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Simulacra's Day in the U.S. Supreme Court: Brown Versus Entertainment Merchants Association and United States Versus Stevens

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Brown v. Entertainment Merchants Association and United States v. Stevens

By Nachshon Goltz[1]

"The greatness of a nation and its moral progress
can be judged by the way its animals are treated".[2]

"Transgression and violence are less serious because they only contest the distribution of the real. Simulation is infinitely more dangerous because it always leaves open to supposition that, above and beyond its object, law and order themselves might be nothing but simulation".[3]

Abstract

This paper will argue that the U.S. Supreme Court's decisions in Brown v. Entertainment Merchants Association,[4] (prohibition of the sale of "violent video games" to minors is unconstitutional), and its predecessor, United States v. Stevens[5] (prohibition of sale of animal abuse videos is unconstitutional) are both based on lack of understanding of new media, therefore biased by Jean Baudrillard's notion of Simulacra and hence wrong.

It is argued that Justice Thomas' and Justice Breyer's dissenting opinion as well as Justice Alito's, opinion in Brown (joining the majority only in his conclusion) and Justice Alito's dissent opinion in Steven's, are the only voices acknowledging this Simulacra bias. Moreover, by

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[2] Mahatma Gandhi, cited in Regenstein, Lewis, Replenish The Earth (New York: Crossroads, 1991), at 225.

[3] J. Baudrillard, **Simulacra and Simulation**, trans. Sheila Faria Glasner, (University of Michigan Press, 1994), at 20.

[4] **Brown v. Entm't Merch. Ass'n**, 131 S. Ct. 2729 (2011).

[5] **United States v. Stevens**, 130 S. Ct. 1577 (2010).

formally joining the majority in Brown (a Simulacra act of itself), Justice Alito is opening the door for a new constitutional balance that will enable the 'right' regulation to pass muster.

Jean Baudrillard's concept of Simulacra will be used to demonstrate that the Court's majority lacks understanding of new media and its implications, sticking to formal and old conventions of the First Amendment, thus allowing harm to the most vulnerable creatures, in this order – animals and children.

1. Introduction

The violent video games legal controversy has sparked the imagination of many scholars,[6] most of them JD students. This may be one of the reasons for the general focus on First Amendment doctrine and justifying the majority opinion in Brown v. Entertainment Merchants Association[7] for following this doctrine traditional root.

This paper will approach the Brown and Stevens case from a different and interdisciplinary view, by identifying Jean Boudliard's interpretation of the ancient Greek term: "simulacra" in the Brown and Stevens decisions.

In 2006, in an attempt to defend a state law that would regulate the sale of violent video games to children,[8] Louisiana argued that the statute was enacted for two compelling state interests, which included preventing both "physical" and "psychological" harm to minors.[9] The district court agreed with the plaintiffs' assertion that protecting minors from "psychological harm" is not a

[6] See, e.g., Kagel, Laura Tate, Balancing The First Amendment and Child Protection Goals in Legal Approaches to Restricting Children's Access to Violent Video Games: A Comparison of Germany and the United States, 34 **Ga. J. Int'l & Comp. L.** 743 2005-2006; Herrero, Luis S. Acevedo, Speech, Violence, and Video Games: Is Grand Theft Auto Worthy of First Amendment Protection? 76 **Rev. Jur. U.P.R** 421 2007; Dean, Christopher, Returning the Pig to Its pen: A Pragmatic Approach to Regulating minor's Access to Violent Video games, 75 **Geo. Wash. L. Rev**. 136 2006-2007; Wilcox, Alan, Regulating Violence in Video Games: Virtually Everything, 31 J. **Nat'l Ass'n Admin. L. Judiciary** 254 (2011); Kiernan, David C., Shall the Sins of the Son Be Visited upon the Father? Video Game Manufacturer Liability for Violent Video Games, 52 **Hastings L.J.** 207 2000-2001; Dubinsky, David S., Video Software Dealers Association v. Schwarzenegger*:* Defining the Constitutional Perimeter around State Regulation of Violent Video Games,13 **SMU Sci. & Tech. L. Rev**. 219 2009-2010; Laughlin, Gregory K.*,* Playing Games With The First Amendment: Are Video Games Speech And May Minors' Access To Graphically Violent Video Games Be Restricted? 40 **U. Rich. L. Rev**. 481 2005-2006.

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

[8] **Entm't Software Ass'n v. Foti**, 451 F. Supp. 2d 823, 825 (M.D. La. 2006) (dealing with a Louisiana law for the purpose of prohibiting the distribution of video games "that appeal to a minor's morbid interest in violence.").

[9] *Id*.

valid stated interest, as it "amounts to nothing more than 'impermissible thought control.'"[10] The court pointed out that there are less restrictive alternatives already available to achieve the State's goals, such as educating people about the ESRB rating system and promoting the use and development of parental controls.[11]

Seven years later, in August 2013, an 8-year-old child from Louisiana shot and killed his 90-year-old babysitter. The shooting occurred after the child was playing the extremely violent video game, adults only rated, 'Grand Theft Auto IV'.[12] The local police reported that the child said that he accidentally shot the woman. Nonetheless, the police are calling this shooting a homicide, since the child shot the babysitter in the back of the head.[13]

The amount of time young people spend playing video games, has seen a substantial increase. While in 1999 the average video game playtime was 26 minutes daily, in 2009 it increased to 73 minutes per day.[14] Moreover, 'Grand Theft Auto' (rated "M" – for ages 17+), the same game played by the Louisiana 8 years old killer, was played by over half (56%) of all 8 to 18-year-olds.[15]

In 2011, almost all the children in the US (91%), ages 2-17 (approximately 64 million) were playing video games. This is an increase of 9 points when compared to statistics from 2009. The fastest growth of video games playing has been among children ages 2-5. The main growth in other segments are females and teenagers ages 15-17.[16]

Revenue does not fall behind. Call of Duty, an M-rated violent game created by the gaming company, Blizzard, is the most successful entertainment product launch ever: with Modern Warfare 2 generating $310 million dollars in the first 24 hours and $550 million in the first 5 days; Black Ops generating $360 million in the first 24 hours and $650 million in the first 5 days

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[10] *Id*.
[11] *Id*.
[12] http://www.rockstargames.com/V/
[13] Louisiana boy, 8, shoots 90-year-old relative after playing video game, police say, August 24, 2013, **FoxNews.com**, http://www.foxnews.com/us/2013/08/24/la-police-boy-8-fatally-shoots-0-year-old-relative-after-playing-video-game/
[14] Generation M2: Media in the Lives of 8 To 18-year-olds.
[15] *Id*., at 26.
[16] *Id*.

and Modern Warfare 3 generated $400 million in the first 24 hours and $775 million in the first five days of sale.[17]

In 2004, A Federal Trade Commission (FTC) study reveled that nearly 70% of unaccompanied 13- to 16-year-olds children were able to buy M-rated video games.[18] In 2009 the FTC's update to Congress, discovered that 20% of children under 17 are still able to buy M-rated games, and, when breaking down sales by store, the FTC reported that this number rises to nearly 50% in the case of one large national chain.[19]

Jean Baudrillard argued that, "our technologies have progressed so far that we now are able to create hyperreal simulations, artificial creations that are more real than real".[20] Drawing on that, Sontag concludes that, "Images are more real than anyone could have supposed. And just because they are an unlimited resource, one that cannot be exhausted by consumerist waste, there is all the more reason to apply the conservationist remedy. If there can be a better way for the real world to include the one of images, it will require an ecology not only of real things but of images as well".[21]

As Baudrillard contends: "It is no longer a question of imitation, nor duplication, nor even parody. It is a question of substituting the signs of the real for the real, that is to say of an operation of deterring every real process via its operational double, a programmatic, metastable, perfectly descriptive machine that offers all the signs of the real and short-circuits all of its vicissitudes".[22]

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[17] Lynely, Matt, Call of Duty: Modern Warfare 3 Snags $775 Million In Five Days, Best Selling Game Of All Time, **Business Insider**, Nov. 17, 2011, http://www.businessinsider.com/call-of-duty-modern-warfare-3-guns-down-record-for-best-five-day-games-sales-ever-2011-11

[18] FTC, **Marketing Violent Entertainment to Children** 27 (2004), http://www.ftc.gov/os/2004/07/040708kidsviolencerpt.pdf.

[19] FTC, **Marketing Violent Entertainment to Children** 28 (2009), http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf.

[20] Strate, Lance, **Echoes and Reflections**, Hampton Press, 2006, Cresskill: NJ (Jean Baudrillard, (1983) **Simulations** (P. Foss, P. Patton, & P. Beitchman, Trans.). New York: Semiotext(e). and **Simulacra and Simulation** (1994) (S. F. Glaser, Trans.). Ann Arbor: University of Michigan Press.

[21] Sontag, S. (1977). **On Photography**. New York: Farrar, Straus & Giroux, at 158.

[22] See Baudrillard, Jean, **Simulacra and Simulations**, In Baudrillard, Jean: **Selected Writing** 166 (Mark Poster ed., 1988). The concept of simulacrum that Baudrillard uses differs significantly from the common use of the word "simulacrum," which is defined as an image or likeness, a vague representation or a sham. See Webster's New World Dictionary of American English 1251 (3d college ed. 1988).

A simulacrum is generally an image, likeness, similarity, or semblance with the connotation that it is superficial or inferior to the original. The philosophical concept (the term is more modern) goes back to the Greek philosophers, where the concept of image manipulation was treated by Plato. However postmodernist, Jean Baudrillard, defined it as an image that takes on a life of its own, but with no basis or connection to reality.[23] The simulacrum is the fourth stage in the procession of an image. In the first stage, an image is a reflection of a reality. The second stage comes about as the reflection perverts or masks the reality. In the third stage, the image masks the absence of the reality. The fourth stage occurs when the image becomes real, taking on a life of its own, without any basis on its founding reality.

Ironically, and perhaps unsurprisingly, Judge Posner's observation that books are as interactive as video games,[24] back in 2001, lies at the heart of the Supreme Court mistake and strikingly demonstrates the misunderstanding of new media and its severe implications. Judge Posner is familiar with the concept of simulacra as he writes that registered partnership and homosexual cohabitation are "in effect a form of contract that homosexuals can use to create a simulacrum of marriage."[25] Judge Posner's wrong ruling in Kandrik,[26] which we are witnessing today in its harmful implications, aligns with an ideology voiced by Judge Easterbrook:[27] the internet is of no innovation to law. Lessig argued convincingly against this contention.[28]

This article reviews the Stevens and Brown decisions including some of the Amicus Briefs in Brown. Further, an analysis of the decisions will be performed in light of Baudrillard's simulacra theory. Finally, a suggestion for new measures will be offered.

2. **United States v. Stevens**

Robert J. Stevens ran websites selling videos of dog-fights and dogs attacking other animals. Among these videos were a Documentary including contemporary footage of dogfights in Japan

[23] Baudrillard, Jean, **Simulations**, (Simiotext[e] and Jean Baudrillard, 1983), at 11.
[24] **American Amusement Machine Assn. v. Kendrick**, 244 F. 3d 572, 577 (CA7 2001).
[25] Posner, Richard A., **Sex and Reason** 313 (1992).
[26] 244 F. 3d 572, 577 (CA7 2001)
[27] Easterbrook, Frank H. (1996), Cyberspace and the Law of the Horse, **University of Chicago Legal Forum**, 207-216.
[28] Lessig, Lawrence, **Code and Other Laws of Cyberspace** (New York: Basic Books, 1999).

(where such conduct is allegedly legal) and footage of American dogfights from the 1960's and 1970's. A third video, documented the use of dogs to hunt wild boars, including a "gruesome" scene of a pit bull attacking a domestic farm pig.[29] Based on these videos, Stevens was indicted on three counts of violating §48. Stevens argued that §48 is invalid as it breaches his freedom of speech under the First Amendment and moved to dismiss the indictment.

An illustration of Stevens repelling merchandise can be found in the following description: "In a dim cellar, two dogs are forced into a pit. Outside the pit's plywood walls, a crowd places bets. What comes next is what the dogs have been trained for all their short, miserable lives. The fight, which is just starting, will be brutal. It will last a long time. No one will call for help. An hour passes before one dog loses. He sinks into a corner, its head and body covered with wounds. He will not survive. The other, also painfully injured, won't recover either. His owner takes the prize, a pocketful of cash, and leaves the 2-year-old dog to die".[30]

Section 48 of the US Federal code establish a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done, "for commercial gain," in interstate or foreign commerce.[31] An "animal cruelty" depiction is defined as one related, tortured, wounded, or killed," if that conduct violates federal or state law where, "the creation, sale, or possession takes place."[32]. In the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[33].

The interstate market for "crush videos," formed the legislative background of §48. According to the House Committee Report on the bill, crush videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice and hamsters.[34]

According to the report, '"Crush videos" often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes," sometimes while, "talking to the animals in a kind of dominatrix patter", over, "[t]he cries and squeals of the animals, obviously

[29] 533 F. 3d 218, 221 (CA3 2008) (en banc).
[30] The Dangers of Dogfighting, **Kind News Online**, (Jan., 2008), http://www.kindnews.org/feature/2008/feature_jan08.asp
[31] §48(a)
[32] §48(c)(1)
[33] §48(b)
[34] H. R. Rep. No. 106–397, p. 2 (1999) (hereinafter H. R. Rep.)

in great pain.".[35] Apparently these depictions "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting."'.[36]

While the animals torturing and killing shown in "Crush Videos" are prohibited by the animal cruelty laws enacted by all the states in the US,[37] these videos rarely disclose the human participants' identities, thus making it impossible to prosecute for the underlying conduct.[38]

In Stevens, the Supreme Court struck down section 48, on facial overbreadth grounds.[39] According to Strossen,[40] the Supreme Court also dismissed two major supporting rationales that have consistently been advanced by advocates of other content-based regulations, based on reinterpreting two of its past rulings in Chaplinsky v. New Hampshire[41] and New York v. Ferber.[42]

In Chaplinsky the Supreme Court determined criteria for excluding certain content-based categories of expression from First Amendment protection,[43] whenever expressions is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[44]

In the Ferber decision, the Supreme Court upheld a statute criminalizing child pornography, based on a "drying-up-the-market" rationale. This decision allowed the government to criminalize the resulting images of child pornography thus reducing the economic incentive to engage in such abuse.[45]

According to Strossen, in Stevens, "the Court significantly recast both Chaplinsky and Ferber in ways that substantially rein in their precedential force as foundations for further inroads into the cardinal rule against content regulations".[46]

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[35] *Id*.
[36] *Id.,* at 2–3.
[37] See Brief for United States 25, n. 7 (listing statutes).
[38] See H. R. Rep., at 3; accord, Brief for State of Florida et al. as *Amici Curiae*
[39] 130 S. Ct. at 1588.
[40] Strossen, Nadine, United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions, 2009-2010 **Cato Sup. Ct. Rev**. 67, at 68-69.
[41] 315 U.S. 568 (1942).
[42] 458 U.S. 747 (1982).
[43] Chaplinsky, 315 U.S. at 571-72.
[44] Stevens, 130 S. Ct. at 1585 (quoting Chaplinsky, 315 U.S. at 571-72).
[45] Ferber, 458 U.S. at 759-60.
[46] Strossen, Supra note 67.

In Stevens, the government argued that the Court can and should expand the set of content-based speech categories excluded from First Amendment protection whenever it concludes it is justified under Chaplinsky's general balancing test. In addition, the government argued that Ferber's drying-up-the-market rationale also justified Section 48.[47]

While the Third Circuit ruled that section 48 does not survive the strict scrutiny,[48] the Supreme Court struck it down as substantially overbroad as it is "presumptively impermissible applications…far outnumber any permissible ones."[49]

Justice Samuel Alito, the sole dissenter in Stevens, criticized the majority for dismissing the statute on facial grounds, rather than confining its review to the particular videotapes at issue.[50] This act of simulacra by the court majority was supported by a completely irrelevant discussion on hunting related depictions. As if recreational hunting is any source of pride.

Judge Smith for the Court of Appeal in Stevens wrote: "[W]hile the Supreme Court has not always been crystal clear as to what constitutes a compelling interest in free speech cases, it rarely finds such an interest for content-based restrictions. When it has done so, the interest has – without exception – related to the well-being of human beings, not animals".[51] Justice Alito also noted that child pornography is much worse than animal cruelty and killing.

The discussion on the difference between animals and children in the context of abuse depictions, at the heart of this case, is absent. This absent is a pure act of simulacra. In this context, the Appeal Court drew primarily on its reading of Church of Lukumi Babalu Aye v. City of Hialeah[52] in determining that "[w]hile animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend that the animals themselves suffer continuing harm by having their images out in the marketplace".[53]

Judge Robert E. Cowen, dissenting at the Court of Appeal, argued that the majority had essentially afforded constitutional protection to depictions of animal cruelty.[54] The dissent

[47] Reply Brief for the United States at 5, United States v. Stevens, 130 S. Ct. 1577 (2010) (No. 08-769).
[48] Stevens, 533 F.3d at 232-33.
[49] Stevens, 130 S. Ct. at 1592.
[50] Stevens, 130 S. Ct. at 1593 (Alito, J., dissenting).
[51] Id.
[52] 508 U.S. 520 (1993).
[53] Stevens, 533 F.3d at 230.
[54] Stevens, 533 F.3d at 236 (Cowen, J., dissenting).

rejected the argument that animal cruelty and child pornography were so dissimilar as to prevent §48 from prevailing under the same analysis used to prohibit the interstate commercial use of child pornography.[55]

3. Brown v. Entertainment

Linda Greenhouse, veteran Supreme Court watcher, called Supreme Court decision in Brown v. Entertainment: "the most surprising decision"[56]. The majority, lead by Justice Scalia, quashed a California's law prohibiting the sale of violent video-games to minors[57] arguing that it offends the First Amendment protections.[58] This is the first (and so far the only) violent video game case to reach the Supreme Court.[59]

The California statute at issue "Prohibits the sale or rental of "violent video games" to minors, and requires their packaging to be labeled "18." The Act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." Violation of the Act is punishable by a civil fine of up to $1,000".[60]

Justice Scalia delivering the majority opinion of the Court in Brown, relied on the Stevens decision in his decision: "in Stevens, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be

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[55] Id. at 247.
[56] Greenhouse, Linda, A Supreme Court Scoreboard, **N.Y. Times Opinionator**, July 13, 2011, http://opininionator.blogs.nytimes.com/2011/07/13/a-supreme-court-score-card/.
[57] See CAL. CIV. CODE §§1746-1746.5 (West 2005).
[58] Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011). See Post, David, G., Sex, Lies, and Videogames: Brown v. Entertainment Marchants Association, Cato Sup. Ct. Rev. 27 2010-2011 at 38-39 on the question why the Supreme Court granted the appeal in the first place.
[59] See Totilo, Stephen, All You Need to Know About This Week's Violent Video Game Case in the U.S. Supreme Court, **Gizmodo** (Nov. 1, 2010), http://www.kotaku.com/5678354/all-you-need-to-know-about-this-weeks-violent-video-game-case-in-the-us-supreme-court.
[60] Brown, 131 S. Ct. at 2732-33.

tolerated…There was no American tradition of forbidding the depiction of animal cruelty – though States have long had laws against committing it".[61]

In an age of new media, the search of any tradition is an absurd. When videos are reletivaly new forms of depictions, never existed before, Justice Scalia's argument that there is not enough American tradition in the context of violent video games and children, is an act of simulacra.

(g) Amici Briefs

The same mistake that was done in Steven's was followed, duplicated and repeated in Brown. The Amici Briefs submitted in Brown emphasis the simulacra mistake done in Stevens and are doing cynical use of simulacra to push the Court to protect their economic interest.

According to 10 Attorney general Amici Brief[62] in Brown: "California also fail[s] to mention that standard gaming consoles contain parental controls that enable parents to block teen – or mature – rated games from being played on them, much like the blocking technology employed in Playboy or that console companies require that all games sold on their platforms be ESRB-rated".[63]

The group is concerned with parental authority undermining the prohibition of selling mature rated violent video games to unaccompanied children: "Mothers and fathers enjoy the parental privilege to make decisions about their children's upbringing. Telling a child, 'You can't play that game because it's bad for you', represents parental authority. Telling a child, 'You can't play that game because there is a law against offensive simulations of violence without sufficiently redeeming artistic value, represents governmental authority. There is no need to abridge First Amendment rights in order for the government to play the role that parents should and do play at home in connection with access to video games."[64]

[61] Justice Scalia, at 3.
[62] Key Excerpts from 27 Amici Briefs, Brown v. Entertainment Merchants Association, http://www.theesa.com/policy/summary-amicis-supreme-court-filings.pdf
[63] *Id*., at 8.
[64] *Id*, at 9.

This brief, opposing the law, is doing a cynical use of parents authority while parents are the ones that are the second main beneficiaries of the law, after their children. After all, the law make it clear that children can purchase any game, as long as their parent is present.

"In short, parents are the appropriate guardians of the content of the video games that their children play at home. They are uniquely well-suited to do so effectively and appropriately, and without any concerns about the abridgement of First Amendment rights."[65]

First Amendment lawyers Association brief[66] takes the same approach in a different angel arguing that children's ability to function in the 'modern world' without being able to purchase mature rated violent video game without an adult, could be hampered: "The subject of violence is pervasive throughout historical literature – including stories written for children…. Any paternalistic attempt by Petitioners to shield juveniles from exposure to concepts involving violence, whether in video games or other forms of media, will leave them ill-equipped to function in the modern world.".[67] "Parents should be supported in their decision to expose their children to a wide range of topics and issues to prepare them for adulthood."[68]

The Progress & Freedom Foundation & The Electronic Frontier Foundation also contends that parents have and should have the power to monitor their children's recreational preferences: "Whatever the state's interest, parents today already have the capacity to choose and control their children's videogame consumption based on their own household standards. Government can help build awareness of parental control tools and methods, and punish deception, but there is no Constitutional justification for restricting this new and evolving form of speech."[69]

The Marion B. Brechner First Amendment Project and Pennsylvania Center for the First Amendment Brief are concerned that preventing children from buying mature rated violent video games without adult supervision will deter adults from buying the games themselves: "[A]s California and other government entities play the media blame game by attacking the speech of

[65] *Id*.
[66] *Id*., at 34.
[67] *Id*., at 6
[68] *Id*. at 22.
[69] *Id*., at 43.

corporate entities in the name of ostensibly protecting, in noble fashion, minors from content many adults fear and abhor."[70]

"[T]he Court should have faith in several matters – faith in the wisdom of parents and guardians to know what video games are and are not appropriate for their children to rent, purchase and play; faith in a voluntary, rigorous Entertainment Software Rating Board ('ESRB') rating system designed to help those parents and that assigns independent age ratings and content descriptors for video games; and faith in technological advances in game consoles that easily allow parents to block games carrying ESRB ratings to which parents object."[71]

As illustrated, the Amici Briefs are nothing but a cynical and blatant attempt to establish and amplify the simulacra mistake.

(c) The Majority Decision

According to the majority, Ginsberg[72] does not shield content from First Amendment scrutiny any time a legislature deems speech "harmful to minors". The only instances where Ginsberg applies is when the speech is harmful to minors because it is obscene. The majority decision relies heavily on the decision in Stevens[73] for the proposition that "new categories of unprotected speech may not be added to the list by a legislature that concludes [that] certain speech is too harmful to be tolerated."[74]

According to the majority, the Court may enable the creation of new exception for "violent-as-to-minors" speech "if there were a long-standing tradition in this country of specially restricting

[70] *Id*., at 58.
[71] *Id*.

[72] In Ginsberg v. New York, 390 U.S. 629 (1968) the owner of a Bellmore, Long Island, luncheonette had been convicted of selling "girlie magazines" – concededly not obscene – to a 16-year-old boy in violation of a New York statute that made it unlawful to sell "any picture…which depicts nudity…and which is harmful to minors…" (Ginsberg, 390 U.S. at 631-32).
[73] In United States v. Stevens, 130 S. Ct. 1577 (2010). the Supreme Court invalidated a federal statute that criminalized depictions of animal cruelty. The Court rejected the government's argument that such depictions should be added to the list of categorically unprotected speech (joining "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct") (Stevens at 1584-85). However, laws forbidding the actual commission of such acts were permissible (Brown, 131 S. Ct. at 2734).
[74] See Brown, 131 S. Ct. at 2734 ("That holding [in Stevens] controls this case.").

children's access to depictions of violence."[75] Nonetheless, according to the Court there is no such tradition. Therefore, the California statute is "a restriction on the content of protected speech" and receives the full Monty of strict scrutiny.[76] The Court contended that California must show that the statute "is justified by a compelling government interest and is narrowly drawn to serve that interest."[77] . How could there be a tradition of new media that creates new situations that was never present before?! As in Stevens, the Court fail to address this question.

The decision holds that the California statute fails both strict scrutiny prongs. It fails the "compelling interest" requirement because California "cannot show a direct causal link between violent video games and harm to minors"[78] with the "degree of certitude that strict scrutiny requires."[79] Secondly, the Court held that the law it is not narrowly tailored to achieve its asserted goal.[80] The wrong assumption that violent video games are harmful as movies, cartoons and books is a root mistake in the Brown decision and a building block to wrong analysis and eventually – wrong decision.

According to Justice Scalia, the statute is also "vastly over inclusive":[81] Although the state asserted that the statute was designed to "aid parental authority," Scalia argued that, "[n]ot all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want. This is not the narrow tailoring…that restriction of First Amendment rights requires."[82] So the Court, as in the Amicus Briefs, is concern about the parents but the concern is with regard to specific parents – those who

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[75] *Id*., at 2736.
[76] *Id*, at 2738. "[T]he government['s] power to restrict expression because of its message, its ideas, its subject matter, or its content" (Brown, 131 S. Ct. at 2733 (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)), is severely limited by the "strict scrutiny" such efforts will receive in the courts. The government's burden of justification in such cases – to demonstrate that it has "a compelling interest" in achieving the goal it is pursuing, and that there are no "less speech-restrictive alternatives" available to accomplish that purpose as effectively – is not only substantial, it is well-nigh insurmountable. (See United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible").
[77] *Id*.
[78] Brown, 131 S. Ct. at 2738.
[79] *Id*., at 2739 n.8
[80] *Id*., at 2740.
[81] *Id*. at 2741.
[82] *Id*.

do not care whether their children purchase over rated video games. Why does these parents, if existing, do not care? This is beyond the scope of the Courts analysis.

The Court's most notable evaluation was its implication that future technologies will be subject to the same protections of the First Amendment.[83] Specifically, the Court stated that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[84]. More than all, this assertion demonstrates the Courts lack of understanding of new media and its implications.

The Court addressed California's argument that video games are distinguishable from other forms of media because they are interactive in that the player participates in the violence and determines its outcome.[85] The Court, however, did not find this distinction compelling for two reasons.[86] Firstly, with respect to controlling the outcome of the game, this is a common feature akin to "choose-your-own-adventure stories," which have been around since 1969.[87] Second, as for the player's participation, the Court viewed this as "more a matter of degree than kind."[88] This increased interactivity, however, is not a strike against video games, and is in fact, a testament to their success at drawing the player into the experience.[89]

The Court failed to understand the concept of interactivity in the context of new media and its powerful influence on the user.[90]

The Court concluded that the California law is also under inclusive because the statute allows these allegedly "dangerous, mind altering" games to find their way into the hands of minors so

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[83] Brown, 131 S. Ct. at 2733

[84] *Id*., See Black, supra note 60 at 122 n351 ("It appears that the Court is trying to preempt future litigation that attempts to restrict emerging technologies because of its increased interactivity, such as the motion sensory technology of Xbox's Kinect and PlayStation's Move system").

[85] *Id*., at 2737-38.

[86] *Id*., at 2738.

[87] *Id*.

[88] *Id*.

[89] *Id*., at 2738. The Court quotes Judge Posner, when commented on the interactivity of literature by stating, "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 suffering as the readers' own." Id. (quoting Am. Amusement Mach. Ass'n v. Kendrick, 224 F.3d 572, 577 (7th 2001)).

[90] See Goltz, Nachshon, The Artificial Medium Laws Theory, **The Media Ecology Association Journal** (forthcoming) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2429899, and **The Law of the Dog: Protecting Children's Imagination in Virtual Worlds by Drawing Lessons from Children's Online Marketing Regulation in Canada and USA,** Dissertation [forthcoming].

long as a parent or guardian gives them permission.[91] The opinion expressed the Court's "doubts that punishing third parties for conveying protected speech to children just in case their parents disprove of that speech is a proper governmental means of aiding parental authority."[92]. The Court is not sure that punishing the video games vendors, in case the parents has not given permission to the purchase of over rated violent video games by their children – aid parental authority. Parental consent is parental authority. The Court argue that video games vendors should not be punished for detouring and thus undermining parental authority, because punishing these vendors for not aiding parents is not a proper governmental mean in this context. This argument contradicts itself and is an absurd.

This type of government regulation of children's access to speech is exactly what the Court upheld in Ginsberg and many other cases.[93] In fact, the Court has upheld numerous broadcasting restrictions, which affect adults and children alike, all in the name of protecting children from speech that their parents may disapprove.[94]

(d) Justice Alito

Justice Alito, joining the majority opinion conclusion, held the statute unconstitutional on the "narrower ground that the law's definition of 'violent video games' is impermissibly vague."[95] The California statute does not meet the vital threshold requirement; it does not define "violent video games" with the "'narrow specificity' that the Constitution demands."[96] The other definitional provisions of the statute – targeting speech that "a reasonable person…would find appeals to a deviant or morbid interest of minors [and] patently offensive to prevailing standards in the community as to what is suitable for minors" – are also "not up to the task," because

[91] *Id*., at 2740.
[92] *Id*.
[93] See Ginsberg, 390 U.S. at 639; See also, e.g., United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 203 (2003); AShcroft v. ACLU, 535 U.S. 564 (2002); Denver Area Educ. Telecomms. Consortium, Inc., v. FCC, 518 U.S. 727; Sable Comme'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
[94] See, e.g., FCC v. Pacifica Found., 438 U.S. 726 (1978); Denver Area Educ. Telecomms. Consortium, Inc., 518 U.S. 727; Info. Providers Coal. for Def. of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).
[95] *Id*., at 2742.
[96] *Id*., at 2741.

(unlike obscenity) there are no "generally accepted standards regarding the suitability of violent entertainment for minors."[97]

Nonetheless, Justice Alito takes the opposite position than the majority with regards to new media:

> "[T]he Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before…In some of these games, the violence is astounding…When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing video games may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand…I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us".[98]

Alito's concurrence expressed the concern that the majority decision will be interpreted as indicating that no regulation of a minor's access to violent video games is ever allowed:[99]

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

[97] *Id*., at 2745.
[98] *Id*., at 2748, 2749, 2751.
[99] *Id*., at 2747.

> legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution".[100]

(e) Justice Breyer

An example of the majority lack of understanding of new media and the fragile border between the real and the virtual, is set in what Justice Breyer refers to in his dissent as the "serious anomaly in First Amendment law"[101], created by the majority's holding:

> "Ginsberg makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that the State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude women, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the women, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman – bound, gagged, tortured, and killed – is also topless?"[102]

Justice Breyer stated that the applicable standards of review in determining the constitutionality of California's video game regulation are the vagueness precedents and the strict scrutiny test. The relevant category of speech for this type of review is not depictions of violence, but rather the category of "protection of children."[103] Under the vagueness analysis, Breyer found that the California statute provided sufficient notice of what is prohibited under the law, and therefore was not impermissibly vague.[104] Additionally, California's law was no more vague than New York's statute in Ginsberg.[105] Accordingly, any issues of remaining confusion could be cured through the state courts' interpretation.[106]

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[100] *Id*., at 2742.
[101] *Id*., at 2771 (Breyer, J., dissenting)
[102] *Id*.
[103] *Id*., at 2762 (Breyer, J., dissenting).
[104] *Id*., at 2763.
[105] *Id*., at 2763-65.
[106] *Id*., at 2765.

By applying the standard of strict scrutiny to California's video game regulation, Breyer reached the opposite result from the majority.[107] Breyer determined that both California's interest in addressing a social problem and in aiding parental authority are legitimate and are indeed furthered by the California legislation.[108] According to Breyer, the California law achieved these aims since it only prevents a minor from buying a violent video game without a parent's permission.[109] Furthermore, video games are accepted teaching tools, and therefore, properly regulating the distribution of video games deemed exceedingly violent will further California's aim of protecting the physical and psychological well-being of minors.[110]

Breyer imparted that the present case is more about education than censorship.[111] As such, the First Amendment does not prevent the government from assisting parents with their children's education about matters of violence.[112]

As Breyer pointed out, the Court has previously stated that an immature and developing child may be less able than an adult to determine for him or herself what material is and is not appropriate and as such is vulnerable to "negative influences."[113] Breyer concludes that, "Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children – by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the First Amendment does not disable the government from helping parents make such choice here – a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children".

(f) Justice Thomas

Justice Thomas dissent took the view that the majority improperly extended the protections of the First Amendment.[114] Instead, Justice Thomas believed the present case encompasses a new

[107] *Id*., at 2765-66.
[108] *Id*., at 2766-67.
[109] *Id*., at 2766.
[110] *Id*., at 2767.
[111] *Id*., at 2771.
[112] *Id*.
[113] *Id*., at 2767 (citing Roper v. Simmons, 543 U.S. 551, 569-70 (2005)).
[114] *Id*., at 2751 (Thomas, J., dissenting).

category of speech: "speech to minor children bypassing their parents."[115] Justice Thomas reasoned that:

> "Where a minor has a parent or guardian…the law does not prevent that minor from obtaining a violent video game with his parent's or guardian's help. In the typical case, the only speech affected is speech that bypasses a minor's parent or guardian. Because such speech does not fall within the "freedom of speech" as originally understood, California's law does not ordinarily implicate the First Amendment and is not facially unconstitutional".[116]

Nonetheless, Black is more concerned about the video game industry and argues that if the California law had been affirmed by the Supreme Court, "it would have had a 'chilling effect' on the video game industry".[117]

Black[118] concludes that recently, "the 'wolf' has taken the form of violent video games; however, the Supreme Court has held that California's cry is nothing more than a false alarm". Tell that to the Louisiana 9 year old and his parents. One wonders whether they consented to the game purchase?!.

4. Discussion

The following points are signs of simulacra, as elaborated in the first part.

4.1 Stevens:

(A) Why cancel the entire law? and if worst comes to worst, release Stevens.

(B) What is the relevance of historically protected? Were these cruel depictions possible before the invention of film? The most ridiculous argument raised in discussing new media is tradition.

[115] *Id*., at 2752.
[116] *Id*., at 2761.
[117] Black, *supra* note 8 at 130-2.
[118] Black, *supra* note 8 at 133.

(C) Why protect actions that harm society and does not have any value of their own? While this is the question in both Stevens and Brown, the Court does not address it.

(D) Why is there a difference between child pornography and crush videos? Another fundamental question that the Court neglected to address.

(E) Child pornography is to be prohibited but depictions of animal torture should not be part of a category of unprotected speech. A line of reasoning that supports child pornography prohibitions is that if it were allowed to continue, a child subjected to the abuse in the video, would continue to be harmed by the distribution of the video.

The court in Stevens notes that animals will not continue to be harmed by the distribution of crush videos and dog fight videos, presumably because the animal will either be dead or have no feelings towards its depiction on internationally distributed video. The court indicates that speech can be proscribed due to obscenity, but usually for minors. However, the fetishists that support these videos would lose an outlet if the videos were banned.

If the videos are permitted, the court encourages animal torture merely to support crush fetishes. There is no reason why such videos should fall into the category of protected speech. The court could make a narrowly tailored decision to support the law or to limit the reach of the law. The Court failed to protect animals.

(F) Who does the right to free speech protects? The law protects commercial sales of such videos, putting the interest of the video maker and commercializer above the interests of the community individuals, and most importantly animals, the most volunrable creatures, without a voice to protest, owned as a commodity and treated alike.

(G) Since the current law may impact hunting videos or educational videos, the law is too broad and will unnecessarily curb free speech. Rather than make a narrow decision interpreting the law narrowly, the Supreme Court has taken it upon itself to allow a depictions of animal torture and brutal human treatment of animals, thereby

encouraging acts of animal torture and brutality. By refusing to narrowly interpret the legislation, the Supreme Court has given it the broadest possible interpretation, encouraging acts of animal torture which are the underlying subject matter for these videos.

(H) The Supreme Court has protected speech by limiting the number of categories of unprotected speech by not creating new categories. The categories created may be narrow or broad. Instead of creating narrow categories, the Supreme Court interpreted this law as broadly as possible.

(I) Alito's argument against the complete abolishment of the law in Stevens – the court could have exempt Stevens and let the law stand.

(J) Alito's statement that child pornography is much more harmful than animal cruelty.

3.2 Brown

(K) video games are the same as books or cartoons, or movies. The depiction of violence in children's books such as Grimm's fairy tales or in literature such as The Iliad and The Odyssey are not the same as those in video games. Nor is the violence in movies or cartoons or even T.V. the same as that in video games. While all the aforementioned media may be violent, the first person nature of video games personalizes the violence in a manner that is not possible through books or movies. The distinction between the video game and the book is that the violence in a book is an image or likeness where the reader is a voyeur. In a video game, the player is the one committing violence or being violated.

(L) There are cases where books are in first person and statistics cannot conclusively show that video games result in violent behavior. With statistics, it is almost impossible in any science or even social science to prove that something is 100% because exceptions always seem to appear. If there is a 70% chance of an event happening, that does not mean that it is inconclusive, nor does it mean that the

exception may be the norm. It merely shows that something is much more likely to occur.

(M) Whose speech is being protected? The constitution relates to people. In Brown, the court appears to protect the speech of video game producers over the moral protection of the people, especially children. The court creates the illusion that free speech is being protected when it is really video games sales that are being protected. Parents cannot be helped by the government to protect their children because of potential profit losses by video game makers.

This is clear by the court's insistence that parental controls at the video games console are the best method for parents to protect their children and make decisions. The court also insists that this is the least restrictive method of controlling speech. It is so non-restrictive that it is positively useless. In answer to the question of who is being protected, a store cannot enforce sales based on ratings because parents should be able to control what their children view.

Also, some parents do not care what their children view. Therefore the reasoning indicates that there should be no controls at the store. The court encourages children to purchase games, only to be locked out by parents at the console, so that the child cannot play the video game, which cannot be returned because package condition store policies prohibit returns on opened products. This is truly an absurd justification for the least restrictive controls on video games.

(N) Because a right exists, free speech, that right cannot be curtailed unless a law can be justified under strict scrutiny. Rights are not independent of responsibilities. As is indicated by the non-protection of speech which causes riots, panics, or fighting-words, such as shouting "FIRE!" in a crowded theater. The Supreme Court may want to avoid making narrow decisions but this is a prime example of narrow decisions.

(O) Movies have ratings and theaters can deny entry based on the ratings. Video games should not be unique. Depictions and images of maiming, torture, and cold-blooded killing can and should be proscribed.

5. Conclusions

The simulacra mistake is so deeply rooted in the Stevens and Brown Supreme Court decisions, to the level that the Supreme Court fails to address the most fundemantal and basic questions of the cases. When dealing with the wrong questions, the answers will never be to the point.

As Justice Breyer pointed, education seems to be the best regulatory instrument to deal with the potential harm of violent video games to children, without insulting the First Amendment. An education institute funded by percentage from the gaming companies revenue will facilitate implementation of such measure.

As for Stevens, any person involved in animal fighting should spend his life in jail. It is the government duty to enact a new law that will replace the one that was quashed in Stevens, and will pass potential judicial review.