4 DEAD 2 (Valve 2009).
135. SUPER MARIO BROS. (Nintendo 1985).
136. Benedetti, *supra* note 131.
137. *See supra* text accompanying notes 102–104.
138. *Compare* Am.'s Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982) (concluding that early video games were incapable of expression and not protected under the First Amendment), *with* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (holding that modern video games were capable of sufficient expression to be protected under the First Amendment).
139. *See supra* Parts II, III.

video game is a continuous system of technology—only changing in its attributes over time—or whether the video game is a "vehicle" whose basic elements are unrelated to each class of vehicle.

For instance, if, after *Brown*, a court were more inclined to accept a video game because of the elements of human interaction, *PONG* may well be protected speech whereas *Grand Theft Auto* might not. In *PONG*, a two-dimensional table tennis simulator, the player stood at a video-arcade machine and used a knob to compete against another human or computer opponent.[140] In *Grand Theft Auto*, on the other hand, the player plays on a console system within the privacy of his own home and does not engage with any other human players. Then again, if a court were to conclude that protected speech is a matter of detail in the game's visual effects, *Grand Theft Auto* would certainly come under the First Amendment.

Moreover, if the video game is more like a car, then *Death Race* and *PONG* are the equivalent of Ford's Model T, and *Crysis*[141] and *World of Warcraft*[142] are the equivalent of a 2011 Honda Civic. Each is still within the same class, but the attributes of the system have been enhanced (faster performance and enhanced graphics). Conversely, if the video game is more like a class of vehicle like a boat, train, plane, or car, not only are the attributes within the particular class changing over time but so are the attributes outside of the class. Sam Lake, a writer of the *Max Payne* series of video games, has addressed this very point: video games contribute attributes of several forms of media—visual effects; music and sound effects; human kinesthetic motion; and elements of a story, including plot, setting, conflict, and resolution.[143]

Thus, where the game is played, the caliber of detail that is used to enhance play, the type of human motion that is needed to play the game, and the emotions or thoughts that the player experiences during play are all elements that courts should consider when they evaluate whether video games constitute expressive conduct that merits First Amendment protection.

140. *See supra* text accompanying note 32.
141. CRYSIS (Crytek 2007).
142. WORLD OF WARCRAFT (Blizzard 2004).
143. *See supra* note 1 and accompanying text.

C. Brown*: A Late Decision?*

Yet, while *Brown* was a significant victory for the gaming industry, the decision came somewhat late. Since *Kendrick*, there has been a fairly broad consensus that the First Amendment protects electronic games.[144] In many ways, *Brown* is similar to *Joseph Burstyn, Inc. v. Wilson*,[145] the 1952 case that established motion pictures as a protected medium; it was cited by both the storeowner in *Showplace* and the Court in *Brown*. The *Burstyn* Court protected movies only after the medium was widely accepted in popular culture.[146] Similarly, the Court in *Brown* protected video games only after their nearly forty-year history in the public's eye.[147] Ultimately, this largely defeats the antimajoritarian goals of the First Amendment.[148]

Until the Supreme Court clearly defines "speech," different forms of new media will only receive First Amendment after they have won popular acceptance, just as film did in the 1950s and video games did a half-century later. In the majority opinion, Scalia wrote: "Justice Alito's argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription."[149] The current legal landscape defines speech only by its prejudices and opinions, rather than by its objective capabilities; new media will continually be susceptible to legal constraint for as long as that is the case.

V. CONCLUSION

The "vehicle" of video games has progressed along two fronts during its nearly forty years of existence. First, the graphical representations of video games have become more visually appealing, sharper, and more defined. Second, the development of a story within the game has captivated players who want to *experience*

144. *See supra* text accompanying notes 24–26.

145. 343 U.S. 495 (1952).

146. *Id.* at 501–02.

147. *History of Gaming: A Look at How It All Began*, PBS, http://www.pbs.org/kcts/videogamerevolution/history/ (last visited Oct. 15, 2011); *see supra* text accompanying notes 85–87.

148. Rousse, *supra* note 29, at 225.

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

and *share* those experiences with other players. The video games of yesterday are nearly unrecognizable from the video games of today. Video games changed from being played in a public entertainment center to being played in the privacy of the home; from simple controls and primitive graphics to persistent universes and three-dimensional characters; from joysticks and knobs to infrared remotes that sync with the player's movements; and from pure entertainment to immersive voice interaction and imaginative role-playing. With *Brown*, the law finally caught up to the technology. Just as society has developed different regulations for different vehicles—needing a driver's license to drive a car, needing a pilot's license to fly a plane—the courts, too, have developed different regulations for different classes of video games. The decisions of *Showplace*, *Caswell*, and *Marshfield* are still valid on the theory that the video games that were at issue in those cases involved "technologically advanced pinball machines," a far cry from the plot-driven, community-based video games of today.

Over forty years, the "technologically advanced pinball machine" has become the persistent, visually astounding, audibly gratifying entertainment option of millions. It is that entertainment option, through the emergence of technology and the creation of complex, satisfying storylines that the Court had as its backdrop in *Brown*. It still remains to be seen what effect Justice Alito's warning that the Court should proceed with caution when it applies rigid constitutional principles to rapidly evolving technology will have on the future of video games. Will the technological progress of video games cause their own demise, once fantasy is merged seamlessly with reality? While the question lingers, for now video games enjoy the same constitutional protection that all other media that came before them enjoy.