JUDGMENT DAY FOR SCHWARZENEGGER V. EMA: TERMINATING FIRST AMENDMENT PROSCRIPTIONS ON VIDEO GAMES AT THE SUPREME COURT

Joseph T. Aquilina†

I. INTRODUCTION

A seven time Mr. Olympia Champion and former chairman of the President’s Council on Fitness, Governor Arnold Schwarzenegger’s physique was a fixture of action packed blockbusters of the 1980s, 90s and even as recently as 2010. In these movies, Schwarzenegger was larger than life, playing characters who could break a man’s neck while seated on an airplane, knock a camel unconscious with one punch, and impale a villain with an exhaust pipe while advising his foe to “let off some steam.” As the star in Predator, determined on terminating a murderous alien, Schwarzenegger’s character notes that “[i]f it bleeds, we can kill it” and also tells a guerilla soldier to “stick

† B.A. The Catholic University of America. J.D. The Catholic University of America, Columbus School of Law, 2011. Joseph wishes to express gratitude to Erica Wisniewski, his family and friends for their love and support. Thanks also to Michael Zolandz of SNR Denton LLP for his valued First Amendment expertise and his colleagues on the COMMLAW CONSPECTUS Editorial Board for their guidance, patience and insight.


3 Was the Camel-Punching Man Imitating Schwarzenegger?, LA TIMES BLOG (May 6, 2008, 12:27 PM), http://latimesblogs.latimes.com/unleashed/2008/05/needs-edit-was.html.


around" after pinning him to a wall with a knife, in addition to coming "back" twice to portray a killing machine in the Terminator films. Schwarzenegger's association with aggressiveness has continued through his political career, and he frequently uses memorable lines from these films to interject humor into speeches. It seems ironic that Schwarzenegger has become a vocal combatant against the video game industry, particularly in the fight between the State of California in its efforts to label certain video games as too violent for youths, and the video game industry, which insists that such labeling requirements are unconstitutional.

In Schwarzenegger v. Entertainment Merchants Association, the United States Court of Appeals for the Ninth Circuit considered whether video game associations have the right to injunctive relief under a California statute that restricted the sale of "violent video games" to minors and imposed a mandatory labeling requirement on games in conformance with the State's definition of violence. This comment will examine the Ninth Circuit holding and argue that, pursuant to First Amendment precedent, the Supreme Court of the United States will affirm that video games are entitled to First Amendment protection and are immune from content-regulating legislative measures. While the Supreme Court has a wealth of precedent that addresses obscenity and speech advocating violence, it has yet to rule on whether the expressive content of virtual violence in video games is entitled to First Amendment protection. The Court will likely endorse holdings of other federal circuits pertaining to regulation of video games, leading to the first Supreme Court case concerning video games in the area of First Amendment law. This will likely be a victory for the video game industry as well freedom of expression in modern visual arts.

Part II examines the Schwarzenegger v. EMA case. This section begins with

---

6 Id. at 6
7 See Matea Gold and Joe Mathews, Film Persona a 'Double-Edged Sword' for Schwarzenegger, L.A. TIMES (Sept. 26, 2003), http://articles.latimes.com/2003/sep/26/local/me-arnold26 ("Schwarzenegger speaks of his intent to 'terminate' the car tax and says he'll be known as 'the Collectionator' as governor because he will squeeze more money out of the federal government."); see also Martin Kasindorf, Schwarzenegger's American Dream, USA TODAY, http://www.usatoday.com/news/politicselections/state/2003-09-24-schwarzenegger-american-dream_x.htm (noting that "[i]n one ad, [Schwarzenegger] repeats a line that echoes the Terminator's 'I'll be back' and 'hasta la vista, baby.'").
8 Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 954 (9th Cir. 2009) (discussing the portion of the statute requiring that each "violent video game" imported into or distributed in California be "labeled with a solid white '18' outlined in black," which shall appear on the front face of the game's package and be "no less than 2 inches by 2 inches" in size"); see also Linda Greenhouse, The Court As Mr. Fix-It, N.Y. TIMES, May 1, 2010, at A19.
9 Video Software Dealers Ass'n, 556 F. 3d at 954 (holding for video game association plaintiffs).
a review of the California violent video game statute that spurred the Entertainment Merchant Association’s injunction and concludes with a discussion of the controversial Ninth Circuit ruling—that the statute violated the First Amendment. Part II discusses prior First Amendment law. Specifically, it recounts the history of Supreme Court rulings in various areas of expression and examines the development of video game precedent in the federal appellate courts. This section also discusses the history of speech and expression regulation, traces precedent on political speech and artistic expression, and outlines the regulation of expression in various entertainment mediums. Part III analyses the evidentiary standards and judicial review involved in First Amendment litigation, as well as the instant case. This section provides insight into the evidence the parties relied upon in the lower courts, and discusses whether states can justify regulating certain games based on content. Part III also examines the questions presented by the Supreme Court relating to Turner Broadcasting v. Federal Communications Commission deference and causation. Part IV examines the matter as it has progressed at the high Court and predicts the Court’s ruling in light of the arguments of the parties, amici and oral arguments. This section concludes with an explanation as to how the unique creative outlet of video games bodes well for pro-First Amendment video game association plaintiffs. Part V suggests that the video game associations will prevail. While the Court will decline to create a new exception for violent video games, they will likely leave open the opportunity for legislatures to draft more precise statutes. In doing so, they will likely stress that more causal evidence linking the games to demonstrated harms could enable states to make it “to the next level.”

II. SCHWARZENEGGER V. EMA: THE VIDEO GAME STATUTE AND HOLDING OF THE NINTH CIRCUIT

A. The Video Game Statute

The Schwarzenegger v. EMA case began as a facial challenge to a California statute regulating video games. California Assembly Bill 1179, signed into law on October 7, 2005, by Governor Arnold Schwarzenegger, sets forth that a "person may not sell or rent a video game that has been labeled as a violent to a minor." Consequently, persons under the age of 18 may not purchase games labeled as violent by the State. California State Senator Leland Yee, a staunch

10 Id. at 953.
11 Id. at 953; CAL. CIV. CODE § 1746.1(a) (West 2009).
advocate of video game regulation,12 introduced the bill and elicited Governor Schwarzenegger's strong support of the legislation.13 Senator Yee asserted that state regulation in this area was necessary, arguing that “playing violent games leads to increased physiological arousal, increased aggressive thoughts, increased aggressive feelings, increased aggressive behaviors, and decreased prosocial or helping behaviors.”14 The California legislature characterized violent games as those which give players the option to “kill, maim, dismember, or sexually assault the image of a human being.”15 The relevant portion of the statute states that a game is violent if it:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.16

The statute specifies a series of factors designed to assess whether a game is especially violent.17 To this end, the statute defines “cruel,” “depraved,” “heinous,” and “torture”18 and it enumerates descriptions of violence, each relating

---

12 Leland Yee Urges Parents to Avoid Violent Games for Holiday Gifts, GAME POLITICS (Nov. 28, 2008), http://www.gamepolitics.com/2008/11/28/leland-yee-urges-parents-avoid-violent-games-holiday-gifts. Senator Yee, who authored the legislation, cautioned parents to avoid buying the games as holiday gifts, noting that “[e]ighty-seven percent of children between 8 and 17 years of age play video or computer games and about 60 percent list their favorite games as rated M for Mature, which are games designed for adults.” Id.

13 Governor Schwarzenegger plainly and openly acknowledged his support for the statute. John M. Broder, Bill Is Signed to Restrict Video Games in California, N.Y. TIMES, Oct. 25, 2005, at All (quoting Schwarzenegger as saying that “[m]any of these games are made for adults and choosing games that are appropriate for kids should be a decision made by their parents”).


15 CAL. CIV. CODE § 1746 (d).

16 Id.

17 Id. § 1746 (d)(3) (“Pertinent factors in determining whether a killing depicted in video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim’s body, and helplessness of the victim.”)

18 Id. § 1746 (d)(2) (defining “[t]orture” as including mental as well as physical abuse of the victim. In both cases, the virtual victim must be conscious of the abuse at the time harm is inflicted; the player must specifically intend to virtually inflict severe mental or physical
to violence toward human-like figures.\textsuperscript{19} For example, a video game is considered violent if there is serious physical abuse toward a virtual victim or gratuitous violence upon a victim beyond killing including, "needless mutilation of the victim's body" as well as "helplessness of the victim."\textsuperscript{20}

The statute's definition of "violent" outlines a range of states of mind for the video game player, as well as various levels of consciousness for the virtual victim.\textsuperscript{21} By delineating a video game player's potential state of mind, the statute distinguishes physical acts of violence from more extreme types of physical abuse such as torture, noting that "serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted."\textsuperscript{22} However, the participant must "virtually intend" to inflict the harm.\textsuperscript{23}

Stores that sell the "violent" video games in violation of the statute are subject to a civil fine of up to $1000.\textsuperscript{24} The statute exempts non-managerial employees who sell the game and does not impose liability if there is a reasonable mistake as to whether a patron is a minor.\textsuperscript{25} Retailers may avoid liability if they "reasonably rely" on a patron's driver's license or other government issued identification.\textsuperscript{26}

B. Federal District Court Litigation and the Ninth Circuit Holding

Almost immediately after the statute was passed,\textsuperscript{27} the Video Software Dealers Association\textsuperscript{28} filed suit against Governor Arnold Schwarzenegger, the California Attorney General, and three city and county officials in their official capacities.\textsuperscript{29} Plaintiffs requested to enjoin the video game statute on the ground

\begin{footnotesize}
\begin{itemize}
\item[19] CAL. CIV. CODE § 1746 (d).
\item[20] id. § 1746 (d)(1)(E)(3).
\item[21] id. § 1746 (d).
\item[22] id. § 1746 (d)(2)(D)-(E).
\item[23] CAL. CIV. CODE § 1746 (d)(2)(D)-(E).
\item[24] Id. § 1746.1(a); id. § 1746.3.
\item[25] Id. § 1746.3; id. § 1746.1.
\item[26] CAL. CIV. CODE § 1746.1(b).
\item[28] The Video Software Dealers Association ("VSDA"), "a division of the Entertainment Merchants Association (EMA), is the not-for-profit international trade association for the $24 billion home entertainment industry." See What is the Video Software Dealers Association?, THE INDEPENDENT DEALERS OF ENTERTAINMENT, http://www.idealink.org/Resource.phx/public/aboutvsda.htm (last visited May 14, 2011). Throughout this Comment, references to Plaintiffs refer to the VSDA at the lower court proceedings and the EMA at the Supreme Court level.
\item[29] See Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d at 951-952; see also
\end{itemize}
\end{footnotesize}
that it was facially invalid, based on content regulation premised on California's categorization of video games as violent and harmful. They also argued the statute unlawfully compelled speech with its new labeling requirement, which obligates game companies to place large font lettering on their product that denotes the video game as violent. Plaintiffs argued that the content-regulating aspect stemmed from the statute's effect of regulating the games merely based on violent subject matter. They noted that the plot, characters and content of the game was artistic material—which game companies were permitted to create, produce and market, consistent with the First Amendment. Plaintiffs stressed that, pursuant to the statute, an entire game would be censored, even if there were only minimal amounts of violent imagery, resulting in an unlawful chilling of expressive content. Consequently, Plaintiffs argued, the statute unconstitutionally chilled speech, was vague, and violated both the freedom of expression guaranteed by the First Amendment and "equal protection."

In contrast, California argued that legislative efforts to regulate the games were wholly constitutional, based on the state's compelling interest in promoting and safeguarding the health of minors. A great deal of this argument hinged on the assertion that the games, some of which contained gruesome virtual images of violence, influenced aggression in minors and psychologi-

Plaintiff's Complaint for Declaratory and Injunctive Relief, supra note 27, at 6.

30 Plaintiff's Complaint for Declaratory and Injunctive Relief, supra note 27, at 7, 15 (arguing that, by using the new labeling requirement, the video game industry would be compelled to assent to a government message and that "[f]orcing individuals to disseminate a message on behalf of the State of California violates the First Amendment every bit as much as restricting the dissemination of individuals' own messages."); see also Graham Owen, California Commands Conscience: Chapter 638 Violates Violent Video Game Sales, 37 McGeorge L. Rev. 208, 212 (2006).

31 Plaintiff's Complaint for Declaratory and Injunctive Relief, supra note 27, at 14.

32 Id. at 7.

33 Id. at 12.

34 Video Software Dealers Ass'n v. Schwarzenegger, 401 F.Supp.2d at 1039.

35 Id. at 955-56. The court did not reach the issue of the Fourteenth Amendment or the issue of impermissibly vague language. Id. at 956.

36 See Appellant's Opening Brief at 8-9, Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (2010) (No. 08-1448) (urging application of the variable obscenity standard of review "to preserve[] the liberty guaranteed by the First Amendment while allowing states to fulfill their duty to protect the health and welfare of children").

37 See Petition for Writ of Certiorari, Schwarzenegger v. Entm't Merchants Ass'n, 130 S. Ct. 2398 (2010) (No. 08-1448) ("The record contains examples of the violent content of various video games that may be covered by the Act. . . . [one] game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them.").
The parties clashed over whether the First Amendment rights of the game producers should or could be limited when their products were sold to minors. The parties also argued over the correlation between virtual and real-life violence, and whether there was a demonstrable causal nexus between playing violent games and committing real-life violent acts. Finally, the parties disputed the proper analytical framework and standard of judicial review to evaluate the video games and the validity of the statute.

1. Plaintiffs' Arguments in Favor of Striking the Statute

The Plaintiffs argued that video games, as a form of expression, are entitled to a significant amount of First Amendment protection and that such protection is sustained, regardless of whether a player is a minor. Additionally, Plaintiffs contended that the statute's definition of "violent" was unclear and that the statute was "rife with unconstitutionally vague terms" that failed to give reasonable notice of prohibited subject matter. To this end, Plaintiffs cited the statute's use of imprecise wording such as "virtually inflict serious injury upon images of human beings or characters with substantially human characteristics" or the proscription against "virtually inflicting a high degree of pain" on the same types of characters. These unintelligible terms, Plaintiffs averred, were especially difficult to reconcile within the video game context—where decidedly inhuman characters such as zombies, centaurs, and characters with magical powers may still have human characteristics. This blurring of human characteristics is a significant issue in determining the First Amendment protection of video games.

---

38. Id. at 2.
40. Id. at 963-64.
42. See Brief for Appellee at 15-17, Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2008) ("The State does not deny that video games are a form of expression protected by the First Amendment. Nor could it, given the evidence presented and the overwhelming judicial authority holding as much.").
43. Id.; see also Brief for Appellee, supra note 42, at 48-49 (arguing "the Act contains two definitions of 'violent' video games. Both are vague. The first definition restricts games that appeal to the 'deviant and morbid' interest of minors. The statute does not define these terms, leaving retailers to guess at whether the appeal of a game goes to a minor's 'deviant' and 'morbid' interests. Similar language has been struck down as vague by other courts, which have noted that such terms have no defined meaning outside the context of sexually explicit obscenity.").
44. Brief for Appellee, supra note 42, at 4-5, 7 (providing the examples of the video games Resident Evil 4 and God of War).
45. See Complaint for Declaratory and Injunctive Relief, supra note 27, at 11. Interest-
and inhuman attributes in both video games and films has made it increasingly difficult to demarcate whether a character (be it an actual person on the silver screen or virtual video game character) is human. The Motion Picture Association of America ("MPAA") argued in support of the Plaintiffs, noted the conundrum of defining 'human' in terms of modern visual arts, and that other mediums have used voluntary industry rating systems for decades without the daunting nebula of content-regulating of censorship. Amici supporting the video game associations have also astutely pointed out that several video games have influenced and fueled the motion picture industry with the advent of the video game movies, such as the Prince of Persia, Doom, Street Fighter, Resident Evil, Mortal Kombat and Tomb Raider.

Additionally, Plaintiffs sought to enjoin the labeling provisions of the statute. They argued that the requirement to label a game’s package “unlawfully compelled” video game retailers and manufacturers to “disseminate a message on behalf of the State of California,” which Plaintiffs asserted was “not tied to a legitimate regulatory purpose.” Furthermore, given that the video game industry has been a self regulated body, like the MPAA and the American Association for Booksellers, it would seem especially suspect for the state to involve itself in the affairs of content regulation with this form of media. Plaintiffs argued that the statute did not serve a legitimate regulatory purpose and

---

47 For example, the title character of the Terminator film franchise featured a “cybernetic organism . . . [with] living tissue over a metal endoskeleton” who was able to “learn the value of human life.” James Cameron’s killing machine was very human-looking, albeit more muscular, and spawned two follow up films that were among the most successful and violent films of their era. James Cameron and William Wisher, Terminator 2: Judgment Day, Screenplay, available at http://www.imsdb.com/scripts/Terminator-2-Judgement-Day.html (last accessed Apr. 6, 2011); See also Paul Ciotti, Real Hollywood Muscle: No Star Makes More Money, Wields More Power or Has More Fun, L.A. TIMES (Aug. 4, 1991), http://articles.latimes.com/1991-08-04/magazine/tm-371_1_arnold-schwarzenegger/13 (noting that Schwarzenegger “has been regularly attacked by critics for making movies that are gratuitously violent, shallow, one-dimensional and politically incorrect”).

48 Brief for the Motion Picture Association of America, Inc. et. al. as Amici Curiae Supporting Respondents at 9,11, Schwarzenegger v. Entm’t Merchants Ass’n, 130 S. Ct. 2398 (2010) (No. 08-1448).

50 Video Software Dealers Ass’n v. Schwarzenegger, 401 F. Supp. 2d at 1047.

51 Complaint for Declaratory and Injunctive Relief, supra note 27, at 5 (discussing the unconstitutionality of compelled speech).

52 Kevin E. Barton, Game Over! Legal Responses to Video Game Violence, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 133, 147 (2002).
that California grossly overstepped its role, given a lack of documented evidence as to whether violence in video games actually influence violent acts by minors. Plaintiffs argued that the video game industry had already developed sufficient signage and published material to educate parents and consumers about the video game rating system and that the rating process sufficiently adequately addressed parental concerns. Given that rating system had already received commendation from the Federal Trade Commission, Plaintiffs contended that additional labeling would cause significant hardship and burdens on industry.

Plaintiffs also relied on a decade of precedent to support their contention that California's video game statute was unconstitutional. The Plaintiffs argued that a number of federal appellate cases overwhelmingly supported their argument that video games are entitled to First Amendment protection, and that attempts to regulate games on the basis of state and municipally-defined violent content are impermissible. For example, in American Amusement Machines v. Kendrick, the United States Court of Appeals for the Seventh Circuit granted an injunction against an Indianapolis law restricting minor's access to video arcade games, arguing that whatever violent content the games contained, it was insignificant compared to the violence contained in other areas of pop culture. In Interactive Digital Software Association v. St. Louis County, the United States Court of Appeals for the Eighth Circuit struck down St. Louis, Missouri’s video game violence ordinance, which contained language near-
ly identical to the California statute at issue in Schwarzenegger. There, the court rebutted the St. Louis County's argument against protection by the First Amendment by relying on the violent content in the video games at issue and the degree of control that allows players to focus on violent action scenes. The government argued that because a player could fast-forward and skip immediately to player-controlled violence, the game was devoid of any worthwhile expressive content that the First Amendment classically protected. The court ruled in favor of the gaming associations, reasoning that the same could be said of action films, where a viewer can easily isolate violence-laden action sequences by rewinding, fast forwarding and pausing.

The Plaintiffs in Schwarzenegger also argued that California's arguments citing obscenity precedent were misplaced, and that the only appropriate area of First Amendment law from which to assess video game violence are holdings that proscribe the First Amendment to prevent actual violence. To this end, Plaintiffs relied heavily on the applicability of the violence-inciting test of Brandenburg v. Ohio. In Brandenburg, the Supreme Court created a test for determining whether speech could be restricted based on its tendency to produce imminent lawless action. The video game association Plaintiffs noted

60 Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954, 956, 959 ("The ordinance, in relevant part, makes it unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to 'permit the free play of' graphically violent video games by minors, without a parent or guardian's consent.").

61 Id. Appellees in the Missouri case conceded that the video games had storylines and plots, aspects which the Interactive Digital Software Association, in a position akin to EMA in the Schwarzenegger case, argued were aspects that supported the First Amendment rights of video games. The games at issue in the case were Doom and Mortal Kombat.

62 See Brief of Plaintiffs-Appellees, supra note 53, at 21, Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954 (8th Cir. 2003); see also Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d at 960 (holding inapplicable the variable obscenity standard in the context of video game content. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.").

63 See Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d at 957 (noting the fact that modern technology has increased viewer control does not render movies unprotected by the First Amendment, and equivalent player control likewise should not automatically disqualify modern video games that are "analytically indistinguishable from . . . protected media such as motion pictures"). Id.

64 See Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d at 961; Brief of Plaintiffs-Appellees, supra note 53, at 13, 16-17, Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (2010) (No. 08-1448).

65 Plaintiff's Reply Memorandum in Support of Motion for a Preliminary Injunction at 1, Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (2010) (No. 08-1448); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (creating a test for whether speech could be restricted based on its tendency to produce imminent lawless action).
that federal courts had frequently employed the Brandenburg test to strike down violent video game statutes, and that the California statute should meet the same fate.\(^\text{67}\)

Plaintiffs also attacked California’s attempt to justify the video game statute by relying on obscenity precedent to justify content-regulation.\(^\text{68}\) The Supreme Court has held that obscenity is unprotected speech, one of the few exceptions to the First Amendment.\(^\text{69}\) However, obscenity cases, Plaintiffs stressed, pertain to controversies involving sexual materials, and not cases where violent content is at issue.\(^\text{70}\) Conversely, California argued that video games should be judged under the variable obscenity standard, which applies a different approach—labeling materials as “obscene” based on whether or not they are suitable for children to view.\(^\text{71}\) This variable obscenity approach evaluates whether a work is obscene based on the audience of that work.\(^\text{72}\)

Lastly, Plaintiffs urged that California could not proffer a compelling state interest to regulate games, citing the conflicting and inconclusive evidence as to whether violent video games actually harm minors or motivate real-world violent behavior, and whether the statute would actually have an effect on reducing aggression.\(^\text{73}\) While California emphasized the existence of a correlation of violent acts with players of violent video games through expert witness Dr. Anderson, Plaintiffs pointed to expert testimony and court opinions in previous cases in which his exact positions and claims were refuted and methodologies attacked.\(^\text{74}\) In particular Plaintiffs argued that the presence of a correlation did not automatically equate to a causal link.\(^\text{75}\) While Plaintiffs acknowledged that California could have a compelling state interest in preventing violence, they argued that in the video game setting, the declared interest of preventing real world violence was far too attenuated.\(^\text{76}\) Ultimately, the Plaintiffs argued that strict scrutiny should apply, since the video game statute regulated


\(^{68}\) Plaintiff’s Reply Memorandum in Support of Motion for a Preliminary Injunction, supra note 65, at 5.


\(^{70}\) Plaintiff’s Reply Memorandum in Support of Motion for a Preliminary Injunction, supra note 65 at 1.

\(^{71}\) See Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d at 957-59.

\(^{72}\) See William B. Lockhart and Robert C. McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 MINN. L. REV. 5, 77 (1960); see also Brief for the Motion Picture Association of America, supra note 48, at 9-10 (noting that the MPAA utilizes a variable obscenity standard).

\(^{73}\) Plaintiff’s Reply Memorandum in Support of Motion for a Preliminary Injunction, supra note 65, at 8.

\(^{74}\) Id. at 6-8.

\(^{75}\) Id.

\(^{76}\) Id. at 1.
the content of expression and the video game violence did not pertain to an excepted class of speech.77

2. The Government’s Argument for Assessing the Games under Variable Obscenity

The State of California argued that the statute was a proper and lawful means to address the harmful impact of certain games which, due to violent content and subsequent harmful influence, were harmful to minors.78 California insisted that the statute should be reviewed under the variable obscenity standard79 and was therefore valid, given the state's compelling interest in deterring aggression and preventing violence among minors.80 Thus, California argued, the statute was narrowly tailored to further the state's compelling state interest in child health and safety, which is threatened by exposure to violent content.81 To support its variable obscenity standard, California relied on Ginsberg v. New York, a 1968 case where the Supreme Court upheld an obscenity statute prohibiting the sale of pornographic "girlie magazines."82 These magazines were materials that normally would not be obscene for adults, yet would be obscene if viewed by minors.83 California cited the necessity of exercising state police power to ensure the health and well-being of minors.84 California contended that the law recognizes "that children are not possessed of mental faculties equivalent to adults" and that there are differing legal ages for driving, smoking, and drinking, as well as minimum ages of voting, marriage and consent to sexual intercourse.85 While

77 Id. at 4.
78 See Appellant’s Opening Brief, supra note 36, at 1 ("California’s violent video game law properly seeks to protect children from the harmful impacts of playing a narrow category of interactive video games that, by definition, are so violent that they appeal to a deviant or morbid interest of children and are patently offensive to prevailing community standards. These games lack any serious literary, artistic, political, or scientific value for children, and a substantial body of research has concluded that they have harmful impacts on the children that play them.").
79 The variable obscenity doctrine evaluates the material with the age of the audience as the determinative factor of whether the material is obscene. See Ginsberg v. New York, 390 U.S. 629, 636-38.
80 Id. at 7, 24-26.
81 Id. at 7, 24-26.
82 See Ginsberg, 390 U.S. 629 (1968); see also Petitioner’s Brief at 17-18, Schwarzenegger v. Entm’t Merchants Ass’n, 130 S. Ct. 2398 (2010) (No. 08-1448).
83 Ginsberg, 390 U.S. at 673.
84 Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d at 958-59.
85 Appellant’s Opening Brief, supra note 36, at 9; but see Am. Commc’n Ass’n v. Douds, 339 U.S. 382, 442-43 (1950) (noting that “control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into
the State acknowledged minors' First Amendment rights, they noted the raft of psychological development between minors and adults. To this end, they claimed that finding the video game statute unconstitutional would undermine "well recognized distinctions between the respective mental capacities and vulnerabilities of adults and children."\(^6\)

In response to Plaintiffs' arguments that the Supreme Court has acknowledged a different First Amendment standard for minors only in the context of regulating obscenity, not violence,\(^7\) California skirted around the lack of violence-specific case law and focused on the potential harm to minors exposed to violent video games, as well as the special considerations of young video game players relative to adults. The government argued that the "material need not be sexual to be considered obscene; it is the harm to the children that is critical."\(^8\) Citing footage introduced at trial, California compared violent material of a villain dismembering and decapitating a victim with a chainsaw to the sexually obscene image of a "lifeless, beaten, blood-soaked female."\(^9\) California asserted that the level of gruesomeness of the former amounted to obscenity and was unsuitable for minors, and that permitting the former violence-only image while forbidding violence with sexuality in the latter image was illogical. Both examples, California argued, were obscene in the sense of being inappropriate, indecent, unhealthy and offensive for minors to view.\(^10\)

California introduced experts to support the negative effects of violent video games on minors\(^11\) and drew attention to the Plaintiff's witness, who admitted
that among "people who play more violent video games, some tend to exhibit greater aggression." Consequently, California contended that "because it was rational for the Legislature to determine, based upon existing social science, that the violent video games covered by the law are harmful to children," the statute did not violate the First Amendment.

C. Holding of the U.S District Court and the Ninth Circuit

The United States District Court for the Northern District of California enjoined California from enforcing the video game statute. California immediately appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the District Court’s holding—the statute was subject to strict scrutiny review and was presumptively invalid as a content-based restriction on speech. To satisfy strict scrutiny review, California must demonstrate (1) a compelling state interest for imposing its definition and labeling of the games and that (2) the statute is the least restrictive means for achieving that interest. The Ninth Circuit agreed with the District Court: California failed to demonstrate a causal link between the statute and the compelling interest and ultimately, California failed to demonstrate that it employed the least restrictive means of dealing with the supposed adverse impacts of violent video games on minors. The Ninth Circuit expressed misgivings about the appropriate use of *Ginsberg* and creating a new exception to the First Amendment, which, the court noted, was essentially what California sought. Governor Schwarzenegger continued to support the video game statute, even as Califor-
nia was defeated at the District Court and the Ninth Circuit. The case has now progressed to the Supreme Court of the United States and presents two questions: (1) whether the First Amendment permits any limits on offensive content in violent video games sold to minors; and (2) whether state regulation for displaying offensive, harmful images to children is invalid if it fails to satisfy the exacting “strict scrutiny” standard of review. Before examining the First Amendment as it relates to video games, it is helpful to trace the development of freedom of speech and freedom of expression precedent.

III. “A TOTAL RECALL” OF THE FIRST AMENDMENT

Freedom of expression, the centerpiece of the Schwarzenegger v. EMA case, is governed by the First Amendment. While the First Amendment may spans numerous types of expression including political, religious, and artistic forms, it is not without limitations. Not all types of speech and expressive content fall within the gambit of protected expression. Courts have also considered the limits on how speech may be expressed based on the time, place, or

---

100 Press Release, Senator Leland Yee, Ph.D., U.S. Supreme Court to Conference on Violent Video Game Law (Apr. 21, 2010) (quoting Governor Schwarzenegger as saying that “[b]y prohibiting the sale of violent video games to children under the age of 18 and requiring these games to be clearly labeled, this law would allow parents to make better informed decisions for their kids. I will continue to vigorously defend this law and protect the well-being of California’s kids.”); Video Software Dealers Ass’n v. Schwarzenegger, 2007 WL 2261546, at *12 (N.D.Ca. Aug. 6, 2007); Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d at 967.


102 See John J. Puccio and Dean Winkelspecht, Total Recall, HD DVD Review, DVDTOWN.COM, http://www.dvdtown.com/reviews/totlrecell/4318 (heralding Total Recall as setting the bench mark in gore and violence, in which Schwarzenegger uses “an innocent bystander as a human shield and a scene where a villain’s arms are removed at the elbow”) (last visited May 14, 2011).

103 U.S. CONST. amend. 1.

104 Breard v. City of Alexandria, 341 U.S. 622, 642 (1951) (“The First and Fourteenth Amendments have never been treated as absolutes.”).

105 For example, perjured testimony and bribery are clearly unprotected and the courts have not had to devote much attention as to their status. See Keith Werhan, Professor Nimmer Meets Professor Schauer (and others): An Analysis of “Definitional Balancing” as a Methodology for Determining the Visible Boundaries of the First Amendment, 39 AKRON L. REV. 483, 490 (2006) (noting that “laws regulating such things as copyrights, espionage, monopolies, and perjury are largely unaffected by the First Amendment even though they may involve speech”); see also Nathan Phillips, Constitutional Law: 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, 586-87 (2004) (“The guarantee of Free Speech is not absolute; courts recognize limited exceptions: libel and defamation, speech designed to incite imminent lawless action, fighting words, and obscenity.”).
manner of expression." Still, the First Amendment enjoys a very hallowed status and consequently the Supreme Court has also acknowledged the "inherent dangers of undertaking to regulate any form of expression."107

A. Categories of Expression

It is useful to examine a few of the categories of expression in order to understand the jurisprudential framework under which to evaluate video games. The first category is communicative expression, which consists of two elements: words or actions which "convey a particularized message" and the tendency of those words or actions to be understood by those who view or hear the expression.108

Just as communicative expression may consist of political chants, letters, and signs, speech may be accompanied by conduct and sometimes consist of only non-verbal actions, such as a march, sit-in or boycott.109 However, combining verbal and non-verbal elements can be regulated if doing so is within the constitutional power of the government, that the government has a substan-

106 Id. at 492, 504; see, e.g., Adderley v. Florida 385 U.S. 39, 47 (1966) (upholding conviction of more than 200 demonstrators who crowded in a private driveway); Madsen v. Women's Health Ctr., 512 U.S. 753, 773-74 (1994) (discussing burden on speech in the context of distance of a protest to an abortion clinic); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 681-84 (1992) (invalidating a ban by the Port Authority on the sale or distribution of literature in airports, but upholding the ban on solicitation of materials in an airport terminal); Richmond Newspapers v. Virginia, 448 U.S. 555, 580-81 (1980) (arguing trials must be open to the public including the press); but see Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972) (upholding refusal of reporter to appear and testify before grand jury with respect to confidential sources without a special showing that such testimony was necessary and noting that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of generally applicable laws); see Bridges v. California, 314 U.S. 252, 271-73 (striking down a contempt for a journalist criticism of a judge and holding that absent imminent threat of danger to a member of the judiciary or the administration of justice that such criticism may not be stifled in keeping with the First Amendment); Craig v. Harney, 328 U.S. 331, 376 (adding "the fires which (the expression) kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."); see also Cox v. Louisiana, 379 U.S. 536, 554-57 (1965) (holding the government has a significant interest in assuring efficient administration of justice and thus may ban protests on sidewalks adjacent to the courthouse where the protestors have voiced an intent to disrupt the judicial process); but see Grace v. US, 461 U.S. 171, 180-84 (1983) (holding the city of Washington, D.C. could not prohibit passage on all sidewalks adjacent to the United States Supreme Court because the restriction went further than the needs of security justified).


108 Spence v. Washington, 418 U.S. 405, 409-11 (1974) (noting that the act of burning the American flag, although not speech in its typical parlance was an action that "combined with the factual context and environment in which it was undertaken" could be described as expressive conduct).

Artistic expression has enjoyed a great deal of First Amendment Protection. Art forms, such as motion pictures, have battled in the courts for legitimacy as an expression medium, and it took decades for the courts to recognize them as “within ambit of protection” guaranteed by the First Amendment.

The Supreme Court has held that government may regulate indecent language; patently offensive “dirty words,” and “excretory language” on public radio airwaves because such words are accorded little in the way of First Amendment protection since they have no real intrinsic value. Governments may also regulate speech to ensure that broadcasters do not selectively restrict content from publication. Therefore, because there is a possibility that disclaimers about the broadcast might not be heard, the state may regulate public broadcasts as a form of nuisance.

---


111 See Schad v. Borough of Mount Emphraim, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”); Cohen v. California, 403 U.S. 15, 24-25 (1970) (noting that in the context of a certain “[f]our letter word . . . it is nevertheless often true that one man’s vulgarity is another’s lyric”).

112 See Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230, 243-45 (1915) (noting that “the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit”).

113 See Joseph Burstyn, Inc. v. Wilson, 343 US 495, 500-501 (1952). Video games are not wholly unrelated to Hollywood. Amici supporting the video game associations have also astutely pointed out that several video games have influenced and fueled the motion picture industry with the advent of the video game movies, such as the Prince of Persia, Doom, Street Fighter, Resident Evil, Mortal Kombat and Tomb Raider. See Brief of the Motion Picture Association of America et. al. supporting Respondents at 29, Schwarzenegger v. Entm’t Merchants Ass’n, 130 S. Ct. 2398 (2010) (No. 08-1448) (arguing that, “[w]hether the motion picture or the video game comes first, the increasing overlap in visual elements, themes, and storylines renders it more difficult to draw clear lines between the two media. At a minimum, therefore, any restrictions on the content of video games would inevitably have some effect on the content of corresponding motion pictures.”).


B. Tailoring Statutes to Conform to First Amendment Protections: Vagueness and Overbreadth

In regulating expression, the government walks a fine line between regulating types of conduct and abridging the protections of freedom of speech. The following are areas that frequently come into play for First Amendment challenges and also appear in Schwarzenegger v. EMA.

Since the underlying purpose of the First Amendment is to encourage the free flow of speech and expression, a regulation that is overbroad will be found unconstitutional.\(^ {117}\) Overly broad regulations have the potential to stifle substantially more expression than is required to effectuate a legitimate state objective.\(^ {118}\) Although a law “may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth, if the law sweeps within the ambit of protected speech, or expression of other persons not before the Court.”\(^ {119}\)

The doctrine of vagueness is a sibling of overbreadth—when the scope of a law scope is unclear, it discourages the public from engaging in expression out of the legitimate fear that doing so would violate the law.\(^ {120}\) Consequently, to regulate speech, government must clearly indicate the type and nature of the proscribed speech, as well as the legislature’s objective for regulating in a given area.\(^ {121}\)

\(^{117}\) See Black’s Law Dictionary 1136 (8th Ed. 1999) (“The doctrine holding that if a statute is so broadly written that it deters free expression then it can be struck down on its face because of its chilling effect—even if it also prohibits acts that may legitimately be forbidden.”).

\(^{118}\) See Shelton v. Tucker, 364 U.S. 479, 488 (1960) (“[E]ven though the governmental purpose may be legitimate and substantial, the purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved”).

\(^{119}\) Doran v. Salem Inn, Inc., 422 U.S. 922, 933 (1975). For example, consider a legislature which, in the interest of law enforcement, passes a statute prohibiting all loitering or picketing: such a statute would be overbroad and invalid on its face. Such a sweeping proscription would chill First Amendment freedoms by prohibiting even peaceful picketing. Thornhill v. Alabama, 310 U.S. 88, 104-105 (1940); see John F. Decker, Overbreadth Outside the First Amendment 34 N.M. L. Rev. 53, 83-84 (2004) (containing overbreadth doctrine’s evolution). In the same vein, an ordinance proscribes speech that potentially interrupts police business “in any manner” would also be overbroad. See Houston v. Hill, 482 U.S. 451, 454 (1987) (finding the wording of the law at issue did not give sufficient notice as to what constituted an interruption with official police duties).

\(^{120}\) See Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (explaining that “where a vague statute ‘abuts upon sensitive areas of First Amendment freedoms,’ it ‘operates to inhibit the exercise of those freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.’”).

\(^{121}\) Laurence H. Tribe, American Constitutional Law, 1034 (2d ed.) The Foundation Press, Inc. 1988; see also Connally v. General Const. Co., 269 U.S. 385, 391 (1926) (noting that a statute is invalid when it is “so vague that men of common intelligence must necessarily guess at its meaning”); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (discussing
The Supreme Court has repeatedly struck statutes for being unconstitutionally vague. In the seminal case, Butler v. Michigan, the Court struck down a statute criminalizing the distribution of material "tending to the corruption of the morals of youth." The Michigan statute punished sales of books "tending to the corruption of the morals of youth" and, the Court held that the text of the law was so vague as to violate the due process clause of the Fourteenth Amendment. The Court emphasized the need for restricting the statute's scope to achieve its intended objective.

The Supreme Court's most noted obscenity case, Miller v. California is known for providing a standard on determining whether material is obscene but defines obscenity with language that relates to sexuality without treatment of violence. Thus, while the Supreme Court has evaluated glorification of violence, it has predominantly evaluated controversies where the violence was sexually based. Similarly, the variable obscenity standard considers material that is harmful to minors, including violence, but does so in the realm of sexuality, without mentioning violence or brutality apart from sexual contexts.

Drafting a statute that is neither vague nor overbroad to restrict the behavior of on screen characters is not an easy task. While the California statute prohibits violent actions against characters that have human-like characteristics, there have also been attacks on statutes which prohibit "human-on-
human violence."131 The daunting prospect of drafting video game statutes is further complicated when one considers violent imagery in cartoons and motion pictures.132 Parties in the Schwarzenegger case, as well as amici have distinguished cartoons from video games.133 Others have aptly noted that a "Tom & Jerry or Road Runner cartoon" is substantially different than video games in which a character can rape, brutally beat, and decapitate others.134 There also exists the challenge of squaring creative material laden with violence, and questions arise as to whether depictions of the realistic criminal and military violence should somehow be distinguished from fantasy brand violence. In the Schwarzenegger case, Plaintiffs highlighted how various art forms have had to defend their legitimacy and newer avenues of expression are associated with the wave of suspicion of being a catalyst for societal ills.135

C. Legislation aimed at Reducing Violent Media

There have been numerous calls for regulation of violence in the media.136

131 See Entm't Software Ass'n v. Blagojevich, 404 F.Supp.2d 1051,1057 (N.D. Ill. 2005).
135 See Brief of Respondents at 26, Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (2010) (No. 08-1448); THOMAS HINE, THE RISE AND FALL OF THE AMERICAN TEENAGER 190 (Harper Perennial 2000). During the California's portion of oral argument, Justice Scalia commented, in the midst of a discussion as to whether cartoons departed from a historically acceptable amount violence behavior noted, "[t]hat the same argument could be made when movies first came out. They could have said, oh, we've had violence in Grimm's fairy tales, but we've had it live on the screen. I mean every time there's a new technology you can make that argument." Transcript of Oral Argument at 7-8, Schwarzenegger v. Entm't Merchants Ass'n, 130 S. Ct. 2398 (2010) (No. 08-1448).
136 Federal oversight of video games has been a prevalent topic with Senators Schumer, Kyl and Clinton all calling for increased controls and regulation. Senator Clinton who encouraged the Federal Trade Commission to investigate the impact of the game Grand Theft Auto urged that the violent games were causing a "a silent epidemic" of behavior. See Clinton seeks 'Grand Theft Auto' probe, Jul. 14, 2005, USA TODAY, http://www.usatoday.com/news/washington/2005-07-14-clinton-game x.htm (discussing Clinton's call for labeling certain games as 'Adult Only' as well as imposing a $5000 dollar penalty rather than the $1000 penalty that the California statute called for); see also Tom Curry, Clinton Burnishes Hawkish Image, MSNBC (July 14, 2005) http://www.msnbc.msn.com/id/8573139/ns/politics-tom_curry/.
Lawmakers are aware that children are exposed to violence. This exposure was so great that Congress and the Federal Communications Commission ("FCC") took notice.\textsuperscript{137} Section 551 of The Telecommunications Act of 1996 was passed because parents desired greater control over their children's exposure to violence.\textsuperscript{138} In response to parental concerns, the FCC introduced the V-chip, which helped parents filter violent content by blocking television programming based on a program's rating.\textsuperscript{139}

While the FCC acknowledged the need for regulation of television violence, it cautiously chose to make the ratings guidelines voluntary, noting that "forced participation in content-based regulation of speech runs headlong into the First Amendment."\textsuperscript{140} Traditionally, other efforts at curbing exposure to violent content have been voluntary as well, driven by parental supervision or industry self-regulation.\textsuperscript{141} Plaintiffs in the Schwarzenegger case have cited the FTC's approval of the current video game ratings and have suggested that the California statute would "have the perverse effect of undermining the quality and availability of information currently provided to parents and minors about game content."\textsuperscript{142} Plaintiffs also stressed that self-regulation has long been ac-

\textsuperscript{137} The Telecommunications Act of 1996, Pub. L. No. 104-104 § 551 ("Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children. . . . Parents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control to block video programming in the home that they consider harmful to their children. . . . There is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children.").

\textsuperscript{138} In re Implementation of Section 551 of the Telecommunications Act of 1996, Order, FCC 98-35, CS Docket No. 97-55 at 1 (Mar. 13, 1998) ("Congress determined that parents should be provided with timely information about the nature of upcoming video programming and with the technological tools that would allow them to easily block violent, sexual, or other programming they believe is harmful to their children. Congress also provided that distributors of video programming should be given the opportunity to develop a voluntary system to provide parents with ratings information.").


\textsuperscript{141} Brief of Respondents, at 7-9, 53-54; see also FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIXTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES, 2 (2009), available at http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf.

\textsuperscript{142} FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIXTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES, 2 (2009), available at http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf. The ESRB system has
cepted in the visual arts, and that the music industry has for decades implemented its own rating system for lyrics that are unsuitable for minors.\textsuperscript{143}

D. Regulation of Speech to Prevent Harm and Violence: From Television Remote to Game Controls

In order to understand how the Supreme Court will analyze video game statutes, it is essential to understand the First Amendment protections afforded to violent speech. Speech or expressions which tend to incite violence are not protected by the First Amendment\textsuperscript{144} and expression that advocates lawless action is subject to the \textit{Brandenburg} test.\textsuperscript{145} Courts may properly limit violent speech that is likely to incite violence; it is insufficient that the speech merely incite fear or the possibility of illicit acts.\textsuperscript{146} Fighting words encompass speech expressed in a face-to-face setting to provoke retaliatory violence by another person.\textsuperscript{147} In contrast to other forms of speech, these words are not normally part of a dialogue, nor are they essential components in the "exposition of ideas."\textsuperscript{148} Thus, because the value of these expressions is likely to be so low, and the "social interest in order and mortality" of maintaining peace is so great, fighting words are subject to proscription.\textsuperscript{149} However, the Supreme Court has pointed out that that there are limits on this doctrine; the mere fact that speech may stir anger or invite dispute is not reason to silence speech under the pre-

\textsuperscript{143} Justice Sotomayor, during the course of the State of California’s case at oral argument for \textit{Schwarzenegger v. EMA} posed the question whether a state could regulate the offensive language in rap music. Transcript of Oral Argument, \textit{supra} note 135, at 9. Rap music, a genre that received much public critique for glorification of violence, has influenced numerous universities to offer course work analyzing rap’s cultural impact. For example, The Textual Appeal of Tupac Shakur. See The University of Washington, \textit{Instructor Class Description}, available at http://washington.edu/students/icd/B/bis/351gmr2.html and http://www.washington.edu/students/icd/S/chid/480gmr2.html.

\textsuperscript{144} \textit{Brandenburg}, 395 U.S. at 447 (noting that states may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

\textsuperscript{145} \textit{Id.}; NAACP v. Clairose Hardware Co., 458 US 886, 927-28 (1982).

\textsuperscript{146} \textit{See Whitney v. California}, 274 U.S. 357, 376 (1926) (“Fear of serious injury cannot alone justify suppression of free speech. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.”).

\textsuperscript{147} \textit{Id.} at 571-72.

\textsuperscript{148} Id. at 572.
vention of violence doctrine.\textsuperscript{150}

As a general rule, a state may place reasonable limits on the "time, place and manner" of speech so long as the restrictions are "content neutral."\textsuperscript{151} A key component of the \textit{Schwarzenegger v. EMA} case focuses on the constitutionality of the video game statute and how speech is chilled by the Legislature through the chosen statute, rather than through less restrictive means such as the denial of a permit.\textsuperscript{152}

E. Government Regulation of Speech: Strict Scrutiny and Rational Basis

To contextualize the issues involving regulation of speech, it is helpful to examine the standards used to evaluate regulation of expressive content. Arguments over the appropriate level of scrutiny proved critical in the lower courts,\textsuperscript{153} and \textit{amici} have continued to put forth arguments over whether or not strict scrutiny should apply to the video game statute.\textsuperscript{154}

The determination of the appropriate type of judicial review is often dependent on the language of a law and how that law regulates expressive content. Laws targeting particular actions, as opposed to speech, generally pass muster and will be upheld even if they restrict speech in some way.\textsuperscript{155} If the government can posit a significant government interest, it may regulate speech without running afoul of the First Amendment.\textsuperscript{156}

\textsuperscript{150} See \textit{Terminiello v. Chicago}, 337 U.S. 1, 27 (1949); \textit{Cox v. Louisiana}, 379 U.S. 536, 550-51 (1965) (noting that if a speaker is stirring a crowd to riot, his or her violence-inducing words may not be silenced if law enforcement can effectively contain the crowd); but see \textit{Feiner v. New York}, 340 U.S. 315, 325-328 (1951)(noting that if speech causes the imminent escalation of spectator violence which cannot be satisfied by crowd control and the speech is the apparent cause of an impending disorder, the fighting word doctrine applies and the speech may be constitutionally suppressed).

\textsuperscript{151} See \textit{Madsen v. Women's Health Ctr., Inc.}, 512 U.S. at 791.

\textsuperscript{152} \textit{Video Software Dealers Ass'n v. Schwarzenegger}, 556 F.3d at 953.

\textsuperscript{153} \textit{Id.} at 957-58.


\textsuperscript{155} See \textit{Arcara v. Cloud Books, Inc.}, 478 U.S. 697 (1986) (upholding a New York statute authorizing closure of bookstore that was used in connection with a prostitution ring; the law was directed at the crime of prostitution not toward any expressive conduct related to the reading or selling of books); compare \textit{Minneapolis Star & Tribune v. Minnesota}, 460 U.S. 575 (1983) (striking a tax on the bulk sale of newsprint and news ink as singling out the press for special taxation).

\textsuperscript{156} See \textit{Bd. of Trs. of State Univ. of New York v. Fox}, 492 U.S. 469, 478 (1989); \textit{see also} \textit{City of Cincinnati v. Discovery Network, Inc.}, 507 U.S. 410, 414 (1997). Another example is a Vietnam-era case, \textit{United States v. O'Brien}, in which the Supreme Court upheld a
Actions that regulate content generally weigh in favor of a private litigant. The government may not regulate speech “because of its message, its ideas, its subject matter, or its content” and if a private litigant is able to plead and prove content regulation, such an argument is generally fatal to the regulation. This is because actions that regulate content are subject to strict scrutiny.

Over time, precedent has developed content-guarding controls to prohibit the government from regulating to promote or suppress the message underlying the speech. This means the government must “[s]how that its regulation is necessary to serve a compelling [governmental] interest and that it is narrowly drawn to achieve that end.” Professor Volokh explains that the implications of narrow tailoring entail the following:

Essentially factual questions about whether the law is indeed narrowly drawn: does the law further the interest; is the law limited to speech that implicates the interest; does the law cover all such speech; are there less restrictive alternatives that will serve the interest equally well?

California faces a significant battle at the Supreme Court by arguing that the Legislature had a compelling state interest in passing the video game statute. In Schwarzenegger v. EMA, video game association Plaintiffs have insisted that the California statute is impermissible because it regulates content, while the criminal statute prohibiting the destruction of a military draft card. See United States v. O’Brien, 391 U.S. 367, 370, 386 (1968). The Court found a significant governmental interest in maintaining an efficient selective service system and that the law prohibiting destruction of the card was passed with no illicit legislative intent to curtail the First Amendment. Id. at 377 (noting that “if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest”).


Id.

See R. A. V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992) (holding that the government may not regulate hate speech, regardless of its offensiveness, where the regulation is “based on hostility—or favoritism—towards the underlying message expressed”); see also Carey v. Population Services Int’l, 431 U.S. 678, 701 (1977) (cautioning against developing a tautology that lumps all offensive speech into the category of obscenity).

See, e.g., Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding state law prohibiting the solicitations of votes and the display or distribution of campaign literature within 100 feet of a polling place upheld as applied to the traditional public forum of streets and sidewalks); see also Simon & Schuster v. N.Y. Crime Victims Bd., 502 U.S. 105, 123 (1991) (striking a Son of Sam law, after finding the state has a compelling interest but the law is not narrowly tailored).

government argues that it had a compelling interest in passing the statute to safeguard minors from violent content. California attempted to avoid strict scrutiny review by arguing that the Ginsberg variable test applied; pursuant to Ginsberg, a government need not prove a compelling interest. However, a great deal of the argument for the compelling state interest is the assertion that the video games negatively affect the health of minors, though there is currently little agreement in the scientific community as to whether a correlation between virtual and real life violence exists.

IV. PREDICTING THE SUPREME COURT'S RESPONSE: 'GAME OVER' FOR VIOLENT VIDEO GAME STATUTES

Although this area of First Amendment law is new to the Supreme Court, several decisions of the lower district courts and federal appellate circuits have decided to grant protection to video game manufacturers.

As Clay Calvert points out, "states across the nation seem fixated on limiting minors' access to violent images and plots in video games." State laws aimed at curbing minors' access to violent video games, like the violent video game statute in Schwarzenegger, have been enjoined and frequently found unconstitutional in federal district courts as well as federal circuits.

In Kendrick, the United States Court of Appeals for the Seventh Circuit considered an ordinance designed to regulate the entry of minors into public video arcades as a means to prevent minors from playing violent video games. The

\[164\] Brief of Respondents, supra note 135, at 13-17; Petitioner's Brief, supra note 86, at 56.

\[165\] See Appellant's Opening Brief, supra note 36, at 14 ("To sustain state power to exclude material defined as obscene by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.") (citing Ginsberg, 390 U.S. at 641) (emphasis in Appellant's Opening Brief).

\[166\] Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 574-77 (7th Cir. 2001); see also Transcript of Oral Argument, supra note 135, at 6 ("Well, do you actually have studies that show that video games are more harmful to minors than movies are?").


\[169\] Entm't Software Ass'n v. Swanson, 519 F.3d 768, 772 (8th Cir. 2008); Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 960 (8th Cir. 2003).

\[170\] Am. Amusement Machine Ass'n, 244 F.3d at 573-74.
ordinance featured language similar to the California video game statute and like California’s statute, contained sections that purported to define violent acts and graphic violence. A majority of the Seventh Circuit noted that the legislative basis of the video game ordinance was the “belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior which might lead to violence.” Judge Posner emphasized that there was insufficient evidentiary grounds to link the aggression-laden video games with real life psychological harm and propensity to commit violent acts.

The ability of governments to sustain challenges to video game statutes continues to have its own vicious cycle because of the judicial reluctance in considering whether such laws would have any beneficial effect. Judges have been dismissive about whether there is any need to prove causation and correlation because they often accept Plaintiff’s arguments about content regulation and are swift to label such theories as conjecture.

Whether or not a showing of correlation or causation is necessary, it is a difficult burden to meet, even in cases where real-life violence has occurred. Some courts have declined to enforce ordinances similar to California’s video game statute, while others have rejected attempts to impose tort liability arising out of incidents where litigants alleged that video games caused violence.

---

171 Id. at 573. The relevant part of the statute restricted a minor’s use of “an amusement machine that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under that age, and contains either ‘graphic violence’ or ‘strong sexual content.’” Id.

172 Id. at 575.

173 Id. at 578-79 (“There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.”) (emphasis in original).

174 Am. Amusement Machine Ass’n, 244 F.3d at 579-80.

175 See James v. Meow Media, Inc., 300 F.3d 683, 687-88, 699 (6th Cir. 2000) (holding “intangible thought, ideas and messages” conveyed by movies, video games and Web site materials were not “products” for the purpose of strict liability in tort). In James, a 14-year-old boy who brought a gun to his school, shot and killed three and wounded five others was found to regularly play ‘Doom,’ ‘Quake,’ ‘Castle Wolfenstein,’ ‘Redneck Rampage,’ ‘Nightmare Creatures,’ ‘Mech Warrior,’ ‘Resident Evil,’ and ‘Final Fantasy,’ interactive computer involving shooting virtual opponents. Id.


177 Watters v. TSR, Inc., 904 F.2d 378, 381-82 (6th Cir.1990) (holding a game manufac-
Even for gruesome incidents in which murderers were allegedly video game fanatics, courts have declined to recognize new brands of tort liability arising out of video games.\textsuperscript{178}

The violent video game playing habits of the belligerents in the 1999 massacre at Columbine High School focused national attention on the gaming industry and how shooter games, such as \emph{Doom}, influenced the attack.\textsuperscript{179} A maelstrom of media indictments against the games ensued, with talks of regulation of the games, rather than, gun control dominating a national dialogue.\textsuperscript{180} A class action of the estates of murdered Columbine students brought suit against video game manufacturers such as Acclaim and Time Warner, alleging that video games induced the shooters' violent proclivities.\textsuperscript{181} Ultimately the court held the video games were entitled to First Amendment protection and that there was no proof of a causal link between the games and the shooters' violent proclivities.\textsuperscript{182}

Upon granting \textit{certiorari}, the Supreme Court ordered the parties to frame their arguments regarding the appropriate judicial review in light of the \textit{Turner Broadcasting v. Federal Communications} case.\textsuperscript{183} While \textit{Turner} involved a very different statute, \textit{Turner} clarified that the government must identify with specificity the harm it seeks to address when passing a law (such as the California video game statute and the objective ensuring health and safety of its minor citizens) and prove that the law will provide redress for the harm that the government seeks to remediate.\textsuperscript{184}

\footnotesize{turer did not have any duty under Kentucky tort law to anticipate and prevent the suicide of a disturbed video game player because such idiosyncratic reactions are not legally foreseeable. The Court held that, to impose liability in such circumstances "would be to stretch the concept of foreseeability . . . to lengths that would deprive them of all normal meaning."); see also Timothy Dylan Reeves, \textit{Tort Liability for Manufacturers of Violent Video Games: A Situational Discussion of the Causation Calamity}, 60 ALA. L. REV. 519, 536 (2009).}
\footnotesize{\textsuperscript{178} Timothy Dylan Reeves, \textit{Tort Liability for Violent Video Games}, 60 ALA. L. REV. 519, at 527, 540-44 (2009)(arguing psychologists have found strong correlations between violent video games and violent behavior and as such tort liability should be imposed on manufacturers these games); see also James v. Meow Media, Inc., 300 F.3d at 694 (declining to recognize a special relationship between a video game developer and the victims of a video game player who was allegedly induced by the game to commit acts of violence).}
\footnotesize{\textsuperscript{180} See Elliot I. Portnoy, \textit{Corporate Citizenship: A Conversation Among the Law, Business and Academia}, 84 MARQ. L. REV. 767 (2000-2001) (criticizing "Congress, over a dozen states, and hundreds, of local communities" for attempting to ban or restrict access by kids to video games with violent themes in the wake of school violence).}
\footnotesize{\textsuperscript{181} Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1268 (D. Colo. 2002).}
\footnotesize{\textsuperscript{182} \textit{Id.} at 1272-75.}
\footnotesize{\textsuperscript{183} See Petition for \textit{Writ of Certiorari}, \textit{supra} note 37 at i.}
\footnotesize{\textsuperscript{184} Turner Broadcasting System, Inc. v. FCC, 512 U.S. at 664.}
It is unlikely that California will be able to demonstrate that its video game statute "will in fact alleviate these harms in a direct and material way." After all, its sister states have passed practically identical laws yet all have been enjoined and the Supreme Court chose not to disturb the holdings in those states. Additionally, many of the lower courts have firmly relied on Turner's framework and the states continually were unable to prove a direct causal relationship in the violence phenomena.

Furthermore, there is a difficulty in applying obscenity and sexuality standards to violence contexts. In Kendrick, Judge Posner explained that violence was a fixture of society, and in particular that minors were inevitably exposed to violence through a variety of mediums. This exposure to violence in our society makes it unlikely that the Supreme Court will rule that video game violence could be regulated as obscenity. Aside from judicial controls and safeguards protecting freedom of expression, the mold of First Amendment precedent for unconventional speech has long been shaped by determinations of whether content has such a high degree of offensiveness, that it rises to a level of obscenity. The Supreme Court has evaluated the offensive nature of materials, examining whether the expression taken as a whole lacks serious "literary, artistic, political, or scientific value."

While the defendants in Schwarzenegger v. EMA argued that violent video games contain obscene low-value expressions that are unsuitable for minors, some courts have recognized the usefulness that games have in exposing minors to good and evil and the struggles inherent in a violent world. In some

185 Id.
186 Adam Liptak Justices Debate Video Game Ban, N.Y. TIMES, Nov. 3, 2010, http://www.nytimes.com/2010/11/03/us/03scotus.html; see Heather Horn, Violent Video Games Come Before the Supreme Court, THE ATLANTIC, Nov. 1, 2010, available at http://www.theatlanticwire.com/opinions/view/opinion/Violent-Video-Games-Come-Before-the-Supreme-Court-5608 ("The court’s decision just days later to hear the video game case, Schwarzenegger v. Entertainment Merchants Association, No. 08-1448, was thus a surprise, particularly as lower courts have been unanimous in saying similar laws violated the First Amendment.").
187 See Interactive Digital Software Ass’n v. St. Louis County, Mo., 329 F.3d at 956 ("Yet when the government defends restrictions on speech ‘it must do more than simply posit the existence of the disease sought to be cured.’") (citing Turner Broad. Sys., Inc., 512 U.S. at 664).
188 Am. Amusement Machine Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (arguing that the city of Indianapolis would concede the point on minor’s exposure to violence and noting that “[v]iolence has always been and remains a central interest of humankind”).
190 See Miller, 413 U.S. at 23; Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d at 953.
191 See Petition for a Writ of Certiorari, supra note 37 at 6-10.
192 See Am. Amusement Machine Ass’n, 244 F.3d at 577.
cases, such as *Kendrick*, judges have extolled the utility that video games provide through exposing children to what is a very real world that is filled with violence.\(^{193}\)

Obscenity and its progeny, such as the variable obscenity standards, have origins in laws attempting to prohibit distribution materials depicting sexuality, i.e. pornographic materials. Under the *Miller v. California* test, these are materials that appeal to the prurient interest in sex.\(^{194}\) Conversely, materials depicting sexuality can offer “serious literary, artistic, political, or scientific value.”\(^{195}\) For example, the Supreme Court has acknowledged that education materials and entertainment may not be prohibited solely because it features human nudity.\(^{196}\) On the other hand certain materials are devoid of First Amendment protection, often to shield minors from exposure to sexual materials or to discourage child pornography.\(^{197}\)

However, courts have carefully excluded violent imagery on its own from the definition of obscenity.\(^{198}\) While pornography itself can be difficult to assess in terms of First Amendment and speech suppression, anything related to child pornography typically is suppressed out of the state’s compelling interest in the safety and health of minors.\(^{199}\) For example, the Supreme Court unanimously ruled in *New York v. Ferber* that, regardless of whether a statute was overbroad or under inclusive, that a state could proscribe the distribution of child pornography and effectively engage in content regulation since such con-

---

\(^{193}\) Seth Schiesel, *Courts Blocks Laws on Video Game Violence*, N.Y. TIMES, August 21, 2007, at E1; Am. Amusement Machine Ass’n, 244 F.3d at 577.

\(^{194}\) *Miller*, 413 U.S. 25; see also *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491, 497 (1985) (holding the prurient interest cannot embody merely normal interests and that only depictions which appeal predominantly to shameful or morbid interests in sexuality). The lack of clarity as to what is legally prurient has continued with video game violence cases. See also Transcript of Oral Argument, supra note 135 at 4; see *Ward v. Illinois* 431 U.S. 767 (1977) (holding it unnecessary for the courts to provide an exhaustive list of sexual conduct descriptions which may be held to be obscene; it is enough if a legislature adopt the prongs of *Miller* “if the statute need only describe kinds of proscribed sexual conduct it adds no protection to what the Constitution itself creates. The specificity requirement as described in *Miller* held out the promise of a principles effort to respond to the vagueness argument”).

\(^{195}\) See *Miller*, 413 U.S. at 25.

\(^{196}\) *Id.* at 26 (citing “medical books for the education of physicians and related personnel necessarily” with graphic illustrations as an example); *Jenkins v. Georgia*, 418 U.S 153, 161 (1974) (noting that “nudity alone” does not place otherwise protected material outside the shield of the First Amendment protection”).


\(^{198}\) *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d at 959-60.

\(^{199}\) See *Sable Communications of Cal.*, Inc., 492 U.S. at 124 (recognizing government’s ability to regulate constitutionally protected speech when states have enunciated a compelling interest to protect minors); see also, Tony Mauro, *Supreme Court to Examine 5 First Amendment Cases*, FREEDOMFORUM.ORG (March 20, 2010), http://www.freedomforum.org/templates/document.asp?documentID=15026.
tent was the product of a patent illegality. 200

While case law and Supreme Court precedent associate obscenity with sexual materials, the Court of Appeals for the Seventh Circuit has also recognized that in "common speech", the word 'obscene' is often just a synonym for repulsive with no sexual overtones. 201 Despite the acknowledgement of every-day use of the word "obscene" courts have not read this common parlance into their opinions. 202 On the contrary courts, including the Ninth Circuit in Schwarzenegger, have explicitly held that they will not extend obscenity law to include violent instead of sexually explicit material. 203

California has argued in Schwarzenegger v. EMA that the Supreme Court should apply the variable obscenity standard articulated in Ginsberg v. New York. In Ginsberg, the Supreme Court imparted a new dimension to obscenity, holding that while pornographic material is not obscene for adults, it transforms into obscenity when sold to a minor and does not receive the full protections of the First Amendment. 204 Further, in the context of child pornography there are no First Amendment protections whatsoever. 205 However, the Ninth Circuit in Schwarzenegger dismissed California’s reference to Ginsberg, stressing that the line of obscenity concerns violent content in the context of sex-related materials—not violence in and of itself. 206 Senator Yee, who introduced the bill, noted in a comment on First Amendment concerns that the Ginsberg case was not completely on point with video game violence. 207

200 See New York v. Ferber, 458 U.S. at 747 (holding that "child pornography is unprotected speech subject to content-based regulation").

201 Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 575 (7th Cir. 2001).

202 Id.

203 Eclipse Enter., Inc. v. Gulotta, 134 F.3d 63, 66 (2nd Cir. 1997) ("We decline any invitation to expand these narrow categories of speech to include depictions of violence"); see also James v. Meow Media Inc., 300 F.3d 683, 698 (6th Cir. 2000) (holding that the court would not "extend . . . obscenity jurisprudence to violent instead of sexually explicit, material"); see also Entm't Software Ass'n v. Granholm, 426 F.Supp.2d 646 (E.D. Mich. 2006) (holding that a "[d]isgusting or degrading" test for obscenity could not be applied outside context of sexually explicit material, and thus could not serve as basis for content-based legislation criminalizing dissemination to minors of "ultra-violent explicit video game[s]").

204 Ginsberg v. New York, 390 U.S. at 635-36.

205 Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-246 (2002) (discussing the Child Pornography Prevention Act of 1996 and noting that, "as a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children").

206 See Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d at 960-61.

Given the unsteady grounds of California’s argument, the Supreme Court will likely affirm the holding of the Ninth Circuit. In the decades since the Supreme Court began handing down obscenity and violence cases, we have never seen a melding of the two doctrines. Violence has proliferated our culture, with images of violence and gruesome stories filling the news cycle. Further, “violent” is difficult to define and when legislatures have attempted to define violent in the video game context, they are immediately challenged and fare no better than the alleged virtual victims of the games they seek to regulate.208

Even if there’s plausibility that virtual violence could influence real world youth violence, it appears that the Court will not undertake any balancing to carve a new video game exception. Recent decisions at the Supreme Court level indicate that the Court is not willing to water down strict scrutiny as a test on regulation of speech. In Stevens v. United States, Chief Justice Roberts cautioned against adopting free floating tests for First Amendment coverage, as doing so would be a dangerous impingement on the scope of the right.209 In Stevens, the Supreme Court held that depictions of animal cruelty in so-called “crush” videos were not unprotected speech and that Court would not weigh the merits of the videos against the their alleged indecency.210 Specifically, the majority noted that the court would not endorse “categorical balancing of the value of speech against its societal costs” even if the speech at issue concerned gruesome depictions of cruelty.211

Nevertheless, the aim of California’s video game statute is to protect minors, and the Supreme Court has held laws can be subject to different standards when minors are involved. While constitutional rights are shared by all persons in the United States irrespective of their age, First Amendment jurisprudence recognizes contexts and environments where speech can be curbed.212 There

---

208 See, e.g., Entm't Software Ass'n v. Granholm, 426 F.Supp.2d at 655-56.
209 See Stevens v. United States, 130 S.Ct. 1577, 1585 (2010) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”); see also Miller, 413 U.S. at 29 (discussing the context of obscenity, and that “no amount of ‘fatigue’ should lead us to adopt [a] convenient ‘institutional’ rationale”).
210 See Stevens v. United States, 130 S. Ct. at 1592.
211 Id. at 1585.
212 Minors still have First Amendment rights and many First Amendment cases have centered on expression in the school setting, often with squaring a student’s freedom of expression with a school’s interest in promoting an environment conducive to learning and comportment. The Supreme Court has taken up this topic as well and has expressed concern, where “students in the exercise of First Amendment rights, collide with the rules of the school authorities.” Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 507, (1969); see also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-73 (protecting a story about teen pregnancy published in a school newspaper); Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 322-325 (2d Cir. 2006), cert. denied by 127 S. Ct. 3054 (2007); see
are also a collection of cases recognizing that while disclosure of criminal acts involving minors can have deleterious effects, such sensitivity does not automatically trump the First Amendment. To impede publication, the governmental party must satisfy strict scrutiny, thus typically states are unable to justify prohibitions on publication.

Judge Posner, writing for a majority of the Kendrick urged that video games are but a small piece of the mosaic of violence in popular culture. Further some studies have indicated that certain games, which incidentally are violent may even be beneficial to youths, particularly in the games that give players creative control and games in which they interact with other players to set plots and landscapes. A recent study, published after the Supreme Court granted certiorari in Schwarzenegger v. EMA, found that video games (including violent ones) might help youths deal with stress and depression, possibly leading to a decrease in violent and aggressive activity. The study also labels the media fervor on video game violence as "much ado about nothing" given the statistically minimal risk that violent games would contribute to real life violence.

The Schwarzenegger case has been dominated by arguments over whether or not there is sufficient empirical evidence to indicate that prolonged exposure to video games will either affect minor's mental health and or whether the games will lead to increased aggression. While the government urged that


213 See Smith v. Daily Mail Pub. Co., 443 U.S. 97, 97, 101 (1979) (finding that the state's asserted interest did not survive strict scrutiny); see Florida Star v. BJF, 491 U.S. 524 (1989) (upholding a newspaper's first Amendment rights to publish the name of the victim of a rape and striking the State's rape shield law, which failed under strict scrutiny).

214 Smith v. Daily Mail Pub. Co., 443 U.S. at 102, 105 (noting "decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards").

215 Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 575 (7th Cir. 2001).


217 Christopher J. Ferguson and Stephanie M. Rueda, The Hitman Study Violent Video Game Exposure Effects on Aggressive Behavior, Hostile Feelings, and Depression, EUROPEAN PSYCHOLOGIST 2010 Vol. 15(2):99-108 at 106, available at www.tamiu.edu/~cferguson/hitman.pdf ("Violent games may provide a mechanism through which players can assert control over a virtual environment, offsetting feelings of helplessness or lack of control over real life, as well as hostile feelings arising independently or as sequence of depression. Violent games, by providing both a means of aggressively demonstrating dominance and clear goal-directed behavior, may provide a particularly good medium by which the impact of real-life frustrations on depressed mood and hostile feelings may be reduced.").

218 Id.

219 Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d at 963-64.
studies by Dr. Anderson indicated that there was plenty of evidence for the California Legislature to rely on in passing the video game statute. Plaintiffs argued that the studies produced inconclusive evidence and even if there was a chance that some minors might be affected there was statistically no basis to believe that video games, taken together with other potential catalysts would actually cause violence. Furthermore, Plaintiffs cited various federal cases which struck down ordinances similar to the California video game statute and in all of the cases, Dr. Anderson’s research was found to be insufficient to justify the video game statutes.

While these cases involve publication of materials rather than the interactive element in video games, the Supreme Court has also evaluated cases in similar genres namely video recordings involving what many would consider distasteful acts. However, obscenity is already an established area of unprotected speech, whereas video game laws are relatively recent. A more extreme example of this distinction is evident in child pornography. New York v. Ferber, a pivotal case in child welfare law, illustrates that safeguarding the psychological well-being of minors has been a compelling issue for the court. However, even with the special considerations that children engender for legislatures the Supreme Court has quoted lower courts, cautioning, it “is essential that legislation aimed at protecting children from allegedly harmful expression . . . be clearly drawn and that the standards adopted be reasonably precise” so there can be no problems with vagueness and overbreadth.

---

220 The Appellant’s Opening Brief at the Ninth Circuit level gave extensive attention to the studies by Professor Anderson. See Appellant’s Opening Brief, supra note 36, at 21-22 (“The research shows that playing violent video games increases aggressive behavior and cognition, and leads to aggressive affect, cardiovascular arousal, and decreases in helping behavior. In the face of this extensive evidence, it cannot be said that it was irrational for the Legislature to determine that the violent video games covered by the Act are harmful to minors.”) (internal citation omitted). In Schwarzenegger v. EMA, Justice Kagan also appears to have taken notice of the lack of conclusive date resulting from these studies. During oral argument, she posed the hypothetical question of whether a study identifying movies as violent as video games would enable the state to enact similar statutes limiting access to films. See Transcript of Oral Argument, supra note 135, at 6.

221 See Brief of Plaintiffs-Appellees, supra note 53, at 34-35, Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (2010) (No. 08-1448) (noting that the expert testimony failed to “demonstrate either a substantial or a causal connection between ‘violent’ video games and aggression”) (internal citations omitted).

222 Id. at 34-35.

223 See Stevens, 130 S. Ct. at 1585.

224 Brief of American Booksellers Foundation For Free Expression et. al., as Amici Curiae Supporting Respondents, supra note 132, at 8.


However, the evidentiary battles that video game statutes have faced are very different than the demonstrable evil of child pornography in minors. Perhaps this is because with child pornography the harm at issue so "overwhelmingly outweighs the expressive interests at stake that no process of adjudication is required" and consequently "the balance of competing interests is already struck." Nonetheless, the Court has noted that the Ferber decision did not rest merely on interest analysis, but on the fact that child pornography was so intrinsically linked to actual child abuse, "an activity illegal throughout the nation." Just how intrinsic is this link and how much of a link would the parties in Schwarzenegger need to show? Perhaps the more appropriate vantage point with video game violence is to think of the harm as something that "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

Lastly, the tone and subjects of debate at Oral Argument suggests that the clock is running out for violent video game regulations. Oral Arguments for Schwarzenegger v. EMA were held at the Supreme Court on November 2, 2010. The Court’s line of questioning mirrored lower courts holdings, suggesting that the Ninth Circuit will be upheld. For example, during the course of the State of California’s argument, the State clarified that it was requesting that the Supreme Court uphold a statute permitting the Legislature to restrict a minor’s ability to purchase “deviant violent video games.” Justice Scalia noted that such request was difficult given that, historically there are no established norms of violence and, like Judge Posner, harkened back to Grimm’s Fairy Tales which were filled with violent imagery. Some justices expressed reservations about setting new parameters for violent content in video games, reasoning that doing so could open up a Pandora’s box of regulations in other art forms, especially motion pictures which have featured a self-rating system for decades.

Justice Sotomayor expressed misgivings whether it would be prudent to allow a state to regulate video games questioning whether this would prompt regulation in other forms of entertainment where violence is featured, such as rap music. Additionally Justice Sotomayor expressed doubts as to whether the statute could survive strict scrutiny and whether the statute would accom-

227 New York v. Ferber, 458 U.S. at 763-64.
228 See Stevens v. United States, 130 S. Ct. at 1586.
231 Id. at 4.
232 Id. at 4 ("Some of the Grimm’s fairy tales are quite grim, to tell you the truth").
233 Id. at 5.
234 Id. at 9.
plish its stated objective.235 She suggested software developers need only insert a non-human like feature onto a character to avoid running afoul of the video game statute.236

While the Justices voiced concern over video games being a new technology and as such difficult to square with older First Amendment precedent, these same arguments, EMA urged were made with technologies such as motion pictures when they were new.237

Overall, the justices did not appear inclined to create a new First Amendment exception for violent video games, or even violent content, yet they did not completely foreclose the possibility that additional studies and clear evidence could translate to a significant governmental interest in the future. Thus, while the game may be over for the State of California, the Justices emphasized that the deficiencies in the State’s argument are based on the current evidence.238

Moving beyond the focus of causation, correlation and statutory construction, the Plaintiffs in Schwarzenegger v. EMA also face difficulty in attempting to argue that certain video game content on the “whole, lacks serious literary, artistic, political, or scientific value.”239 Video game developers have been vocal about their concerns and have steadfastly argued that “exploration and self-discovery available through books and movies is magnified in video games by the power of interactivity.”240 Consider the myriad of video games, which despite enabling the player to kill or maim may encourage are placed in a historical context such as World War II and motivate the player to learn more about history.241

236 Id. Justice Sotomayor posed whether a non-human character such as a Vulcan would come into the definition of a human being as the video game statute was written. Justice Sotomayor underscored the difficulty of enforcing the language of the statute juxtaposed against the creativity of video software writers. Id.
237 Id. at 37 (noting that other expressive avenues have met with harsh criticism and have fought hard for legitimacy); see also id. at 36 (noting a “new medium that cannot possibly have been envisioned at the time when the First Amendment was ratified.”); but see Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 575 (7th Cir. 2001).
238 Transcript of Oral Argument, supra note 135, at 37.
240 E.g., Daniel Greenberg, Why the Supreme Court should rule that violent video games are Free Speech, WASH. POST (Oct. 31, 2010 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/29/AR2010102905315.html (“Mature-rated games such as ‘BioShock,’ ‘Fable 2’ and ‘Fallout 3’ go far beyond allowing players to engage in imaginary violent acts; they also give players meaningful consequences for the choices that they make.”).
241 A search on MobyGames.com for “WWII” yields thirty-one results, while a search for “Vietnam” yields twenty-four results. See www.mobygames.com (last visited May 14, 2011).
Would these be devoid of any value? Consider a shooter game based on World War II. Clearly World War II was filed with appalling violence, yet it is also a time we tend to romanticize for heroism—an era that has continually to fueled scholarship as well as our artistic outlets of expression. Would a video game have less value than say the gruesome depictions of war’s agony in Picasso’s Guernica its graphic depiction of war’s agony? Can any content be devoid of value if notwithstanding gore and war it might serve as “gateway for further exploration” of history or culture? What about violent video games which have even been marketed to attract adherents to certain religions? Value aside, the Supreme Court appears poised to not allow video game statutes to advance “to the next level.”

V. CONCLUSION

The Supreme Court is likely to hold that video games are a subcategory of expressive conduct entitled to First Amendment protection. The lower courts have generally agreed that such statutes violate the First Amendment, and the State will be found to have overstepped its role, due to the inability to demonstrate a causal link between video game violence and real-life violence—which has been difficult to prove even in instances in which teens have committed actual violence. Furthermore, any arguments that apply to the obscenity context do not apply in this context, given that violence and sex imagery is different than violence-only imagery. Finally, at oral arguments, the Supreme Court indicated that it leaned towards striking the statute. All of this suggests that the Supreme Court will declare “Game Over” for violent video game statutes.

---

242 See Petitioner’s Brief, supra note 86, at 6 (arguing the restricted games are “material with no redeeming value for children”).
