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The New *Resident Evil*: State Regulation of Violent Video Games and the First Amendment

I. INTRODUCTION

The game's premise is simple: the player controls an escaped convict named James Earl Cash as he fights for his life through the gritty streets of a fictional American city. In doing so, players of the hit video game, *Manhunt*, first released in 2003, are immersed in a detailed, interactive world, offering a wide range of possibilities to the creative gamer. In the game, Cash is enlisted as the protagonist in a series of snuff films by "the Director," who is eerily omnipresent due to his use of strategically positioned video cameras and an earpiece. The Director's mandate: kill or be killed. To carry out the Director's bidding, Cash has at his disposal a variety of deadly options. Cash can kill other characters "by suffocating them with a plastic bag, slicing them up with a chainsaw, shooting them point blank with a nail gun, stabbing them in the eyeballs with a glass shard, or beheading them with a cleaver," among other methods.¹ The more grisly the killing, the more points players earn. All the while, the Director eggs the player on—emphasizing the need to please his waiting audiences and the Director's own sexual gratification.²

While games like *Manhunt* have grown enormously popular among both children and adults,³ these games have increasingly drawn the ire of state regulators over the past two decades. Numerous states and political subdivisions have passed legislation seeking to restrict minors' access to violent video games.⁴ Many

1. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 770 (8th Cir. 2008) (excerpting a number of descriptions of violent video games advanced by the state as justification for state regulation).

2. *Id.* ("The Director makes comments such as 'You're really getting me off, Cash' and 'You're really doing it for me! Why I ain't been this turned on since . . . Well, let's not go there.' The game has two difficulty settings: fetish and hardcore.").

3. Ilana Lubin, Note, *Challenging Standard Conceptions of Tradition, Science and Technology in 2006: Why Laws Prohibiting the Sale of Violent Video Games to Minors Should Be Ultimately Upheld*, 13 *CARDOZO J.L. & GENDER* 173, 173 (2006) (describing the popularity and magnitude of the video game industry and the rise of children owning violent games).

4. Among these are California, Illinois, Louisiana, Michigan, Minnesota, Oklahoma, Washington, the city of Indianapolis and St. Louis County, Missouri. See CAL. CIV. CODE §§

other political bodies have either attempted to enact such legislation or are currently attempting to do so.⁵ Without exception, each legislative effort has met staunch opposition from a broad coalition of gamers, industry leaders, and First Amendment advocates. Federal courts have responded by invalidating, on First Amendment grounds, any state effort to restrict minors' access to video games based on violent content alone.⁶

Federal appellate courts grappled with the constitutional implications of violent video game regulation for ten years before the Supreme Court took up the issue. In 2011, the Court decided *Brown v. Entertainment Merchants Ass'n*,⁷ upholding a Ninth Circuit Court of Appeals decision that invalidated a California law prohibiting the sale of violent games to minors. Although *Brown* did clarify some ambiguities in the law created by the various lower court decisions, this Comment identifies two fundamental questions that

1746–1746.5 (West 2009), *declared unconstitutional by* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 967 (9th Cir. 2009), *aff'd by* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011); 720 ILL. COMP. STAT. ANN. 5/12A & 5/12B (West Supp. 2011), *declared unconstitutional by* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641 (7th Cir. 2006); 2006 La. Acts 1815–17, *declared unconstitutional by* Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006), *repealed by* 2008 La. Acts 1421; 2005 Mich. Pub. Acts 336–42, *declared unconstitutional by* Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006); MINN. STAT. § 325I.06 (Supp. 2010), *declared unconstitutional by* Swanson, 519 F.3d 768; OKLA. STAT. tit. 21 § 1040.75–77 (2002 & Supp. 2010), *declared unconstitutional by* Entm't Merchs. Ass'n v. Henry, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); WASH. REV. CODE § 9.91.180 (2010), *declared unconstitutional by* Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); ST. LOUIS CNTY., MO., ORDINANCE NO. 20,193 (Oct. 26, 2000), *declared unconstitutional by* Interactive Digital Software Ass'n v. St. Louis Cnty., 329 F.3d 954 (8th Cir. 2003); INDIANAPOLIS, IND., GENERAL ORDINANCE 72 (2000), *declared unconstitutional by* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); *see also* Renee Newman Knake, *From Research Conclusions to Real Change: Understanding the First Amendment's (Non)Response to the Negative Effects of Media on Children by Looking to the Example of Violent Video Game Regulations*, 63 SMU L. REV. 1197, 1219 (2010).

5. For example, in 2009, the Utah legislature passed a bill that would have penalized video game retailers and movie theaters that allowed minors access to games or films rated above their age level. Although the bill passed by a wide margin, it was ultimately vetoed by then-Governor Jon Huntsman. *See* Jeffrey O'Holleran, Note, *Blood Code: The History and Future of Video Game Censorship*, 8 J. ON TELECOMM. & HIGH TECH. L. 571, 593 (2010) (citing Mike Fahey, *Utah Governor Smacks Down Thompson Bill*, KOTAKU (Mar. 26, 2009, 10:00 AM), <http://kotaku.com/5185169/Utah-governor-smacks-down-thompson-bill>).

6. *Schwarzenegger*, 556 F.3d 950; *Swanson*, 519 F.3d 768; *Blagojevich*, 469 F.3d 641; *Interactive Digital*, 329 F.3d 954; *Kendrick*, 244 F.3d 572; *Foti*, 451 F. Supp. 2d 823; *Granholm*, 426 F. Supp. 2d 646; *Maleng*, 325 F. Supp. 2d 1180; *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002).

7. 131 S. Ct. 2729 (2011).

remain unanswered: First, will a video game (or similar form of interactive media) ever receive anything less than strict First Amendment scrutiny? Second, will a state ever meet its burden under the strict scrutiny standard? This Comment argues that although *Brown* does not squarely address either question, *Brown* and prior lower court decisions demonstrate that both questions must be answered in the negative. By focusing on the theoretical underpinnings of violent video game regulation, this piece brings a fresh look to the two questions above, which underlie an extensive, cross-disciplinary debate that has raged for over ten years. This Comment critiques many of the arguments advanced by jurists and scholars—most of which find voice in the various opinions in *Brown*—to demonstrate that prevailing constitutional norms leave virtually no room for regulation of violent video games.

Accordingly, Part II proceeds by offering a brief background of video game regulation and its interplay with the First Amendment. Part III discusses the first question identified above. At first blush, *Brown* appears to answer the question as to whether regulation of violent video games will ever be afforded less than strict scrutiny. However, Part III underlines arguable differences between video games and other media, some of which are discussed in Justice Alito's concurring opinion in *Brown*. Ultimately, this Part concludes, however, that none of these differences are likely to persuade the Court to afford video games less rigorous First Amendment protection, regardless of how realistic or interactive they are or become.

Part IV then takes up the second question identified above, whether a state could ever meet its burden under strict scrutiny. It concludes that future attempts to regulate minors' access to violent video games are likely to meet the same fate as the California law invalidated in *Brown* for three reasons. First, proponents of state regulation have blurred the normative line between harm to children and content offensiveness, and (unnecessarily) ceded the rhetorical upper ground to regulation opponents. Second, although ongoing scientific research is likely to continue to support a causal link between violent video games and harm to children, judicial inertia will likely bar any future finding of sufficient evidence to satisfy strict scrutiny. Third, the nature of the states' proffered regulatory rationale—harm to children—makes statutes addressing that harm particularly vulnerable to under- or over-inclusiveness. Thus, despite

the states' measured approach to regulating minors' access to violent video games, *Brown* demonstrates that future state regulatory attempts are likely doomed, even if the state can sufficiently prove that violent video games cause harm to minors. Part V briefly concludes.

II. BACKGROUND

In many First Amendment cases, parties asserting First Amendment rights face a threshold question of whether, and to what extent, the alleged speech is actually protected.⁸ Once full protection is recognized, however, content-based restrictions⁹ on speech must survive strict scrutiny.¹⁰ For a statute to withstand strict scrutiny, the government must prove that a regulation is “narrowly tailored to promote a compelling Government interest.”¹¹ Although First Amendment litigation over video game regulation in federal courts is a relatively recent development,¹² the state of the law is well-settled. The Supreme Court and every prior federal court that has considered the issue, with only a few exceptions, has held that video games enjoy full First Amendment protection, and that state efforts to regulate them must therefore survive strict scrutiny.¹³ Accordingly,

8. *See, e.g.*, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008) (summarizing the employee speech doctrine enunciated in prior Supreme Court decisions by noting “the First Amendment protects public-employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern”); *see also Brown*, 131 S. Ct. at 2733–34 (devoting significant discussion to whether, and to what extent, video games are protected by the First Amendment); *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002) (upholding constitutionality of county ordinance restricting minors' video game access because “plaintiffs failed to meet their burden of showing that video games are a protected form of speech under the First Amendment”).

9. Federal courts, even prior to *Brown*, uniformly held that state efforts to single out violent video games as a target for regulation amounted to content-based restrictions. In fact, California did not even challenge this assumption at the appellate level. *Schwarzenegger*, 556 F.3d at 958 (“It is . . . undisputed that the Act seeks to restrict expression in video games based on its [sic] content.”); *see also Blagojevich*, 469 F.3d at 646 (recognizing State's concession that the challenged regulation is content-based).

10. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

11. *Blagojevich*, 469 F.3d at 646 (quoting *Playboy Entm't*, 529 U.S. at 813) (internal quotation marks omitted).

12. In 2001, a federal appellate court addressed for the first time First Amendment issues in video game regulation. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

13. *Brown*, 131 S. Ct. at 2733–34. *Interactive Digital*, 200 F. Supp. 2d 1126, and *American Amusement Machine Ass'n v. Kendrick*, 115 F. Supp. 2d 943 (S.D. Ind. 2000), are the only two “recent” federal court opinions that diverge from this otherwise uniform

each of the video game cases centers around three essential points of divergence between state regulators and the gaming industry.¹⁴ This Part identifies these issues in turn and demonstrates that the courts have sided overwhelmingly with the gaming industry on each.

A. Violent Video Games Are Fully Protected Speech Under the First Amendment

For several years, state regulators championed the argument that their regulations need not pass strict scrutiny because video games are not protected expression in the first place. Notwithstanding the rich history of First Amendment protection for other forms of media,¹⁵ protection for video games was initially open to debate. Furthermore, the Supreme Court has never precisely articulated a test for determining whether a given form of expression is constitutionally protected.¹⁶ As one district court judge explained: “Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.’ Any given form of entertainment, activity, or interaction may or may not be protected under the First Amendment.”¹⁷ Although this variability might seem like good news

conclusion. Both cases upheld the state’s right to regulate based on their conclusion that video games do not enjoy full First Amendment protection. See *Interactive*, 200 F. Supp. 2d at 1135 (holding that video games are not protected speech under the First Amendment); *Kendrick*, 115 F. Supp. 2d at 954, 975 (recognizing that “at least some games are protected by the First Amendment,” but concluding that the First Amendment affords lesser protection to violent video games when those games are accessible to minors). Both *Interactive Digital* and *Kendrick* were reversed by their respective appellate courts. See *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954 (8th Cir. 2003); *Kendrick*, 244 F.3d 572.

14. *But see Schwarzenegger*, 556 F.3d at 958 (“The State does not contest that video games are a form of expression protected by the First Amendment.”).

15. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (“[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (“The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.”).

16. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179 (D. Conn. 2002); *Kendrick*, 115 F. Supp. 2d at 952.

17. *Kendrick*, 115 F. Supp. 2d at 952 (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)). Although the Seventh Circuit reversed the district court’s *Kendrick* opinion, Judge Posner implicitly left this proposition intact by spending the major portion of his opinion discussing why he thought video games constitute protected speech. *Kendrick*, 244 F.3d at 574–79.

to state regulators, *Brown* makes clear that even statutes regulating novel forms of expression will be subject to strict scrutiny, unless they fall into traditionally recognized exceptions.¹⁸

States have generally advanced two categories of arguments for why video games should enjoy less than full First Amendment protection.¹⁹ Both avenues were rejected by the *Brown* Court and were rejected by most federal courts even prior to *Brown*. First, states have argued that the Constitution permits restriction of minors' access to offensive materials to a degree that it would never permit for adults. This argument flows naturally from the concept of "variable obscenity" adopted by the Supreme Court in *Ginsberg v. New York*.²⁰ Simply put, the variable obscenity doctrine holds that certain expression could be considered obscenity when experienced by a minor, even though that expression would not rise to the level of obscenity when experienced by an adult.²¹ States have advanced a broad reading of *Ginsberg* that would fit extreme violent video game content under the variable obscenity umbrella.²² However, Judge Posner set the stage for widespread judicial rejection of this variable obscenity argument by narrowly construing *Ginsberg*. According to Judge Posner, *Ginsberg* stands only for the proposition that "potential harm to children's ethical and psychological development is a permissible ground for trying to shield them from forms of *sexual expression* that fall short of obscenity."²³ In this vein, Judge Posner and, later, the *Brown* majority have declined states' invitations to read *Ginsberg* as expanding obscenity beyond its traditional regulation of sexual materials, even where only minors'

18. *Brown*, 131 S. Ct. at 2733–34.

19. Some states have also argued that violent video game statutes should not be subject to strict scrutiny because their aim is to prevent violent, aggressive, or antisocial behavior. *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002). Courts have quickly discounted this rationale by applying *Brandenburg v. Ohio*, which holds that incitement to violence is unprotected, but only in certain circumstances. *See, e.g., id.* Under *Brandenburg*, "states may only regulate that speech which is '*directed to* inciting or producing *imminent* lawless action and *is likely to incite* or produce such action.'" *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); *see also Wilson*, 198 F. Supp. 2d at 182 (dismissing tort complaint in part on First Amendment grounds because plaintiffs did not allege that the video game urged imminent lawless action and it was not likely to produce such action).

20. 390 U.S. 629, 635 n.4 (1968).

21. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958–59 (9th Cir. 2009).

22. *Kendrick*, 244 F.3d at 574.

23. *Id.* at 576 (emphasis added).

access is restricted.²⁴ Because violence is not sex, goes the argument, it is not obscenity.²⁵

The second main strategy states use to argue that video games are not protected expression is simply to distinguish video games from traditionally protected forms of media. States have typically done this by stressing the interactivity of video games.²⁶ However, courts have uniformly rejected any state attempts to set video games apart, instead concluding that modern video games are “analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, [and] are protected by the First Amendment.”²⁷

B. No Regulatory Body Has Been Able to Show a Compelling Government Interest

Because video games are protected expression, a state’s regulatory interest must be compelling to withstand strict scrutiny.²⁸ States have commonly advanced two rationales for violent video

24. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733–34 (2011) (“Because speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York*.”); *Kendrick*, 244 F.3d at 576; *see also Schwarzenegger*, 556 F.3d at 960 (“In light of our reading of *Ginsberg* and the cases from our sister circuits, we decline the State’s invitation to apply the *Ginsberg* rationale to material depicting violence . . .”).

25. *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 958 (8th Cir. 2003) (citing *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992)) (“Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults.”); *James v. Meow Media, Inc.*, 300 F.3d 683, 697–98 (6th Cir. 2002) (“As we understand James’s complaint, he complains that the video games and the movie are excessively violent—yet we have generally applied our obscenity jurisprudence only to material of a sexual nature We decline to extend our obscenity jurisprudence to violent, instead of sexually explicit, material.”).

26. *See, e.g., Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 830 (D. La. 2006) (“The State contends that a video game is different from all other forms of media because it provides visual, auditory and other sensory feelings of feedback and encouragement, etc., when the viewer complies with instructions to do violence.” (internal quotation marks omitted)).

27. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002); *see also Brown*, 131 S. Ct. at 2737–38; *Interactive Digital*, 329 F.3d at 958 (“[Video games] are as much entitled to the protection of free speech as the best of literature.” (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948))) (internal quotation marks omitted).

28. *Brown*, 131 S. Ct. at 2738; *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (“[T]he [regulation] is a content-based restriction on speech, and we must employ strict scrutiny in assessing its constitutionality.”); *Interactive Digital*, 329 F.3d at 958 (“Because the ordinance regulates video games based on their content (the ordinance applies only to ‘graphically violent’ video games), we review it according to a strict scrutiny standard.”).

game restriction: “(1) preventing violent, aggressive, and antisocial behavior; and (2) preventing psychological or neurological harm to minors who play violent video games.”²⁹

The first regulatory rationale has not received very much attention from the courts, and has been unhelpful when advanced by regulation proponents.³⁰ By contrast, the second regulatory rationale—preventing direct psychological harm to underage video game players—has featured prominently in judicial discussion.³¹ At the outset, most courts are willing to acknowledge that preventing harm to minors is a compelling state interest, at least in the abstract.³² However, beyond mere recitation of a compelling interest, the government bears the burden to “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”³³

As a result, the compelling government interest analysis of this issue requires courts to parse large amounts of psychological research supporting either side.³⁴ While courts vary widely in the degree of credit they grant the states’ scientific evidence,³⁵ almost all have

29. *Schwarzenegger*, 556 F.3d at 961.

30. *See supra* note 19 (discussing the *Brandenburg* test).

31. *See, e.g., Brown*, 131 S. Ct. at 2737–39; *Schwarzenegger*, 556 F.3d at 961–64 (resolving the *Brandenburg* incitement issue in a single footnote, but devoting significant discussion to the direct harm issue).

32. *See Interactive Digital*, 329 F.3d at 958; *see also Schwarzenegger*, 556 F.3d at 961; *Entm’t Software Ass’n v. Swanson*, 519 F.3d 768, 771 (8th Cir. 2008).

33. *Schwarzenegger*, 556 F.3d at 962 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion)) (internal quotation marks omitted).

34. *See, e.g., id.* at 963–64.

35. Consider, for example the wide divergence of court opinion, regarding the State’s evidence supporting a Minnesota statute, between appellate stages of *the same case*. In *Swanson*, 519 F.3d at 772, the Eighth Circuit Court of Appeals concluded “that the State’s evidence provides substantial support for its contention that violent video games have a deleterious effect upon the psychological well-being of minors.” By contrast, a Minnesota district court had previously stated:

This Court’s review of the [research] reveals it to be completely insufficient to demonstrate an empirical, causal link between video games and violence in minors. . . . The State itself acknowledges both in its submissions and during its counsel’s oral argument, that it is entirely incapable of showing a causal link between the playing of video games and any deleterious effect on the psychological, moral, or ethical well-being of minors.

Entm’t Software Ass’n v. Hatch, 443 F. Supp. 2d 1065, 1069–70 (D. Minn. 2006). Both courts’ conclusions rested primarily on a 2004 study by Dr. Craig Anderson. *Swanson*, 519 F.3d at 70–71; *Hatch*, 443 F. Supp. 2d at 1069. Dr. Anderson’s meta-analysis revealed a significant link between violent video games and “increases in aggressive behavior, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behavior.”

viewed it with great skepticism.³⁶ Because research into the psychological effects of video games on minors is still in its infant stages,³⁷ much of the same material has been repeatedly recycled by different regulatory bodies to support their aims.³⁸ Although a thorough analysis of the available research is beyond the scope of this Comment, it is enough to note here that there is persuasive science on both sides of the “psychological harm rationale,”³⁹ as demonstrated by the vigorous advocacy on both sides of the issue, each purporting to rest on a scientific foundation.⁴⁰ Accordingly, the problem for the state is simply one of proof, and no state has successfully carried its burden.⁴¹

C. No Regulatory Body Has Been Able to Show that Their Proffered Regulation Is the Least Restrictive Means to Address the Stated Interest

Although judicial resolution of the compelling government interest prong probably obviates the least restrictive means analysis,⁴² several courts have resolved this issue in the video game regulation

Schwarzenegger, 556 F.3d at 963. However, the study also revealed several weaknesses in the body of violent video game literature, including flaws in past studies and the lack of longitudinal studies. *Id.*

36. *See, e.g.*, *Entm’t Merchs. Ass’n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097, at *6 (W.D. Okla. Sept. 17, 2007) (“There is no support in the record, let alone ‘substantial evidence,’ for Defendants’ conclusion that allowing dissemination of violent video games to minors is harmful to those minors or any others.”) (quoting *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1187 (W.D. Wash. 2004)).

37. *See infra* notes 151–54 and accompanying text.

38. Some courts’ treatment of this evidence raises the question of whether courts in the later decisions even seriously considered it. *See, e.g.*, *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 832 (M.D. La. 2006) (“It appears that much of the same evidence has been considered by numerous courts and in each case the connection was found to be tenuous and speculative.”).

39. *See also Schwarzenegger*, 556 F.3d at 963 (discussing “psychological harm rationale” and the link, or lack thereof, between violent video games); *compare* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2737–38 (2011) (calling California’s proffered evidence of harm to children “ambiguous”), *with Brown*, 131 S. Ct. at 2739 (Breyer, J., dissenting) (listing numerous authorities supporting a causal link between violent video games and harm to minors).

40. Lubin, *supra* note 3, at 189–92.

41. *See, e.g.*, *Schwarzenegger*, 556 F.3d at 964.

42. *See Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 958–59 (8th Cir. 2003) (resolving the strict scrutiny analysis without inquiring whether the St. Louis ordinance was the least restrictive means to accomplish the county’s stated regulatory purpose). *But see Schwarzenegger*, 556 F.3d at 965 (conducting the least restrictive means inquiry despite concluding that the State failed to demonstrate a compelling government interest).

context.⁴³ Essentially, this prong of the strict scrutiny analysis requires that a statute be narrowly tailored to address the alleged psychological harm to minors caused by violent video games.⁴⁴ For a regulation to survive, regulators must demonstrate “why less restrictive means would not forward [their regulatory] interests.”⁴⁵ Thus, a state may not focus merely on the “most effective” means of combating the regulated evil.⁴⁶ Because courts have easily hypothesized a number of less restrictive regulatory methods,⁴⁷ they have been universally unsympathetic to state regulatory attempts.⁴⁸

Further, the requirement that a proposed statute be “narrowly tailored” implicates the method and restrictive scope of proposed legislation. Video game statutes struck down by courts have fallen along a broad spectrum of “restrictiveness”—from forbidding minors from playing in video arcades without their parents,⁴⁹ to simply requiring consent of a parent or guardian for someone to rent, sell, or otherwise make available a violent video game to a minor.⁵⁰ Nevertheless, courts have broadly rejected states’ proposed solutions, often finding them either overinclusive, thereby needlessly restricting protected expression,⁵¹ or underinclusive, thereby failing to adequately address the precise problems that serve as the state’s rationale.⁵²

43. See, e.g., *Brown*, 131 S. Ct. at 2740–41; *Schwarzenegger*, 556 F.3d at 965; *Foti*, 451 F. Supp. 2d 823; *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 646, 654 (E.D. Mich. 2006); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004).

44. *Schwarzenegger*, 556 F.3d at 964–65.

45. *Id.*

46. *Id.* (internal quotation marks omitted).

47. *Brown*, 131 S. Ct. at 2740–41; see also *infra* Part IV.C.

48. See, e.g., *Brown*, 131 S. Ct. at 2740–42; *Schwarzenegger*, 556 F.3d at 965.

49. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001).

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

51. See, e.g., *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006).

52. *Brown*, 131 S. Ct. at 2740–41 (characterizing the California statute as both “wildly underinclusive” and “vastly overinclusive”); *Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001) (noting that violent video games are less prevalent and often less violent than movies, but movies were not addressed in the City’s ordinance); *Entm’t Merchs. Ass’n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 at *6–7 (W.D. Okla. Sept. 17, 2007); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 654 (E.D. Mich. 2006); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 833 (M.D. La. 2006).

III. QUESTION ONE: WILL REGULATION OF A VIOLENT VIDEO GAME EVER RECEIVE LESS THAN STRICT SCRUTINY?

As demonstrated above, courts have consistently rejected legislative efforts to produce constitutionally sound video game regulation. In doing so, courts have largely refused to draw distinctions between video games and other forms of protected speech. Further, even where a distinction is recognized, opinions vary as to whether that distinction is constitutionally significant.⁵³ As it stands now, *Brown* has made clear that violent video games enjoy protection equal to that of any other form of media.⁵⁴ This Part argues that although there is at least a colorable difference between violent video games and other forms of violent media, *Brown* forecloses the possibility that video games regulation might receive less than strict scrutiny. While it is unclear how far *Brown*'s conclusion will extend to new media forms, this Part ultimately concludes that regulation proponents will likely fail to persuade courts to apply less-rigid scrutiny, regardless of how realistic or interactive video games may become.

A. Violent Video Games Distinguished from Other Forms of Protected Speech

Violent video games differ from other modes of protected speech in at least two important ways. First, regulation proponents argue that video games have the potential to portray violence in far more extreme and visceral ways than books or even movies. Second, and more importantly, video games are far more interactive than other media forms. The *Brown* majority rejected both attempts to distinguish video games from other forms of protected media.⁵⁵ However, each difference warrants further analysis to determine whether there is room for evolution in judicial thinking as new technologies are developed.

53. *Brown*, 131 S. Ct. at 2737 n.4.

54. *Id.* at 2737–38.

55. *Id.*

1. A video game's ability to transmit content realistically and viscerally is not a sound constitutional basis for distinction and will not become so as technology further develops.

Regulation proponents commonly include descriptions, and even multimedia demonstrations, of violent video games in their briefing and courtroom advocacy.⁵⁶ To the extent that these descriptions are offered to establish background and context for state regulation, they are useful. To the extent that these descriptions are offered to argue that the statutes should withstand strict scrutiny, they are ineffective and counterproductive. To argue that video games are particularly effective in transmitting violent ideas, a party must *assume* that they transmit ideas. Accordingly, to argue that they should be barred on this basis is to argue that minors' access to violent ideas should be barred. Thus, any attempt to do so subjects a statute to automatic judicial skepticism,⁵⁷ if not First Amendment panic.⁵⁸

This phenomenon is well illustrated by *Brown*. Justice Alito's concurring opinion hones in on several examples of video games in which "the violence is astounding."⁵⁹ He references games wherein "[v]ictims by the dozens are killed with every imaginable implement," and games inviting players to "reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech."⁶⁰ Justice Alito draws from these examples the relatively modest conclusion that the majority acted prematurely in broadly dismissing the possibility that video games might be distinguishable from other forms of more passive media.⁶¹ Nevertheless, Justice Scalia, writing for the *Brown* majority, quickly seizes on Justice Alito's proffered examples as illustrating the very reason that violent video games *should* enjoy First Amendment protection.⁶² He writes: "[I]ronically, Justice Alito's argument

56. See, e.g., *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 770 (8th Cir. 2008); *Kendrick*, 244 F.3d at 577.

57. This phenomenon is illustrated throughout the federal appellate history of violent video game regulation. For example, it prompted Judge Posner to invoke "[t]he murderous fanaticism displayed by young German soldiers in World War II" to illustrate the potential harm that results from seeking to control children's exposure to ideas. *Kendrick*, 244 F.3d at 576-77.

58. See *infra* Part IV.A.

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

60. *Id.* at 2749-50.

61. *Id.* at 2751.

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

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.”⁶³ There is no better illustration of how quickly courts discount states’ “harm to minors” rationale once the specter of censorship appears.⁶⁴

On a theoretical level, the argument that video games are different than other media based on their realism and gore will not get better with age. Although, as Justice Alito notes,⁶⁵ video games are increasingly realistic, Justice Scalia’s conclusion regarding the dangers of suppressing ideas is probably inescapable, even as new technology develops. Nothing about the idea of spattering blood changes when a new simulator allows the player to one day *feel* the blood spatter rather than merely *see* it splatter (an example used by Justice Alito).⁶⁶ The message from the video game developer to the minor does not change. Thus, *Brown* probably signals the Supreme Court death knell of this argument going forward, just as surely as it does for similar arguments regarding today’s graphics technologies.

2. Interactivity is a more persuasive basis for constitutional distinction and will likely be even more so in the future.

It is unclear to what extent Justice Alito actually fell into the realistic/visceral trap discussed above. After all, the examples he presents are used to illustrate a more important and more persuasive point: video games are interactive to a degree unknown to other forms of media.⁶⁷ Even before *Brown*, however, any effort to distinguish video games based on their interactivity faced an uphill battle because courts were, apparently universally, convinced that “‘violent’ video games contain stories, imagery, ‘age-old themes of literature,’ and messages, ‘even an ideology,’” to the same extent as books and movies.⁶⁸ Although *Brown* was no exception to this

63. *Id.*

64. *Id.*

65. *Id.* at 2749 (Alito, J., concurring).

66. *Id.*

67. *Id.* at 2751.

68. Interactive Digital Software Ass’n v. St. Louis Cnty., 329 F.3d 954, 957 (8th Cir. 2003) (quoting Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577–78 (7th Cir. 2001)).

monolithic view,⁶⁹ a brief overview of judicial thinking on this subject and close analysis lend credence to Justice Alito's position that the *Brown* majority might have been too quick to dismiss any possibility of a constitutionally significant distinction. This is likely to be even more true as technology continues to develop.

a. Overview of judicial views on constitutional significance of interactivity. Although a widely disfavored view today, several early courts held that video games were not entitled to First Amendment protection *at all*.⁷⁰ Beginning with *Amusement Machine Association v. Kendrick* in 2001, however, video games' superficial resemblance to other forms of media, among other things,⁷¹ led courts to swing the pendulum in the complete opposite direction. Since that time, courts have hastily dismissed states' efforts to distinguish video games based on interactivity.⁷²

Nevertheless, judicial reasoning for supporting the literature/movies/video game analogy ranges from the questionable-but-plausible, to the downright erroneous. Judge Posner's *Kendrick* opinion offered the most commonly cited rationale for treating video games and other media the same.⁷³ He argues:

69. *Brown*, 131 S. Ct. at 2737–38 (majority opinion).

70. *See supra* note 8. The first federal case to address video games' status under the First Amendment was *America's Best Family Showplace Corp. v. N.Y. Dep't of Bldgs.*, 536 F. Supp. 170 (E.D.N.Y. 1982). Analyzing the extent to which the Constitution protected video game arcades from restrictive zoning ordinances, the district court found that "although video game programs may be copyrighted, they 'contain so little in the way of particularized form of expression' that video games cannot be fairly characterized as a form of speech protected by the First Amendment." *Id.* at 174 (quoting *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982)). The court reasoned that "a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games 'talk' to the participant, play music, or have written instructions does not provide the missing element of 'information.'" *Id.* This view has been expressly rejected in the more recent line of video game cases. *See Interactive Digital*, 329 F.3d at 957 ("[T]he Supreme Court has long emphasized that the first amendment protects entertainment, as well as political and ideological speech, and that a particularized message is not required for speech to be constitutionally protected." (citations and internal quotation marks omitted)).

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

72. *See, e.g., Interactive Digital*, 329 F.3d at 957–58; *Kendrick*, 244 F.3d at 577; *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179–81 (D. Conn. 2002).

73. *See, e.g., Interactive Digital*, 329 F.3d at 957; *Entm't Software Ass'n v. Chi. Transit Auth.*, 696 F. Supp. 2d 934, 948 (N.D. Ill. 2010); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006); *Wilson*, 198 F. Supp. 2d at 180.

All literature . . . is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.⁷⁴

The *Brown* majority cites this very passage in dismissing California's argument that "video games present special problems because they are interactive."⁷⁵ Although Judge Posner and Justice Scalia ignore the common-sense distinction between passive, imaginative interaction and direct, player-driven participation,⁷⁶ some elements of video games evoke emotions in similar ways as do movies or other media. But it requires more than a logical baby step to conclude that books and movies are *equally* as interactive as video games.

Yet, this is what some courts attempted to do pre-*Brown*. For example, consider *Interactive Digital Software Ass'n v. St. Louis County*, which, after *Kendrick*, was the next federal appellate decision to squarely address a proposed governmental regulation of video games.⁷⁷ In supporting its decision to extend full constitutional protection to violent video games, the court reasoned:

[S]ome books, such as the pre-teen oriented "Choose Your Own Nightmare" series (in which the reader makes choices that determine the plot of the story, and which lead the reader to one of several endings, by following the instructions at the bottom of the page) can be every bit as interactive as video games.⁷⁸

The *Interactive Digital* court then attempted to analogize the video-game player's ability to control the flow of the expressive content to the movie viewer's ability to control expressive content by virtue of a

74. *Kendrick*, 244 F.3d at 577.

75. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2737 (2011) (internal quotation marks omitted).

76. Justice Alito alluded to this passive/active distinction in arguing that at least some video games or interactive media could be distinguishable from books and movies. *Id.* at 2750 (Alito, J., concurring).

77. Although *James v. Meow Media, Inc.*, 300 F.3d 683, 697-98 (6th Cir. 2002), did analyze First Amendment protection of video games, it was not in the context of state regulatory efforts. Rather, *James* raised First Amendment concerns with extending tort liability to video game makers for harm caused by game players allegedly influenced by the games' violent content. *Id.*

78. *Interactive Digital*, 329 F.3d at 957-58.

“videocassette or DVD player.”⁷⁹ Because “increased viewer control does not render movies unprotected by the first amendment, . . . equivalent player control likewise should not automatically disqualify modern video games.”⁸⁰ Justice Scalia, in *Brown*, sidesteps this logical leap of faith. Although he invokes the example of choose-your-own-adventure stories, Justice Scalia correctly points out that the difference between a video game and a choose-your-own-adventure book is one of degree, not of kind.⁸¹

In doing so, Justice Scalia frames the issue at the heart of First Amendment protection: the speaker’s message to the listener (or the player). It is easy to see how a video game with “characters, dialogue, plot, and music” could arguably contain an expressive message to the same extent as a book.⁸² After all, for a player to advance levels and ultimately reach the end of a game, the player must pass through content written by the game programmers. However, as discussed below, the players, rather than the programmers, increasingly control the content of the message.

B. Although Video Games’ Interactivity May Increasingly Make Their Expressive Message Different in Kind from Other Media, the Difference Will Likely Have Little Effect on Judicial Scrutiny

Kendrick, *Interactive Digital*, and, most recently, *Brown*, discount too quickly the wide range of game-play opportunities available to modern gamers. Regulators and commentators alike have persuasively argued that video games offer a level of player control unappreciated by the *Kendrick* line of cases.⁸³ That level of control allows video games to have a different impact on players than more passive media forms. As one student author noted, “when one empathizes with a character in a book or movie, one does not control the character’s actions or bear the consequences that result. Instead, as an observer, one has the ability to intellectualize the actions committed by the characters.”⁸⁴ Courts have generally glossed over “control” as a constitutionally insignificant difference

79. *Id.* at 957.

80. *Id.*

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

82. *Id.* at 2733.

83. Lubin, *supra* note 3, at 182.

84. *Id.* at 181.

between movies and video games with little supporting reasoning.⁸⁵ However, in addition to *Brown*, some federal court opinions, such as *Kendrick*, at least directly attempted to address the constitutional significance of player control.⁸⁶ *Kendrick* cites the lack of “evidence that violent video games are any more harmful” than “other violent, but passive,” forms of media as justification for protecting violent video games.⁸⁷ After all, the court reasons:

When Dirty Harry or some other avenging hero kills off a string of villains, the audience is expected to identify with him, to revel in his success, to feel their own finger on the trigger. It is conceivable that pushing a button or manipulating a toggle stick engenders an even deeper surge of aggressive joy, but of that there is no evidence at all.⁸⁸

Nevertheless, there is increasing scientific evidence that video games’ interactivity *does* cause greater impact to the player than a more passive form of participation required to enjoy a book or movie.⁸⁹ Accordingly, the question is not whether there will ever be evidence of a difference in kind between video games and other media, but whether there will be *enough* evidence of a difference and whether courts will deem that difference constitutionally significant.

Beyond the control distinction, video game players’ ever-increasing range of *choice* distinguishes video games from other protected media. Federal courts have seldom even alluded to new, flexible game formats that turn players loose in an interactive world with a fully equipped digital agent at their fingertips.⁹⁰ The *Brown*

85. Courts seem content to overcome the interactivity distinction based on Judge Posner’s definition of interactivity. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001); see also *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 830 (M.D. La. 2006).

86. See, e.g., *Kendrick*, 244 F.3d at 578–79.

87. *Id.* at 579.

88. *Id.*; accord *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 654 (E.D. Mich. 2006).

89. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2769 (2011) (Breyer, J., dissenting) (citing DONALD E. COOK ET AL., JOINT STATEMENTS ON THE IMPACT OF ENTERTAINMENT VIOLENCE ON CHILDREN, CONGRESSIONAL PUBLIC HEALTH SUMMIT (July 26, 2000), available at <http://www.aap.org/advocacy/releases/jstmtevc.htm> [hereinafter JOINT STATEMENTS] (pointing to interactivity as a key feature in explaining the impact video games have on children)).

90. But see *Granholm*, 426 F. Supp. 2d at 651 (“With the rapid advancements of video game technology and new innovations, such as online gaming, video games are becoming more open ended with more possibilities to interact with other players and control the fate of

majority is no exception to this lack of attention, as Justice Alito's opinion points out.⁹¹ Consider the *Postal* video game series, which drew the ire of parents and politicians for its creatively gory content including "urinating on people to make them vomit in disgust . . . and playing fetch with dogs using human heads," among others.⁹² The player, through "Postal Dude," has an assortment of tasks that may be performed in any order and require (often violent) interactions with various non-player characters ("NPCs").⁹³ In a recent interview, Vince Desi, creator of the series, touted the makers' efforts to improve the NPCs' artificial intelligence for the third installment in the series "to make [their] characters truly living individuals."⁹⁴ With these new improvements, "not only will the [Postal] Dude be all about freedom of choice, but so will general pedestrians, and other key celebrity characters."⁹⁵ The open world and freedom of choice offered by games like the *Postal* series often leads to widely divergent gaming experiences.⁹⁶ This variety sharply contrasts the fixed content in movies and the internet, as noted by Vince Desi and *Postal III* creative director, Steve Wilk.⁹⁷ When asked how *Postal* creators were changing game features between *Postal II* and *Postal III*, Desi stressed the game's interactive features. He stated, "It's all about the Gameplay. *I like movies as much as anyone,*

the characters and the worlds they inhabit.").

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

92. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 770 (8th Cir. 2008).

93. *Postal 3 First Impression Interview*, VG CORE (Feb. 15, 2006), <http://xbox360.vgcore.com/interviews/10.html>.

94. *Postal III, Interview with Running with Scissors*, OMG PC GAMES (May 3, 2008), <http://omgpcgames.com/index.php/interviews/45-postal-iii-interview-with-running-with-scissors> (last visited Oct. 6, 2011).

95. *Id.*

96. *Postal* is not the only series or game that emphasizes an open and flexible environment. For example, *World of Warcraft* offers its eleven million players an unparalleled world of freedom of choice and movement. Christina H, *6 Ways World of Warcraft is Worse Than Real Life*, CRACKED.COM (Nov. 28, 2008), http://www.cracked.com/article_16782_6-ways-world-warcraft-worse-than-real-life.html. Although fantasy-based, *World of Warcraft* is open enough that its universe is prone to random events of the sort that make the real world news every day, including scandals, political protests, and uncontrollable epidemics. *See id.* (describing an adulterous affair between two Chinese players that became a major political controversy in China, eventually leading to in-game protests and a mass, in-game suicide); *Virtual Game is a 'Disease Model'*, BBC NEWS, <http://news.bbc.co.uk/2/hi/health/6951918.stm> (last updated Aug. 21, 2007) (describing how virologists are studying players' reactions to the "Corrupted Blood" disease, affecting characters on various World of Warcraft servers, to better understand how to control real-world disease outbreaks).

97. *Postal 3 First Impression Interview*, *supra* note 93.

but I'd rather watch 'em on a big screen."⁹⁸ Wilk responded to a later question about violence in video games by noting:

We created a reactive environment where the player has some tasks to complete. How the tasks are completed is entirely up to the player. Just like in the real world, weapons exist, but how they are used is left up to the judgement [sic] of the individual wielding it. . . .

So the unfortunate situation for us is that what offends people is the concept of a game where you have free will and can choose, if you have that particular bent, to attack innocent bystanders.⁹⁹

However, as discussed above, this difference in the players' ability to control a character is constitutionally insignificant, a matter of degree only, unless it brings a difference to the video game's expressive message. Courts have rightly pointed out that movies and books evoke (if not display) violent content and themes to the same extent as video games.¹⁰⁰ The Eighth Circuit even pointed out that "a good deal of the Bible portrays scenes of violence."¹⁰¹ However, nothing that readers can do will allow them to change the story so that David cuts off Goliath's head with a chainsaw instead of Goliath's own sword.¹⁰² Certainly the reader might imagine that Goliath met a more gruesome fate than provided in the biblical account, but such passive, intellectual interaction is a world apart from the id-stroking, player-driven feedback available from video games like *Manhunt* and *Postal 2*.¹⁰³ This interactivity distinction raises the crucial yet unanswered question of how player participation affects the constitutional burden on game makers when states restrict

98. *Id.* (emphasis added).

99. *Id.*

100. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (noting the descriptions of violence in literary classics such as the *Odyssey* and *War and Peace*).

101. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008).

102. *See* 1 *Samuel* 17:51 (King James).

103. *But see* *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002) (calling games like *Mortal Kombat III* "gratuitously violent cross[es] between a comic book and a Saturday morning cartoon, with the player having some control over the sequence of events and choice of weapon-wielding characters"). The problems with this analogy hardly require rebuttal. There is not a comic book published that offers the variety of user choice available in games like *Mortal Kombat* in terms of character selection, fighting style, and visual feedback in response to user preferences. Also, if pressed, the court would likely be unable to name a Saturday morning cartoon that gave the young watcher the choice between killing opponents by kicking their throats versus simply tearing out their spines.

minors' access to their games. Courts freely tout the rights of game makers to transmit storyline, imagery, and even ideology through the video game medium.¹⁰⁴ Yet, even *Brown* fell short of fully addressing the type of hybridized, cooperative interaction between the gamer and the game whereby a large portion of the maker's time is devoted, not to expression or a plot, but to the provision of tools to equip the player's digital agent.¹⁰⁵ In regulating violent video games, the focus of states and courts should not be on what the player learns, sees, or thinks, but rather on what the player *chooses* and *does*,¹⁰⁶ taking into account the effect of gamers' actions on a game's expressive message.¹⁰⁷ This focus would allow underage players' own

104. *See, e.g.*, Interactive Digital Software Ass'n v. St. Louis Cnty., 329 F.3d 954, 957 (8th Cir. 2003) (quoting *Kendrick*, 244 F.3d at 577–78).

105. *But see Wilson*, 198 F. Supp. 2d at 181 (D. Conn. 2002) (arguing that interactivity simply enhances the expressive and artistic elements of violent video games). While it is true that interactivity allows a video game player to access varying expressive content depending on the player's decisions, interaction also *demand*s affirmative choice and participation by the player to a greater degree than any form of protected media. This raises the specter of the age old question about a tree falling in the woods. Phrased to match the video game context: if a video game maker engages in constitutionally protected expression and there is no player to access it through participatory cooperation, is it pure expression? Of course speech always requires a hearer and a book requires a reader. But, passive access to fixed conduct *is* analytically distinct from affirmatively imposing the player's free will on a digital agent.

106. Regulatory bodies have asked courts to parse a video game's expressive elements from the player-controlled portion. Courts have, understandably, been unwilling. *See, e.g.*, Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006) ("It would be impossible to separate the functional aspects of a video game from the expressive, inasmuch as they are they are so closely intertwined and dependant on each other in creating the virtual experience."); *see also* Nathan Phillips, Note, Interactive Digital Software Ass'n v. St. Louis County: *The First Amendment and Minors' Access to Violent Video Games*, 19 BERKELEY TECH. L.J. 585, 600 (2004) ("[I]t is becoming increasingly difficult to separate out the unadulterated gaming element within video games."). Although *Granholm* used this to justify extending *full* protection to violent video games, it could just as easily be used to justify *no* protection of violent video games.

107. This argument is distinct from the early arguments that games are not protected because of the lack of information or ideas being communicated. *See, e.g.*, Am.'s Best Family Showplace Corp. v. N.Y. Dep't of Bldgs., 536 F. Supp. 170, 173 (E.D.N.Y. 1982). Nor should video game playing be considered the player's "pure" conduct that implicates no expressive rights of the game maker. This was persuasively refuted even by the earliest commentators. *See, e.g.*, David B. Goroff, Note, *The First Amendment Side Effects of Curing Pac-Man Fever*, 84 COLUM. L. REV. 744, 757–58 (1984). Rather, game makers' expressive rights simply deserve *less* protection due to the portion of control over the message that they have ceded to the game players. Two of the justices, diverging from the majority in *Brown*, seem to make such an argument. For example, Justice Breyer, in dissent, while maintaining that video games deserve full protection, seems to argue that interactivity should make courts more sympathetic to states' efforts to meet their strict scrutiny burden. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2768 (2011) (Breyer, J., dissenting).

choice and participation to provide a theoretical basis for regulation that is not present in other forms of protected media.

Although *Brown* forecloses this argument for now, there is some chance that the argument could win favor as technology continues to develop. Currently, most video games (including *Manhunt*, which is discussed in the Introduction), for all their player choice, still follow a relatively fixed format. A player proceeds through levels and eventually “beats” the game. However, as gaming formats become increasingly open and the Internet allows developers to create and populate digital worlds, state regulators will likely persist in their efforts to regulate the new frontier. Even now, online games allow players to assume identities and take a proprietary interest in their characters.¹⁰⁸

However, regardless of how “nonexpressive” video games become, it is difficult to see how violence could ever be regulated. Courts have been unwilling to parse the nonexpressive elements of a game from the expressive ones.¹⁰⁹ Though perhaps less justified, courts are likely to be equally unwilling, even if all that remains of the programmers’ expression are the characters, weapons, music, and landscape and almost no storyline is presented. Accordingly, *Brown* demonstrates that even attempts to regulate the newest, most conduct oriented forms of media will likely prompt strict scrutiny.

IV. QUESTION TWO: WILL A STATUTE AIMED AT RESTRICTING MINORS’ ACCESS TO VIOLENT VIDEO GAMES EVER PASS STRICT SCRUTINY?

As demonstrated above, state attempts to distinguish violent video games from other forms of protected media have done nothing to tip the policy scales in favor of state regulation. Nor are courts willing to relax the demands of strict scrutiny where the statutes address only minors’ access to videogames.¹¹⁰ Although strict

108. See *supra* note 96.

109. See *supra* note 106.

110. See, e.g., *Brown*, 131 S. Ct. at 2735–36 (majority opinion) (“[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975) (citation omitted))). Nevertheless, courts are quick to give lip service to parents and state regulators’ general conclusions that many violent video games are not “suitable” for children. See, e.g., *Entm’t Merchs. Ass’n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097, at *3 (D. Okla. Sept. 17, 2007); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash.

scrutiny is very often the judicial death knell for state regulatory efforts,¹¹¹ several nuances of violent video game regulation make strict scrutiny an especially difficult hurdle. Some of these context-specific obstacles inhere in the statutes themselves and the nature of the medium. Other obstacles are the result of counterproductive advocacy offered by regulation proponents. This Part identifies three reasons that future state attempts to craft violent-video game regulations will be unlikely to pass strict scrutiny.

A. Regulation Advocates Have Blurred the Theoretical Basis for Regulation, Provoking Judicial Skepticism of State Regulatory Efforts.

One of the arguments consistently used by both state regulators and commentators in defense of state regulatory efforts is that violent video games should fall under the concept of “variable obscenity,” and be afforded less than strict scrutiny as a result.¹¹² Not only has this argument failed to gain any traction in the federal courts,¹¹³ the argument is theoretically counterproductive. Simply put, obscenity law’s theoretical justification is different than the rationale states use to justify video game regulation.

As Judge Posner noted in *Kendrick*, “The main worry about obscenity . . . is not that it is harmful, which is the worry behind the [city’s] ordinance, but that it is offensive.”¹¹⁴ This distinction works well for courts and advocates refuting states’ variable obscenity arguments because no state has openly advanced “offensiveness” as

2004) (“That is not to say that the video games presented to the Court are unobjectionable. To the contrary, many of them promote hateful stereotypes and portray levels of violence and degradation that are repulsive.”).

111. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “‘strict’ in theory and fatal in fact”).

112. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009) (acknowledging the state’s argument that *Ginsberg* should be read to allow states to prohibit sales of violent video games to children where it would be unconstitutional if aimed toward adults), *aff’d sub nom.* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011); *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 958, 959 (8th Cir. 2003) (same); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574, 576 (7th Cir. 2001) (same); Lubin, *supra* note 3, at 176–79, 195.

113. *Schwarzenegger*, 556 F.3d at 957–61. *But see* *Am. Amusement Mach. Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 975 (S.D. Ind. 2000) (concluding that video games enjoy less than First Amendment protection because they are obscene as to minors). The Indiana district court was expressly reversed on this point by *Kendrick*, 244 F.3d at 574–75.

114. *Kendrick*, 244 F.3d at 574.

their regulatory rationale.¹¹⁵ Further, *Kendrick* and subsequent cases make clear that if a state *did* attempt to regulate violent video games because they are offensive, such a normative argument would overlap with the obscenity doctrine.¹¹⁶ Because obscenity deals only with sex-related materials, such an argument advanced in support of the regulation of violent video games justifiably fails, as Justice Scalia was quick to point out in *Brown*.¹¹⁷ Thus, states are left with two equally unappealing options regarding variable obscenity: stick with the psychological harm rationale and fail on theory (because the regulatory rationale is harm and not offense), or try to argue that violence is offensive and fail under the obscenity case law (because violence is not sex).

This Morton's Fork sheds light on the repeated attempts of regulators and commentators to urge courts to read *Ginsberg* to encompass non-sexual material. Indeed, *Ginsberg* uses broad language to restrict minors' access to previously nonobscene materials—sparking hope in the minds of state regulators. For example, the *Ginsberg* Court noted “that even where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’”¹¹⁸ Read in conjunction with other cases in a variety of contexts,¹¹⁹ such broad language could be read to encompass even nonsexual materials. Were that the case, *Ginsberg* would leave *some* room for states to regulate children's access to violent video games for purely paternalistic reasons.¹²⁰

115. See, e.g., *id.* at 575.

116. See *id.* at 574 (“A work is classified as obscene not upon proof that it is likely to affect anyone's conduct, but upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity.”).

117. *Brown*, 131 S. Ct. at 2735. This has happened repeatedly. See *supra* note 25 and accompanying text.

118. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

119. Consider Justice Powell's language in *Bellotti v. Baird*, 443 U.S. 622 (1979). Writing for the Court, Justice Powell offered three justifications for modifying constitutional protections where the rights of minors were implicated: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.” *Id.* at 634. Elsewhere in the opinion, Justice Powell noted that “the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice,” while simultaneously recognizing that some protection is afforded under *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). *Bellotti*, 443 U.S. at 637 n.15.

120. This is especially true when the majority opinion is read in light of Justice Stewart's

Although *Ginsberg's* general pronouncements on state power might seem to lend policy support to states' regulation of violent video games,¹²¹ any legislative hope it might have kindled died with *Brown*. The *Brown* court recognized, as had other courts before it, that *Ginsberg's* holding could not withstand the twisting required to support state regulation of minors' access to violent video games.¹²² The *Ginsberg* court itself acknowledged that its decision did not define "the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State."¹²³ Rather, the court restricted its inquiry to whether it was unconstitutional for the New York statute in question "to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what *sex material* they may read or see."¹²⁴ As such, because courts have honed in on the restrictive, rather than the expansive language in *Ginsberg*, that case has ultimately proven unhelpful to state regulatory efforts.

At the same time, there is a more invidious danger in trying to cast violent video games as "variable obscenity" than merely wasted space in appellate briefs. Proponents of state regulatory efforts have unwisely conflated the harm and offense rationales by arguing that violent video games are obscene. The stark theoretical contrast

concurring opinion. To Justice Stewart, when a person distributes offensive material to children, that activity is akin to "foisting his uninvited views upon the members of a captive audience." *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring). A state can deprive a child of rights that it could not deny adults because "a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.* at 649–50. Although this patriarchal view is somewhat outmoded in defense of regulating "offensive" materials, it is attractive to state regulators looking for theoretical justification for the harm rationale undergirding video game regulation.

121. At least one court has expressly rejected a general appeal to *Ginsberg's* broad "harmful to minors" language to create a category based solely on the alleged harm caused by the restricted activity. In *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004), the district court concluded:

The statute at issue in *Ginsberg* did not create an entirely new category of unprotected speech: rather, it adjusted the *Roth* definition of obscene material to capture that which is of sexual interest to minors. Defendants have not identified, and the Court has not found, any case in which a category of otherwise protected expression is kept from children because it might do them harm.

Id. at 1186.

122. *Brown*, 131 S. Ct. at 2735 ("Because speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York* . . .").

123. *Ginsberg*, 390 U.S. at 636.

124. *Id.* at 637 (emphasis added).

between obscenity and the harms associated with violent media provides an important rhetorical tool for distinguishing video game regulation from past legislative efforts to regulate other forms of media. This conflation blurs the line between modern, measured regulatory efforts and the over-the-top censorship that fomented much of the 20th century obscenity litigation. Although “First Amendment panic” is obviously not a stated judicial rationale for invalidating video game regulation, it seems clear that states’ variable obscenity arguments have triggered a judicial skepticism that has colored the video game cases from *Kendrick* to *Brown*.¹²⁵ Insofar as states and commentators have argued that violent video games are variable obscenity, they have needlessly ceded the normative upper ground to regulation opponents. As a result, it is all too easy for regulation opponents to label the harm rationale a pretext, a scientific canard advanced to obscure morality-driven legislative goals. As such, states have unwittingly armed their regulatory opponents and fueled the (arguably unwarranted) judicial skepticism of state regulatory efforts that has colored and will continue to color future state attempts to pass strict scrutiny.

B. The Required Quantum of Proof Remains Unclear and Judicial Inertia Will Likely Doom Future State Efforts to Show a Compelling Government Interest.

Brown, like many lower court decisions before it,¹²⁶ squarely held that the state did not meet its burden to show a compelling

125. A number of court opinions contain a large section of discussion of the dangers of government efforts to control children’s thoughts. *See, e.g.*, *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 959 (9th Cir. 2009) (discussing why a state’s interest in controlling minors’ thoughts is not legitimate), *aff’d sub nom. Brown*, 131 S. Ct. 2729; *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (“The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion.”). This dicta demonstrates either that states were unclear about the regulatory basis for their respective statutes, or that the courts simply believed that offense, rather than psychological harm, was really at the core of state regulatory efforts.

126. *See, e.g.*, *Kendrick*, 244 F.3d at 577. Although *Kendrick* was the seminal pre-*Brown* case analyzing violent video game regulation, it contained surprisingly little discussion, much less authority, on what exactly the regulators have to prove to satisfy strict scrutiny. This may be simply because *Kendrick* was the earliest case on modern video games and the issues were not yet crystallized. The city apparently argued in *Kendrick* that violent video games “are dangerous to public safety.” *Id.* at 578. The *Kendrick* court quickly dismissed this argument because the social science studies proffered by the city did not establish that “video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused

government interest based on psychological harm to minors.¹²⁷ Future state regulatory efforts will likely face at least two context-specific problems in attempts to pass strict scrutiny. First, nuances of child psychology and the courts' insistence on direct proof of harm to minors will likely continue to prove an insurmountable obstacle. Second, continued judicial rejection of numerous studies showing both correlation and causation between harm to minors and violent video games makes it apparent that courts simply are not on board with the current body of research. Judicial inertia will likely require some sort of "smoking gun," or numerous studies over several years, before states will be able to prove a compelling interest in regulation.

1. States must show direct harm to minors.

Since *Kendrick*, courts have required proof that video games directly cause psychological harm to minors.¹²⁸ Correlation is not enough.¹²⁹ For example, *Brown* stated that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution."¹³⁰

Pre-*Brown* decisions, however, probably go further than *Brown* did in describing what type of proof the courts would require. Those courts almost universally quoted language from the Supreme Court's decision in *Turner Broadcasting System, Inc. v. Federal Communications Commission*.¹³¹ In *Turner*, the Supreme Court held that a federal law violated the First Amendment where it required cable companies to reserve a certain number of their channels for use by "local commercial television stations."¹³² Writing for a plurality of

the average level of violence to increase anywhere." *Id.* at 578–79. According to Judge Posner, the city in *Kendrick* did not even argue that the addition of violent video games to other types of violent media "increases whatever dangers media depictions of violence pose to healthy character formation or peaceable, law-abiding behavior." *Id.* at 579.

127. *Brown*, 131 S. Ct. at 2739 ("The State's evidence is not compelling.").

128. *See, e.g.*, *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1069–70 (D. Minn. 2006) (resolving the compelling government interest prong against the state because of its inability to demonstrate a "causal link between the playing of video games and any deleterious effect on the psychological, moral, or ethical well-being of minors").

129. *See, e.g.*, *Brown*, 131 S. Ct. at 2739; *Schwarzenegger*, 556 F.3d at 964 (noting that a number of studies, though demonstrating correlation, failed to establish causation).

130. *Brown*, 131 S. Ct. at 2738 (internal citations omitted).

131. 512 U.S. 622 (1994).

132. *Id.* at 630 (internal quotation marks omitted).

the court, Justice Kennedy rejected the government's argument that the "must-carry" provisions were necessary to preserve the health of broadcast television.¹³³ He reasoned:

When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." *It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.*¹³⁴

Following from this language, state regulators face context-specific problems in meeting the causation requirement. First, *Turner* itself did not clarify *how much* proof would actually be required. In *Turner*, the government offered only one statistical study showing that broadcast stations had been dropped from cable programming.¹³⁵ It simply offered no evidence that *broadcasters* would suffer serious financial difficulty without the must-carry provisions.¹³⁶ Accordingly, Justice Kennedy's language, quoted above, aptly describes the government's case in *Turner* because the government's claims were actually "conjectural." By contrast, states litigating the video game cases have offered large amounts of persuasive evidence of harm to minors, not just that minors were actually playing video games.¹³⁷ Thus, it remains unclear how much

133. *Id.* at 664–68.

134. *Id.* at 664 (emphasis added) (internal citation omitted).

135. *Id.* at 666–67.

136. *Id.* at 667 ("We think it significant, for instance, that the parties have not presented any evidence that local broadcast stations have fallen into bankruptcy, turned in their broadcast licenses, curtailed their broadcast operations, or suffered a serious reduction in operating revenues as a result of their being dropped from, or otherwise disadvantaged by, cable systems.")

137. The same statute invalidated in *Turner* was reconsidered by the Supreme Court in *Turner Broadcasting System, Inc v. Federal Communications Commission (Turner II)*, 520 U.S. 180 (1997). After the first *Turner* case was remanded, the "District Court oversaw another 18 months of factual development . . . 'yielding a record of tens of thousands of pages' of evidence." *Id.* at 187 (quoting *Turner Broad. Sys. v. Fed. Commc'ns Comm'n*, 910 F. Supp. 734, 755 (D.D.C. 1995)). On this enormous quantum of evidence, the Supreme Court had "no difficulty in finding a substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions." *Id.* at 196. However, a later Supreme Court decision, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000), addressed the quantum of proof needed to demonstrate a genuine problem in need of a regulatory solution. Noting the lack of government evidence of such a problem, the Court stated, "This is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than

more evidence a court would require to show proof of harm causation.

The second reason that video game regulators will have an even harder time proving harm to minors than the government had in showing direct harm in *Turner* inheres in the nuances of child psychology. Clearly, it is a much easier proposition to prove economic harm to the broadcast industry than to prove the psychological well-being of minors.¹³⁸ Simply put, the nuances of child psychology are distinct from the more measureable health of individual businesses.¹³⁹ Thus, because courts scrutinizing video game regulation cannot “abdicate” their important role in protecting important rights,¹⁴⁰ the subtleties of youth psychological studies will likely continue to make direct proof of actual harm difficult going forward.

2. Although Brown clarified the burden of proof, it remains unclear how much proof will be required to support a compelling government interest and whether judicial inertia will ever accept it.

Brown clarified the burden of proof required to show a compelling government interest, clearing up some apparent lower court confusion. Once again, *Turner* is an important starting point in considering the appropriate standard of proof in the video game cases. Although the Supreme Court ultimately reversed the lower court’s upholding the must-carry provisions in *Turner*,¹⁴¹ the Justices sharply diverged in their reasoning.¹⁴² While Justice Kennedy

anecdote and supposition.” *Id.* at 822. Many courts analyzing the video game issue have seized on the “anecdote and supposition language” from *Playboy Entertainment* to reason that states have insufficiently proved psychological harm to minors. *See, e.g.*, *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 822 (8th Cir. 2003). *Playboy Entertainment* actually cuts against regulation opponents, however, because it at least implies that the evidence offered in *Turner II* (all 10,000 pages worth) was overkill, even in a strict scrutiny case.

138. *Cf. Turner*, 512 U.S. at 664–65.

139. *See* Lubin, *supra* note 3, at 189–90 (describing several recent studies revealing a dynamic and evolving understanding of the adolescent brain).

140. *See Turner*, 512 U.S. at 671 n.2 (Stevens, J., concurring).

141. *Id.* at 668 (plurality opinion).

142. As to the reasoning behind the result, Justice Kennedy did not give the opinion of the court. *Id.* at 622. In fact, Justice Stevens joined in the result only grudgingly. *See id.* at 674 (Stevens, J., concurring) (“It is thus my view that we should affirm the judgment of the District Court. Were I to vote to affirm, however, no disposition of this appeal would command the support of a majority of the Court. An accommodation is therefore necessary.” (citing *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result))).

acknowledged that “courts must accord substantial deference to the predictive judgments of Congress,”¹⁴³ he concluded that the government had not met its burden.¹⁴⁴ Justice Stevens would have upheld Congress’s judgment that continued vitality in the broadcast industry required the must-carry provisions, despite the government’s failure to provide direct evidence of harm to broadcasters.¹⁴⁵ Although Justice Kennedy and Justice Stevens disagreed on how much evidence the government actually needed to carry its burden, both agreed that the standard of proof was whether Congress had “drawn reasonable inferences based on substantial evidence.”¹⁴⁶ Prior to *Brown*, lower federal courts adopted different standards for the burden of proof the government must carry in the violent-video game context. Several cases had adopted the *Turner* standard, evaluating whether the statute was based on reasonable inferences based on substantial evidence. Another federal court had stated that a statute could not be upheld in the absence of “incontrovertible proof” that violent video games caused harm to minors.¹⁴⁷ *Brown* made clear, however, that applying the standard articulated in *Turner* was error. Justice Scalia, for the majority, wrote:

[T]he State claims that it need not produce [direct] proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation. California’s burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice.¹⁴⁸

The problem now faced by regulation proponents, as discussed above, is to what extent any future court will credit the growing body of research demonstrating a causal link between violent video games and psychological harm to minors.

143. *Turner*, 512 U.S. at 665 (plurality opinion) (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973)).

144. *Id.* at 665–68. The result in *Turner* was a remand to the district court to allow the parties to further develop the evidence supporting their respective positions. *Id.* at 668.

145. *See id.* at 670 (Stevens, J., concurring).

146. *Id.* at 670 n.1.

147. *Entm’t Software Ass’n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008).

148. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738–39 (2011).

Justice Breyer, dissenting from the Court's decision in *Brown*, believes that states have already produced a sufficient body of research to demonstrate a compelling government interest.¹⁴⁹ Supporting his position, Justice Breyer noted: "There are many scientific studies that support California's views. Social scientists, for example, have found *causal* evidence that playing these games results in harm."¹⁵⁰ Justice Breyer also pointed to various statements by medical associations including a joint statement made in 2000 by six American medical groups¹⁵¹ that announced a definitive link between media violence and youth aggression.¹⁵² The statement conceded that "less research has been done on the impact of violent interactive entertainment (video games and other interactive media)" on children.¹⁵³ However, the statement did note that "preliminary studies indicate that the negative impact may be significantly more severe than that wrought by television, movies, or music."¹⁵⁴

Although reasonable minds may differ as to the conclusiveness of the existing research, the real problem facing regulation proponents is the increasing judicial inertia demonstrated by the cases leading up to *Brown*. This inertia stems from judicial skepticism and a dissatisfaction with the body of research offered by states. Ironically, the cause of this dissatisfaction may trace back to the states themselves. Essentially, the states inadvertently put the regulatory cart before the scientific horse. The infant state of psychological research specifically addressing violent video games cannot bear the weight of judicial scrutiny—yet.¹⁵⁵ This is especially true where courts have been unclear about what quantum of proof a state must produce to meet its burden.

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

150. *Id.*

151. These were the American Academy of Pediatrics, American Academy of Child & Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and the American Psychiatric Association. JOINT STATEMENTS, *supra* note 89.

152. *Id.* ("[W]ell over 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.")

153. *Id.*

154. *Id.*

155. "Some suggest it is only a matter of time before science can meet the exacting causation standard that courts currently demand." Knake, *supra* note 4, at 1202 (citing Kevin W. Saunders, *Shielding Children from Violent Video Games Through Ratings Offender Lists*, 41 IND. L. REV. 55, 55 (2008)).

Now that *Brown* has essentially etched in stone constitutional disapproval of existing science, it will be increasingly difficult for courts to identify the “smoking gun” study when it is published.¹⁵⁶ This judicial inertia, however, predated *Brown*. To illustrate, consider the Eighth Circuit’s opinion in *Entertainment Software Ass’n v. Swanson*.¹⁵⁷ In stark contrast to the majority of cases that give little to no credence to the states’ proffered evidence,¹⁵⁸ the *Swanson* court stated that the “State’s evidence provides substantial support” for its claim that violent video games harm minors.¹⁵⁹ Nevertheless, the *Swanson* court concluded that the state regulation was invalid, despite not only the “substantial” evidence, but the state’s “intuitive (. . . commonsense) feelings regarding the effect that the extreme violence portrayed in [modern] video games may well have upon the psychological well-being of minors.”¹⁶⁰ This conclusion, notwithstanding the Eighth Circuit’s apparent sympathy with state-proffered evidence, demonstrates the same judicial inertia that will likely plague later state attempts to pass strict scrutiny. Bear in mind that for many of the lower federal court cases “substantial evidence” was, at least nominally, the standard of proof required by strict scrutiny. Now that *Brown* has made clear that a higher standard is required, it will be that much harder for regulation proponents to pass constitutional muster. Accordingly, because courts appear dissatisfied with the body of current research, and considerable inertia has already been demonstrated by *Brown* and lower court decisions alike, notwithstanding persuasive evidence of harm, regulation proponents will likely continue to come up short.

C. The Nature of the “Harm to Minors” Rationale and State Regulatory Attempts Make Violent Video Game Regulation Particularly Infirm in Light of the “Narrowly Tailored” Requirement.

Courts have quickly dismissed state attempts to show that, regardless of the interest at stake, a proposed regulation is narrowly

156. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2739 (2011).

157. *Entm’t Software Ass’n v. Swanson*, 519 F.3d 768 (8th Cir. 2008).

158. *See Entm’t Merchs. Ass’n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007).

159. *Swanson*, 519 F.3d at 772.

160. *Id.* Indeed, the *Swanson* court reasoned simply that, although there was substantial evidence of a causal link between violent video games and harm to minors, the state had failed to show the “incontrovertible proof” required to uphold the statute.

tailored to promote that interest.¹⁶¹ Courts typically reject state arguments for one or more of the following reasons: (1) the proposed statute is “underinclusive” in the sense that it fails to “materially advance” the protection of minors because it does not address other forms of violent media;¹⁶² (2) the regulation is overinclusive in that it purports to aid parents in monitoring their children’s behavior without demonstrating that parents really want or need such help;¹⁶³ or (3) the government has failed to prove that court-suggested, less restrictive alternatives would fail to adequately address the alleged problem.¹⁶⁴

Courts’ use of the underinclusiveness rationale presents an especially difficult obstacle for regulation opponents given the infeasibility of extending government regulation over other forms of protected media. Movies have long enjoyed First Amendment protection,¹⁶⁵ except those qualifying as obscenity.¹⁶⁶ Violent movies have never been considered obscene.¹⁶⁷ While, as one court noted, regulation proponents would probably like to argue for more restrictions on minors’ access to violent movies,¹⁶⁸ the constitutional history of movie protection makes this nearly impossible. In addition, although at least one court has acknowledged that a state seeking to regulate minors’ access to media violence “has to start somewhere and should not be discouraged from experimenting,”¹⁶⁹ this sentiment has not been embraced by most courts. This apparent requirement—that a state address the whole universe of violent media before addressing any of it—presents regulators with a true dilemma that will likely doom future state efforts to regulate violent video games. Axiomatically, the more restrictive the statute, the less

161. *Brown*, 131 S. Ct. at 2741; *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009) (“The State appears to be singularly focused on the ‘most effective’ way to further its goal, instead of the ‘least restrictive means,’ and has not shown why the less-restrictive means would be ineffective.”).

162. *See, e.g., Brown*, 131 S. Ct. at 2740; *supra* note 52 and accompanying text.

163. *Brown*, 131 S. Ct. at 2741.

164. *Id.* at 2740–41.

165. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (“[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”).

166. *See Jacobellis v. Ohio*, 378 U.S. 184, 187–88 (1964).

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

168. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

169. *Id.*

likely a court will find it “narrowly tailored” and the less likely it is to be the “least restrictive means” to advance the stated interest. As such, in the violent video game context, it appears that the Constitution requires that the regulatory remedy address the harm to minors but leaves no room for a solution broad enough to do so.

In addition to the underinclusiveness issue, federal courts often elaborate a number of “less restrictive” means that states could use to address harm to minors without the proposed statutes. These include: simply allowing the gaming industry to regulate itself through voluntary ratings,¹⁷⁰ relying on parents to use modern parental controls to block mature content on household game consoles,¹⁷¹ and an education campaign about the voluntary industry ratings.¹⁷² Not only does the apparent success of these methods hamper state regulatory efforts, the context-specific nuances of child psychology, parent preference, and the harm rationale make it difficult for states to narrowly tailor a statute to address the purported harm.

Not all video games are created equal in terms of interactivity and level of violent content.¹⁷³ Neither does every child possess an equal capacity to conduct and oversee digital carnage while remaining emotionally and mentally unscathed. Theoretically, the state could absolutely protect children from potential harm caused by violent video games by preventing *all* children from playing them. However, such a measure is too blunt an instrument to adequately balance constitutional freedoms with the state’s interest in preventing harm to individual minors. The “gold standard” of government regulation would be to block access to violent video games only by those minors most likely to be harmed, and then only blocking those games that might be harmful. A statute enforcing parental consent before a minor can buy, rent, or have unrestricted access to a particular game best fits this standard. Under such a statute, a parent, who is or should be¹⁷⁴ in the best position to know

170. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2740–41 (2011).

171. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009) (citing *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 833 (M.D. La. 2006)).

172. *Id.*

173. See *Kendrick*, 244 F.3d at 579–80.

174. Justice Scalia argues that the legislature’s normative objective of enforcing the parents’ role in regulating their minors’ access to violent video games made the California statute “vastly overinclusive.” In Justice Scalia’s view, “[w]hile some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its

which games, if any, will likely harm their child would be the institutional gatekeeper of such content.

Nevertheless, this is the exact sort of statute that the Court struck down in *Brown*. Further, it seems, as Justice Breyer noted, that under a statute such as the one at issue in *Brown*,¹⁷⁵ the relative burden to the gaming and retail industry is fairly light.¹⁷⁶ In fact, it seems likely that codifying,¹⁷⁷ or even promoting, the industry's voluntary rating system—a favorite alternative advanced by regulation opponents—potentially could be equally or even more economically burdensome to retailers. If a parent learns about the ratings system, decides to restrict “M-rated” games, and blocks them wholesale on the family console, there will be little incentive for the children to buy them. Conversely, if children want a game and need only convince their parents that the virtues of the game's “age-old themes”¹⁷⁸ outweigh its incidental violent content, parents need only give their consent or accompany children to the store. This one-time burden is in sharp contrast to the burden imposed by other types of statutes or proposed alternatives.¹⁷⁹ Thus, because statutes like the one at issue in *Brown* appear to be as narrowly tailored as possible, it is unlikely that future state regulatory efforts can find a sharper instrument.

entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to ‘assisting parents’ that restriction of the First Amendment rights requires.” *Brown*, 131 S. Ct. at 2741.

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

176. Of course, regulation opponents hotly contest this issue. Yet, it is not always clear who regulation opponents argue will be burdened. For example, one student author seemed concerned that statutes criminalizing the sale of violent video games to minors will actually burden the expressive rights of adults. He argued: “[T]he threat of criminal penalties for retailers who rent or sell violent video games to minors will undoubtedly cause many retailers to stop selling violent video games with an ‘M’ rating. This will prevent adults from renting or purchasing such games, unnecessarily limiting their freedom of expression.” Russell Morse, Note & Comment, *If You Fail, Try, Try Again: The Fate of New Legislation Curbing Minors’ Access to Violent and Sexually Explicit Video Games*, 26 LOY. L.A. ENT. L. REV. 171, 197 (2005/2006). The main problem with this argument is that it seems unlikely that vendors would stop selling video games simply because they cannot sell them to children. Many stores sell cigarettes, even though they are much more strictly regulated than video games would be under these statutes.

177. See Phillips, *supra* note 106, at 606–07 (arguing that the solution to the violent video game problem should be industry classification enforced by local legislation).

178. See *Kendrick*, 244 F.3d at 577–78.

179. One example is the City ordinance at issue in *Kendrick* which required a parent to accompany the child any time the child wanted to play at a video arcade. *Id.* at 579.

V. CONCLUSION

The deck is already definitively stacked against state regulators trying to restrict minors' access to violent video games. The only questions remaining are (1) whether future developments in technology will ever warrant a court's review of a violent video game regulation with anything less than strict scrutiny; and (2) whether a state regulation will ever pass strict scrutiny. Although not squarely answered by the *Brown* Court, *Brown*, read in conjunction with earlier cases, demonstrates that both questions must be answered in the negative. Courts have been wholly unsympathetic to the proposition that a video game could be realistic or interactive enough to warrant anything less than full First Amendment protection. As to the second question posited above, violent video game regulation is unlikely to ever withstand the rigors of strict scrutiny. Judicial skepticism and inertia work against future regulatory efforts. Further, the nuances of child psychology and the states' harm rationale make proof difficult and make regulation susceptible (at least in the eyes of some) to being over or underinclusive. Thus, notwithstanding the staunch public opposition to games like *Manhunt* and *Postal II*, the message from the Supreme Court is clear: The game is on.

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