

5-1-2013

How 21st Century Violent Video Games Are Testing the Limits of First Amendment Values and What Can Be Done to Save Our Children

Ariel Rotenberg

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Rotenberg, Ariel, "How 21st Century Violent Video Games Are Testing the Limits of First Amendment Values and What Can Be Done to Save Our Children" (2013). *Law School Student Scholarship*. 170.
https://scholarship.shu.edu/student_scholarship/170

*How 21st Century Violent Video Games Are Testing the Limits of First Amendment Values and
What Can Be Done to Save Our Children*

INTRODUCTION

The level of technological advancement in the latter part of the 20th Century enabled individuals to recreate nearly any event, in crystal clear clarity, on their television screens and on their computers. This technological advancement was not the product of television networks supplying the public with news and sports or even the Internet allowing the public to share information on never before seen levels. This advancement was made possible by a new level of video game and video game systems in which the player could recreate battles on a highly realistic playing field. Moreover, players did not need a sibling or a friend over to their house in order to play with someone. With new online connections, players could play against opponents anywhere in the world, and even talk to them.

While this realism and globalization can build community, it creates danger as well. When violent games get in the hands of children and when children are able to play and reenact countless bloody encounters, hours on end, the exposure cannot help but have deleterious effects. First, the “real” involvement in violence that these video games provide desensitizes children to the horror of bloodshed. Second, it renders the infliction of harm an everyday act and minimizes the horror of murder. Third, that desensitization renders children (who then become adult actors) more inclined to participate in, or abide, violent cultures. Given these dangers, we are compelled to ask a twofold question: can these games be kept from children through ratings that stop their sales to minors and would such regulation breach a First Amendment line that governance should not cross? In this paper, I will elaborate on these potential harms with the aim of developing a framework for government responsiveness that will both keep children safe and protect their constitutionally determined rights.

This analysis will examine the scope of the First Amendment and the impact, if any, that First Amendment freedom of speech should have on the regulation of the video game industry. In order to accomplish this task, Part I will present the history of video games and how they developed from a very basic technological framework to the modern framework where millions of individuals may interact through an internet connection in a virtual world filled with violence and gore. Part II will introduce the California law that was enacted to stop the sale of violent video games to minors. This section will argue that the law did not violate the First Amendment freedom of speech of minors. Additionally, this section will discuss *Brown v. EMA*, a case that came out in support of First Amendment protection for video games and look at how future research on the connection between video games and violence may change the Supreme Court's decision. Part III will look at the psychology of video games and analyze some of the many psychological studies that have been done attempting to link violence in video games to violence in life. Additionally, it will critique arguments made by medical and psychological organizations in support of and in opposition to the California Law. Part IV will address the ESRB rating system and compare its coverage to other similar systems in the arts, specifically the MPAA. Finally, Part V will address public policy concerns and relate violence in video games to gun violence from Columbine to Aurora and more specifically to Adam Lanza and the Sandy Hook shootings at the end of 2012. Part VI will lay out a practical framework that any future law restricting the video game sales to minors must follow in order to pass constitutional muster. In the Conclusion, I will reiterate the argument that it does not violate the First Amendment rights of minors to restrict their access to certain video games that reach a heightened level of violence and gore and restate the impact research and public policy interests should have on this issue.

I. DEVELOPMENT OF VIDEO GAMES

The development of video game consoles generally and video games specifically has run parallel to the emergence of other technological developments. In the late 1970's and early 1980's the gaming industry began to emerge. The content in early arcade and video game consoles had some violent elements but were generally neutral like *Pong*, which simulated Ping-Pong or table tennis and *Frogger*, where a player has to cross a busy street and avoid getting hit by any of the obstacles or cars, though there were many exceptions.¹ Some games, like *Gun Fight*, for example, in which a gamer played the role of a cowboy in a duel, did contain some elements of violence.² This violence though was less gore and more comical. The realism in it was lacking and no there was no way to mistake the gameplay with any type of realistic violence.

As the 1980's proceeded, the advancement in graphics and realism led to the increased popularity of video games, specifically in first-person shooter games. In a first-person shooter game, the player serves as the protagonist of the game and sees the game as though he is actually the leading character.³ This type of game made shooting appear as though it was being done by the player himself. The first-person shooter genre created more opportunities for developers to make games in which the players could embody the characters they play, playing through the eyes of the characters and furthering the level of violence experienced by players. Games in the early 1990's, particularly *Wolfenstein 3D* and *Doom* left indelible marks on the gaming world where gamers spent hours upon hours role-playing and virtually killing.⁴ *Wolfenstein 3D* is

¹ Konami's *Frogger* and *Castlevania* Nominated for Walk of Game Star, GAMESPOT (Dec. 11, 2005). <http://www.gamespot.com/news/konamis-frogger-and-castlevania-nominated-for-walk-of-game-star-6135485?>

² *Gun Fight: Overview*, ALLGAME (2010). <http://allgame.com/game.php?id=10214>.

³ Matt Casamassina, *Controller Concepts: Gun Games*, IGN (Sep. 26, 2005). <http://www.ign.com/articles/2005/09/26/controller-concepts-gun-games>.

⁴ Noah Shachtman, *May 5, 1992: Wolfenstein 3-D Shoots the First-Person Shooter Into Stardom*, WIRED (May 5, 2008). http://www.wired.com/science/discoveries/news/2008/05/dayintech_0505.

roundly considered as the game that put the first-person genre on the mark.⁵ Reviewers have stated that the game allowed the player to “move smoothly in 360 degrees, you felt like you were there.”⁶ When enemies died, they “fell and bled on the floor.”⁷ This was as real as it came up to this point in gaming. In *Doom*, the player’s mission is to shoot off a slew of demons to keep them from attacking Earth.⁸ The progression from early, low level and basic gaming systems to today’s more advanced games and consoles with better graphics and nearly perfect realism made playing many games, particularly violent action games, more impactful. As the gaming market grew and systems like Atari, Nintendo and Sega Genesis became more popular, companies were competing for the minds and the money of gamers. This competitive development and drive created a need for more sophisticated and advanced games that went well beyond the basic concepts of early arcade games like *Pac-Man*.

Since the turn of the century, online gaming has become part of the basic framework of the video game industry. Current generation gaming consoles such as Sony Playstation 3 and Xbox 360 now come equipped with high-speed internet capabilities, allowing anyone with an internet connection to play with and against other live users anywhere in the world. Many violent and popular games like *Halo*, where players fight and battle a variety of aliens and *Call of Duty*, where players are able to play as soldiers in various wars, battles and missions, in particular World War II, allow gamers, no matter where they are in the world, to team up with or play against other users.⁹ Players are able to reenact many different battles and wars throughout the world. The combination of enhanced realism coupled with the violent content of games has

⁵ Id.

⁶ Id.

⁷ Brief for Petitioner at 7, *Brown v. EMA*, 131 S.Ct. 2729. (S.Ct. 2011) (No. 08-1448) (2010 WL 2937557).

⁸ *The Greatest Games of All Time: Doom*, GAMESPOT.COM. <http://www.gamespot.com/features/the-greatest-games-of-all-time-doom-6143094/>.

⁹ Katie Bush, *Call of Duty Walkthrough*, GAMESPOT.COM. <http://www.gamespot.com/features/call-of-duty-walkthrough-6081710/>,

created a dangerous atmosphere where children are vulnerable and the distinction between video games and reality is blurred for them.

The shift from benign games to games with malignant and violent themes was a slow process. This process by no means encompassed the entire world of video games. While many of the most popular games have violent and gory themes and action, many of the most popular games are sports games that do not have any violent impact on children and are not under attack by proponents of a violent video game ban. Sports games, in particular EA Sports' yearly *Madden* football game and *Wii Sports* perennially have a spot in yearly top 20 sales charts.¹⁰ Additionally, the *Just Dance* series is extremely popular.¹¹ Racing games have strong sales in the video game market, as well.¹² Also, the *Super Mario* series, which entails a great deal of action without the blood or gore of violent games, remains popular.¹³ These types of games are able to maintain their popularity without crossing the line into dangerous and violent games. While these releases have their place on the top selling charts, the top end of the charts are generally dominated by whatever *Call of Duty* or *Halo* release is available.¹⁴ Any inquiry into the impact of violent video games in a historical context must look at "violent" games from the 1980's and on, rather than sports, racing and dance games over time to track the historical arc this paper seeks to address.

Violent games in the 1980's and early 1990's before the introduction of *Wolfenstein 3D* and *Doom*, while entailing shooting and violence, had a far more elementary and unrealistic feel. Once 3D realism and better graphics became part of the equation, violent games took on a whole new tenor and impact. Games in the *Mario* series, released initially by Nintendo in the mid-

¹⁰ *USA Yearly Chart*, VGCHARTZ. <http://www.vgchartz.com/yearly/2011/USA/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

1980's, involved defeating and killing enemies in order to beat levels and ultimately win the game.¹⁵ Mario has long been the highest selling video game franchise and has always managed to maintain a benign level of violence.¹⁶ Blood and gore have never been a part of the *Mario* series and Nintendo has managed to maintain that image even as the video game industry has moved into a more violent era of video games. Most iconic franchises that have launched in the past ten or fifteen years like *Call of Duty* and *Halo* have embraced the realistic, malignant violence and success of games like *Doom* rather than the classic and benign violence of the *Mario* franchise. In doing so, video games have gone from animated, non-threatening yet profitable violence to a realistic, impactful, violently gory economic boon. One of the outgrowths of this change is the greater media scrutiny the video game industry faces as gun violence moves to the forefront of the American psyche.

The logical question that arises from this increased violence is whether playing these realistic and violent games may transfer over into reality. While it is difficult to prove a causal link between violence and video games, the state's in loco parentis fiduciary role suggests that government can do more to protect children from the constant exposure to violence that today's genre of video games presents. As the Supreme Court's decision in section II below comes to show, while state governments may be attempting to care for the well-being of America's youth, the Supreme Court is getting in the way of that endeavor.¹⁷

II. A TEST CASE: ATTEMPTS TO CURB THE SALE OF VIDEO GAMES IN CALIFORNIA

Following high profile shootings in schools across the United States, both political figures and child psychologists spoke out on the need for more discussion and more research on

¹⁵ *Nintendo's Shining Star: The History of Mario*, GAMECUBICLE.COM. http://www.gamecubicle.com/features-mario-nintendo_shining_star.htm.

¹⁶ *Id.*

¹⁷ *Brown v. EMA*, 131 S.Ct. 2729 (S.Ct. 2011).

whether a connection exists between playing violent video games and committing acts of violence in real life. One individual who researched and studied the potential connection was California State Senator Leland Yee. In addition to being a state senator, Mr. Yee is also a trained child psychologist.¹⁸ Along with the backing of state psychological and pediatric organizations, including one study from the California Psychiatric Association that “violent video games are learning tools for our children and clearly result in more aggressive behavior,” Mr. Yee sponsored a law in the California state senate and in 2005, the California Legislature passed a law that was signed by the governor and banned the sale of violent video games to anyone under 18.¹⁹ This law required that all video games judged to have a high level of violence contain a warning label on the outside of the box beyond the basic ESRB video game rating system.

The Legislature used a variation of the *Miller* Test from the United State Supreme Court’s *Miller* decision in order to align itself with current First Amendment jurisprudence.²⁰

The *Miller* Test has three parts, which must all be satisfied in order for speech to be considered obscene. The test is as follows.

“Whether (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, whether (2) the work depicts, describes, in a patently offensive way, sexual conduct specifically defined by applicable state law and whether (3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”²¹

¹⁸ *Biography*, SENATOR LELAND YEE, PH.D. (2013). <http://sd08.senate.ca.gov/biography>.

¹⁹ John M. Broder, *Bill is Signed to Restrict Video Games in California*, NEW YORK TIMES, (Oct. 8, 2005). http://www.nytimes.com/2005/10/08/national/08video.html?_r=0.

²⁰ *Brown*.

²¹ *Miller v. California*, 93 S.Ct. 2607, 2623 (S.Ct. 1973).

As with many laws that restrict the rights of a group of individuals, in this case minors, there was both public and constitutional law based backlash. The backlash came from the video game industry, obviously with a monetary interest in this kind of restrictive law, and second, from constitutional law groups, who saw a potential issue with restricting the sale of games to a group as large as minors. The video gaming industry quickly obtained an injunction against the California law. They feared, and rightly so, that the law would hurt the industry. Additionally, the industry filed a lawsuit on First Amendment free speech grounds.

The lawsuit went through the lower level courts. Both the district court and the court of appeals ruled that there was not enough information and research done to prove a causal relationship between video games and violent behavior among children. Therefore, the law violated the First Amendment. The case was appealed again and the Supreme Court granted certiorari.²²

In a nearly unanimous opinion, the Supreme Court held that video games were protected by First Amendment freedom of speech. Again, one of the main issues facing those in support of the law was what the Court deemed a lack of conclusive evidence linking video games to violence. The Court gave video games the same First Amendment protections as other common literary devices. In support of the law, amicus briefs were entered, which offered a variety of reasons why the law should be upheld. One of the most significant theories was that children do not have a First Amendment right to buy graphically violent material and violent video games are similarly graphic and therefore are not protected by the First Amendment. In addition, the California law does not prohibit children from playing the games, rather, the law puts the judgment in the hands of the parents, who have the option of buying or not buying the violent games for their children.

²² *Brown*, 131 S.Ct. 2729.

The Court did not see fit enough to allow the ban to pass muster. In his majority opinion in *Brown v. EMA*, Justice Scalia said that while it is true that the Court may pass laws that protect children from obscene material, the Court did not consider “speech about violence to be obscene.”²³ This part of the opinion, developed out of *Ginsberg*, would require those in favor of the law to somehow prove that violent video games are obscene.²⁴ Though this seems far-fetched, if much of the research comes to fruition for the law-backers this could be a possibility in the future. Portions of the majority did not view this as an open and shut case for proponents of the law, they just considered this to be a premature time to pass the law based on the state of current research.²⁵ Specifically, the Court made a point of stating that this decision should not interfere or stop further legislative efforts and further research that aim to find a connection between violence and video games.²⁶

The two dissenters had very different reasons for going against the majority but create two interesting thought patterns on this situation.²⁷ Justice Thomas simply stated that minors are under the umbrella of their parents in First Amendment jurisprudence and therefore the video game companies do not have a right to speak to children anyway.²⁸ Therefore, there is no First Amendment violation. Justice Breyer’s dissent is the one that most closely aligns with the reasoning of State Senator Ye and other supporters of the law.²⁹ Breyer held that the majority goes against prior court decisions.³⁰ And importantly, he stated that while the Court would stop the sale of nude magazines to minors, they would, based on this decision, allow minors to

²³ Id at 2735.

²⁴ Id.

²⁵ Id. at 2742.

²⁶ Id.

²⁷ Id. at 2751, 2761.

²⁸ Id. at 2751.

²⁹ Id. at 2761.

³⁰ Id.

“virtually...gag, torture and kill women.”³¹ Examples abound of games that include the violence Breyer evokes here.

Justice Breyer’s dissenting opinion serves to give state legislature guidance and a leg to stand upon when formulating any future statute restricting the sale of violent video games to minors.³² At the same time though, when looked at with an eye to the majority’s opinion, it is clear that most of the justices have a definitively different feeling toward this particular First amendment jurisprudence. Breyer does agree with the majority that restrictions on speech like the one exhibited in the California law must face strict scrutiny in order to be upheld.³³ Breyer compares *Brown* to the Supreme Court precedent in both *Miller* and *Ginsberg*, two landmark cases that set the framework for the Court’s treatment of obscenities. He does not see a difference between the nudity that did not receive protection in *Ginsberg* and *Miller* and the violence here in *Brown*.³⁴ With that, Breyer stated that the California law does, in fact, advance a compelling interest for purposes of strict scrutiny on the basis that it “consists of both (1) the “basic” parental claim “to authority in their own household to direct the rearing of their children,”...and (2) the State’s “independent interest in the well-being of its youth.”³⁵ This, according to Breyer, overrides any inclusivity the majority believes exists in the law and enables parents to still have the last word on whether their children play the violent games.³⁶

Breyer has a particular affinity for video games when it comes to education.³⁷ He believes that video games serve a positive role within the community as a learning tool for

³¹ Id. at 2763.

³² Id.

³³ Id.

³⁴ Id. at 2766.

³⁵ Id. at 2767.

³⁶ Id.

³⁷ Id. at 2771.

children and even in the realm of military training.³⁸ This beneficial use is something Breyer lauds. The interactivity and repetition of video games is what makes it such a positive learning tool.³⁹ Similarly, when the interactivity and repetition is for extreme violence in an interactive setting, Breyer believes the causal studies prove that violent video games are “at least as, if not more, harmful to children as photographs of nudity.”⁴⁰ Ultimately, Breyer focuses on education and the choices that come with educating children as he seeks to determine what this particular case is ultimately about.⁴¹ Giving parents a choice to make the ultimate decision for their children is simply the government helping parents educate their children here. The majority opinion does not agree with this tactic and is less persuaded by the current research on the causal connection between violent video games and harm to minors.⁴²

The majority opinion presents a template that would withstand constitutional review. The Court stated that because the California Act placed a restriction on the content of protected speech, California had to show that the Act passes the strict scrutiny test, meaning it must be justified by a compelling government interest and be narrowly drawn to serve that interest.⁴³ It is exceedingly difficult to meet that standard of review. However, if a study clearly established the existence of a connection between video games and violence, the Court would be hard-pressed not to consider that conclusion a nationwide problem worthy of a compelling government interest and worthy of curbing the speech rights of the gaming companies.

Ultimately, *Brown*'s insight into where the Court stands and what proponents of the California law need to do moving forward is much more instructive and important than the actual

³⁸ Id.

³⁹ Id. At 2769.

⁴⁰ Id. At 2771.

⁴¹ Id. At 2769

⁴² Id.

⁴³ Id. at 2766.

holding of the case. The decision was an invitation, to a large extent, to researchers to continue to look for more connections between violence and video games.⁴⁴ The decision also alerted legislatures to an important issue affecting children throughout the country, and it may serve as somewhat of a springboard to garner support for anti-video game legislation and decisions. Among the questions that need to be researched and asked are: Why do individuals and specifically children play video games? What is the shock value of certain violent games? Do games invite anti-social behavior?

To date, research on video games reveals little more than it did during the *Brown* case. The tide may be changing though. Following the Sandy Hook shooting in December 2012, along with the outcry for greater gun control, many organizations, politicians and President Obama himself called out for further research into violence in video games as well.⁴⁵ The gun control initiative championed by President Obama included in it ten million dollars set aside to study violence in entertainment, which included violence in video games.⁴⁶ This study could have found greater empirical evidence proving a conclusive direct connection between violent video games and harm to minors. Ultimately, the final bill that went before Congress did not contain this provision for video games, though, and the bill did not pass through the Senate.⁴⁷ Despite the failure of the gun control initiative, since the Sandy Hook shooting other states have brought bills that if passed would put a tax on the sale of violent video games and “make it a crime to sell certain games to minors.”⁴⁸ Based upon the current political climate it is likely a

⁴⁴ Brief for Petitioner at 4, *Brown v. EMA*, 131 S.Ct. 2729. (S.Ct. 2011) (No. 08-1448) (2009 WL 1806224).

⁴⁵ *Now is the Time: The President's Plan to Protect Our Children and Our Communities by Reducing Gun Violence*, THE WHITE HOUSE (Jan. 16, 2013).

http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf.

⁴⁶ *Id.*

⁴⁷ Ted Barrett and Tom Cohen, Senate Rejects Expanded Gun Background Checks, CNN (Apr. 18, 2013).

<http://www.cnn.com/2013/04/17/politics/senate-guns-vote>.

⁴⁸ Benny Evangelista, *Video Games Drawn Into Violence Debate*, SAN FRANCISCO CHRONICLE (Jan 27, 2013).

<http://www.sfgate.com/news/article/Video-games-drawn-into-violence-debate-4219013.php>.

gun control initiative of some sort will pass muster prior to the end of President Obama's second term. If that does happen, and Congress does include video games in the bill, empirical research looking into violence in video games will create sufficient content to challenge the Supreme Court decision in *Brown* and move the Court to come to a different outcome.

III. PSYCHOLOGY OF VIDEO GAMES

The amicus brief submitted to the Supreme Court by the California Chapter of the American Pediatric Association and by State Senator Yee addressed many areas where video games can have adverse impacts on the brain and negatively affect the well-being of children.⁴⁹ Among their findings was that exposure to violent video games reduces the use of brain areas involving thoughts and impulses, viewing violence increases both short-term and long-term aggression and as graphic violence in video games increases, children are exposed to even greater violence or bloodshed.⁵⁰ This research was not enough, according to the Court, to prove a causal link between exposure to video games and violence.⁵¹ The logic that goes from playing violent games to committing violent acts, though, is a popular leap that is made by the public when mass shootings occur.

In the aftermath of the Sandy Hook attack in December 2012, many news outlets increased their coverage of the psychology of mass shootings.⁵² A study cited by the New York Times found that between 1994 and 2010, the number of violent minor offenders dropped by more than half according to government statistics. At the same time, video game sales have

⁴⁹ Brief for Petitioner at 7, *Brown v. EMA*, 131 S.Ct. 2729. (S.Ct. 2011) (No. 08-1448) (2010 WL 2937557).

⁵⁰ *Id.*

⁵¹ *Brown*, 131 S.Ct. 2729.

⁵² Brian Arnold, *New York Times: Violent Video Games Decrease Violent Activity*, THE EXAMINER (Feb 14, 2013), <http://www.examiner.com/article/new-york-times-violent-video-games-decrease-violent-activity>, Luran Neergaard, *After the Sandy Hook Shooting, Experts Say Kids Are Resilient In Coping With Trauma*, HUFFINGTON POST (Dec. 18, 2012), http://www.huffingtonpost.com/2012/12/18/kids-who-survived-sandy-hook_n_2325575.html.

“more than doubled since 1996.”⁵³ This study raises many questions. The most basic question it raises is simply, does this study tell us anything about the connection between violence and video games? It appears at face, that the connection is not great. This study, however, does not take into account many other different variables and therefore it fails to make much of a mark. For instance, in 1994 the Internet was in its infancy and obtaining weapons and ammunition online was likely impossible.⁵⁴ Today, nearly all mass shooters obtain weapons and/or ammunition online.⁵⁵ Additionally, technology now enables individuals to create detailed plans and acquire a great deal of knowledge about attacks, on the Internet in their own homes.⁵⁶ Another reason for the seeming correlation between falling violence and rising game sales may be that minors now have more distractions, first and foremost video games. So much time is spent by kids playing video games, that they may have less time to commit violent crimes. That does not mean the crimes they are committing are not more violent as a whole.

Another question that needs to be asked is: are legislatures, the public, researchers and others putting the proverbial horse before the carriage when it comes to child psychology and video games? Shortly after the Sandy Hook shooting, one of the first questions asked was, “Did Adam Lanza play violent video games?”⁵⁷ According to some psychologists, that is the wrong question to ask because it creates a false sense of knowledge for those looking for answers to tragic questions.⁵⁸ Chris Ferguson, a psychologist from Texas A&M, states that there is no

⁵³ Examiner.com, <http://www.examiner.com/article/new-york-times-violent-video-games-decrease-violent-activity>

⁵⁴ Ali Vitali, *Colorado Governor Signs Tough Gun Laws in Wake of Mass Shootings*, MSNBC (Mar. 20, 2013), <http://tv.msnbc.com/2013/03/20/hickenlooper-to-sign-colorado-gun-law-tightening-ammo-limits>.

⁵⁵ Id.

⁵⁶ Mike Lupica, *Morbid Find Suggests Murder Obsessed Gunman Adam Lanza Plotted Newtown, Conn.'s Sandy Hook Massacre For Years*, NEW YORK DAILY NEWS (Mar. 25, 2013), <http://www.nydailynews.com/news/national/lupica-lanza-plotted-massacre-years-article-1.1291408>.

⁵⁷ Chris Ferguson, *Don't Blame Video Games for Real World Violence*, THE CHRONICLE OF HIGHER EDUCATION (Jan. 10, 2013), <http://chronicle.com/blogs/conversation/2013/01/10/dont-blame-video-games-for-real-world-violence>.

⁵⁸ Id.

connection in any of the studies between violence and video games.⁵⁹ While the quick move to blame video games after every shooting ignores the real issue of gun control and mental illness, to dismiss a contributory role played by violent video games is to turn a blind eye to some causal role.⁶⁰ Shortly after Ferguson wrote an article questioning the public outcry that looked toward video games as a potential reason for Lanza's shooting, stories surfaced that Lanza did, in fact, play violent video games in his basement for long hours and spent a great deal of time immersed in the world of various violent games.⁶¹

A recent study by the Radiology Society of North America ("RSNA") has found that violent video games may, in fact, alter the brain function of young men. This study claims to be the first of its kind to show that young adults who have spent a week playing violent shooting video games have less activation in the brain regions controlling emotion and aggressive behavior. The second week participants did not play video games and the areas of the brain which were impacted in the first week were diminished. Though this study did not use children, it certainly is a positive step for proponents of a law against violent video games.

With all the support against violent video games, it is easy to overlook the positives that video games may provide for children. Many studies see both positive and negative impacts of video games. While they may desensitize children to violence, games may also provide many positive teaching skills. Games, when well designed, can be "natural teachers." Games can provide players, including children, with immediate feedback and give out rewards and punishments. Games can also be played on different levels and respond to a player's skill level. Repetition, a main part of gaming, can strengthen brain-cell connections that may help memory

⁵⁹ Id.

⁶⁰ Id.

⁶¹ N.R. Kleinfield and Ray Rivera, *Newtown Killers Obsessions, in Chilling Detail*, NEW YORK TIMES (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/nyregion/search-warrants-reveal-items-seized-at-adam-lanzas-home.html?pagewanted=all>.

storage and learning ability. One study even thought that action games can “improve visual attention to the periphery of a computer screen.” The problem is though, that many of these benefits of video games can be taught without the violence that is found in the more obscene games so an obvious question is why can’t games that children play be both educational, entertaining and not highly-violent?

Recent studies have shown that video games can be highly addictive and those children who become addicted have a higher level of depression and anxiety than children not who are not addicted to video games.⁶² A question that remains though is whether kids who are depressed and anxious may turn to video games because they cannot cope with their daily lives at school and in the real world.⁶³ With all the studies and research currently taking place, an answer to the impact video games have on violence will likely come soon. At this point though it should be clear that doing anything for hours a day will have an effect on the thoughts and actions of children.⁶⁴ In order to gauge how far rating systems may be able to go in the realm of video games, looking to other literary devices should give particular guidance. At the same time, the psychological impact of playing video games cannot be considered the same as music, radio or even movies.

IV. RATING SYSTEMS AND OTHER RESTRICTIONS

As technology advanced through the second half of the 20th Century government regulations increased. Many of those regulations have addressed areas in which children are at risk of exposure to language, imagery, or other potentially age-inappropriate material. This has

⁶² *Violent Video Games Alter Brain Function in Young Men*, RADIOLOGICAL SOCIETY OF NORTH AMERICA, (Nov. 30, 2011), http://www2.rsna.org/timssnet/media/pressreleases/pr_target.cfm?ID=570.

⁶³ Serena Gordon, *Video Game Addiction Tied to Depression, Anxiety in Kids*, U.S. NEWS AND WORLD REPORT, (Jan. 17, 2011), <http://health.usnews.com/health-news/family-health/brain-and-behavior/articles/2011/01/17/video-game-addiction-tied-to-depression-anxiety-in-kids>.

⁶⁴ *Id.*

created regulations like the FCC ban on certain words that are considered indecent.⁶⁵ In *FCC v. Pacifica*, a father heard a George Carlin routine over the radio while with his son in the car. He was disgusted and he complained to the FCC, which censured the radio station. Movie ratings were also created, many of which do not allow children into a film without an accompanying adult.⁶⁶ In some cases the courts have addressed whether regulations should be standardized.⁶⁷ In others, the courts have not yet provided guidance as to what role government will play in regulating certain fields.

In 2005 a Senate bill was introduced which aimed to limit the sales of mature and adult-only video games. The bill, which was introduced and co-sponsored by high-profile senators Hillary Clinton and Joe Lieberman among others also called for a federal mandate of the Entertainment Software Rating Board (“ESRB”) to protect children from highly inappropriate content. The mandate would have approved monetary fines and/or community service for owners who sold the mature or adult only material to children. In addition to the fines and community service the Act would also call for a Federal Trade Commission investigation into the ESRB system established in 1993 to see whether it has been accurately rating games. The ESRB, a self-regulatory organization has never faced any type of investigation or authority like the bill called for. The Act also called for an annual independent analysis of the rating system and allowed the FTC to randomly audit retailers. This Act would have significantly changed the independent status of the ESRB and would have created high levels of oversight that would have taken much of the ESRB power from the video game industry. This type of investigation and oversight would likely have created a certain amount of backlash from the video game industry if it had passed, similar to the push back faced from the California law. In fact, it did face criticism

⁶⁵ *FCC v. Pacifica*, 98 S.Ct. 3026 (S.Ct. 1978).

⁶⁶ *Id.*

⁶⁷ *Id.*

from elements of the video game industry. The bill did not become law as it died in the Senate but it likely would have caused the same uproar as the California law. The main difference would have been that the Act was backed by the federal government as opposed to a state authority. Whether that federal support would have made a difference in a Supreme Court challenge is not yet known, but, in fact, the Supreme Court judgment came after the Act's introduction and did not reflect that higher level of interest.

Other states have also passed laws and ordinances restricting the sale of video games to minors but they have faced opposition as well. In April 2002, a federal judge said a local county government can limit the access to violent or sexually explicit video games and those types of speech are not protected.⁶⁸ This law was passed in St. Louis County. It required children under 17 to have parental consent before they could buy violent or sexually explicit video games.⁶⁹ The federal judge, Stephen Limbaugh, said that after reviewing four games he found, "no conveyance of ideas, expression, or anything else that could possibly amount to speech." He also equated video games more with board games and sports than movies, meaning that speech in video games should not require speech protection. This St. Louis ordinance was by no means the first of its kind. It was modeled after a law in Indianapolis which had been invalidated by a federal court. The next year the St. Louis law was struck down on appeal in a federal appeals court for being unconstitutional. The court of appeals said that video games are entitled to the same kind of protection as the best of literature. Proponents of the St. Louis law were

⁶⁸ John Jorsett, *St. Louis County's Regulations on Video Games Upheld*, FREE REPUBLIC (Apr. 25, 2012), <http://www.freerepublic.com/focus/f-news/672891/posts>.

⁶⁹ *Id.*

disappointed in the decision but knowing what we know now about the position of the Supreme Court on this issue this decision does not come as a surprise.⁷⁰

In 2005 another law was passed in Michigan prohibiting the sale of violent video games to minors. Again though, the law was rejected by the court as unconstitutional. The court in Michigan stated that the law could not be considered constitutional as it does not state exactly what it is trying to accomplish. More simply put, the court did not believe there was proof of a direct correlation between video games and violence. This thought was later the impetus behind the Supreme Court decision in *Brown*.

Many industries have faced the same issue the video game industry is currently facing with backlash from increased violence.⁷¹ Both the movie industry and the music industry faced increased scrutiny at different points during the latter part of the 20th century and into this century.⁷² Following the Aurora movie theater shooting in July 2012, certain movie previews were pulled from circulation due to their violent content.⁷³ Movies with epic levels of violence like *A Clockwork Orange* and *Dirty Harry*, among others, were subjects of a long-standing debate in the movie industry about how much violence was too much violence.⁷⁴ This debate ultimately led to the creation of the MPAA rating system for movies.⁷⁵

⁷⁰ *8th Circuit Strikes Down Limits on Kids' Access to Violent Video Games*, ASSOCIATED PRESS (Jun. 4, 2003), <http://archive.firstamendmentcenter.org/news.aspx?id=11555>.

⁷¹ *FTC Renews Call to Entertainment Industry to Curb Marketing of Violent Entertainment to Children*, FEDERAL TRADE COMMISSION (Dec. 3, 2009), <http://www.ftc.gov/opa/2009/12/violentent.shtm>.

⁷² *Id.*

⁷³ Michel Cieply, *A Studio With Violence in Its Bone*, NEW YORK TIMES (Jul. 25, 2012), http://www.nytimes.com/2012/07/26/movies/warner-brothers-and-its-decades-of-violent-films.html?_r=0&adxnnl=1&pagewanted=all&adxnnlx=1364746948-rbzAFa0CHHGPIGwAdis7Zw.

⁷⁴ *Id.*

⁷⁵ *History*, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/about/history>.

The music industry was also confronted with a great deal of criticism in the 1980s from legislators and others regarding the sexual, violent and graphic nature of certain songs.⁷⁶ Tipper Gore led a committee called the Parents Music Resource Center (“PMRC”) which was started in order to give parents and adults more control over the music their kids were able to listen to.⁷⁷ The committee’s crowning achievement occurred at a Senate hearing involving the music industry. The witnesses, some of whom were music stars, served as a clear reminder of the thin line between protecting the minds of our children and maintaining freedom of expression and freedom of censorship.⁷⁸ Ultimately, by the time the hearing ended, the recording industry agreed to put “parental advisory” warnings on certain releases decided by the Recording Industry Association of America.⁷⁹ The warning though, was generic and did not describe the category of the music.⁸⁰

What makes video games different from watching movies and listening to music is the repetition that video games entail. Repetitive gaming, which involves “practice, repetition and rewards for acts of violence” according to the American Psychological Association, is significantly more interactive than either music or movies, which are much more passive activities.⁸¹ Dr. Craig Anderson, a psychologist whose testimony was analyzed, in depth, in the Brown decision has studied the differences between repetitive video game playing and repetitive

⁷⁶ Tom Cole, *You Ask, We Answer: Parental Advisory Labels – The Criteria and The History*, NATIONAL PUBLIC RADIO (Oct. 29, 2010), <http://www.npr.org/blogs/therecord/2010/10/29/130905176/you-ask-we-answer-parental-advisory---why-when-how>.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Craig A. Anderson & Wayne A. Warburton, *The Impact of Violent Video Games: An Overview*, in *GROWING UP FAST AND FURIOUS: REVIEWING THE IMPACTS OF VIOLENT AND SEXUALIZED MEDIA ON CHILDREN*, 56, 71 (W. Warburton & D. Braunstein eds., (2012)). <http://www.psychology.iastate.edu/faculty/caa/abstracts/2010-2014/12AW.pdf>.

music listening and movie watching.⁸² Anderson has found that the repetition entailed in playing violent video games far exceeds repetition in music listening and movie watching, which are both passive activities.⁸³ Additionally, the rewards that are given for activities that in the “real world” would be considered violent and dangerous makes video games “ideal for learning aggressive attitudes.”⁸⁴ Music and movies on the other hand do not contain the same type of repetitive behavior and do not involve the same type of interactivity as video games do, and therefore, according to Anderson, do not have the same kind of impact on the brain.⁸⁵

What the PMRC accomplished within the recording industry is certainly beneficial for children but the issue at hand there differs from video games and violence for both practical and emotional reasons. First, video games are visual with the player taking an active role in the game. The imagery can be as real as real life and the gore and killing can appear directly in front of you. Music, even at its most impactful, cannot inspire the way a video game can. Second, the emotional fear that the country has of mass shootings and violence, both in school and in public spheres, brings the country to its knees. The reaction to the Sandy Hook shootings alone was able to spur a movement for greater gun control.⁸⁶ Not to underscore the danger drugs and sex has on minors, but it cannot compare to the dangers and fears that guns and violence can cause.

In the gaming industry regulations do exist, to an extent.⁸⁷ As noted above, the ESRB is a self-regulating non-profit that was set up during the 1994 “heyday” of the gaming industry in

⁸² Id..

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Edgar Sandoval, *News' Report on Sandy Hook Gunman Adam Lanza's Video Game Style Slaughter Score Sheet Inspired Call in D.C. to Stiffen Regulation of Violent Games*, NEW YORK DAILY NEWS (Mar. 19, 2013), <http://www.nydailynews.com/news/national/crackdown-urged-violent-games-lanza-report-article-1.1292402>

⁸⁷ Chris Kohler, *July 29, 1994: Videogame Makers Propose Ratings Board to Congress*, WIRED (Jul. 29, 2009), http://www.wired.com/dayintech/2009/07/dayintech_0729.

response to high levels of violence in video games.⁸⁸ The rating system was built off the same theme as both the MPAA movie ratings and the parental advisory warnings that were created out of the PMRC.⁸⁹ Also, similar to the Parental Advisory Warning, the ESRB was created in response to government intervention.⁹⁰ In 1993, Senator Joseph Lieberman began an investigation into violent video games which led to a deeper concern both privately and governmentally.⁹¹ When comparing the ratings systems in video games to other artistic fields, there are many similarities that show the potential constitutionality of video game restrictions.

The MPAA rating system is a movie rating system that both warns the public about a movie's content and in some cases, like in "R" movies, creates restrictions against who can buy tickets.⁹² In "NC-17" movies, the MPAA does not allow anyone 17 and under into the movie, even if a parent is joining them and buying the tickets.⁹³ There are many video games that contain violent, sexual and obscene material.⁹⁴ Games like Grand Theft Auto contain material that in the MPAA system would easily be under the "R" rating if not the "NC-17" rating.⁹⁵ Considering the First Amendment constitutionality of the MPAA system and the requirement that anyone under 17 must be accompanied by an adult or guardian to see an "R" movie, a video game with the same level of material as an "R" or "NC-17" should be given similar treatment. Even though some of these standards have been criticized as being subjective, ignored and

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² *What Each Rating Means*, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/ratings/what-each-rating-means>.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

difficult to enforce, their existence serves as a warning to parents and other adults and undoubtedly has, at least, some degree of effectiveness that is worthwhile to maintain.⁹⁶

V. THE PUBLIC REACTS: VIDEO GAMES AND GUN VIOLENCE

While the issue of violence in video games is often a popular issue in the American psyche, it is no more so than after a mass shooting.⁹⁷ Since the Columbine High School shooting in 1999, there have been a number of high profile school shootings throughout the country. Each time this happens, networks, papers and public servants ask the same question, did the perpetrator play violent video games?⁹⁸ This question arises even more so when the shooting is at a school and done by a younger individual. Often times there is no connection, but in other instances, the shooter has been found to have spent countless hours playing video games.⁹⁹ There may be many important things to learn from this. Legislative inquiries into this question address this public policy issue at its core.¹⁰⁰

The recent Sandy Hook shooting is no exception. The shooter, Adam Lanza, a 19 year old, was given the freedom to play violent video games in his basement, for hours on end by his mother.¹⁰¹ Many reports have been released stating that Lanza had Asperger's disease or was autistic, creating an even more complicated web of potential questions regarding individuals who are mentally impaired playing certain violent video games though that question is beyond the scope of this paper.¹⁰² The fact that Lanza spent hours playing violent video games and then

⁹⁶ Dave Banks, Today's MPAA Ratings Hold Little Value for Parents, *Wired* (Apr. 10, 2012), <http://www.wired.com/geekdad/2012/04/mpaa-ratings/>.

⁹⁷ Yannick Lejacq, *After Sandy Hook, Should Violent Video Games Call a Cease-Fire?*, *THE WALL STREET JOURNAL* (Dec. 21, 2012), <http://blogs.wsj.com/speakeasy/2012/12/21/after-sandy-hook-should-violent-video-games-call-a-cease-fire>.

⁹⁸ *Id.*

⁹⁹ Lupica, <http://www.nydailynews.com/news/national/lupica-lanza-plotted-massacre-years-article-1.1291408>.

¹⁰⁰ Sandoval, <http://www.nydailynews.com/news/national/crackdown-urged-violent-games-lanza-report-article-1.1292402>.

¹⁰¹ Lupica, <http://www.nydailynews.com/news/national/lupica-lanza-plotted-massacre-years-article-1.1291408>.

¹⁰² *Id.*

killed his mother, 20 young children and 6 of their teachers, makes the public policy question regarding a potential connection between video games and violence even greater and serves as an impetus behind further research.¹⁰³

The issue here is not whether non-violent individuals become violent by playing violent video games. That is not at the heart of the concern that even the government inquiries have had. The real question is whether high levels of exposure to violent video games push individuals who may already be susceptible to violence over the edge. In recent weeks, it has become clearer that Lanza's motive for the Sandy Hook shooting was, to an extent, based upon his obsession for video games and his hope to gain a high "score" by killing as many individuals as possible.¹⁰⁴ He believed that a school with young children would prompt the least amount of resistance.¹⁰⁵

Politicians in Washington are beginning to use the Sandy Hook shooting to create support for research on the connection between violence in video games.¹⁰⁶ President Obama expressed his belief that there is a need for enhanced research into whether or not a connection exists between video games and violence.¹⁰⁷ Among those in support of a study into the connection is Senator Jay Rockefeller, who described video games as containing "often obscene levels of violence."¹⁰⁸ Though Rockefeller is not a legal scholar and did not attend law school, his use of the word "obscene" in describing video games is telling.¹⁰⁹ Connecting video games to violence and connecting video games to obscenity is a direct recipe for overturning the Supreme Court

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Sandoval, <http://www.nydailynews.com/news/national/crackdown-urged-violent-games-lanza-report-article-1.1292402>.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ *Ginsberg v. New York*, 88 S.Ct. 1274 (S.Ct. 1968), Miller, at 2623., *About Jay*, UNITED STATES SENATOR JAY ROCKEFELLER, <http://www.rockefeller.senate.gov/public/index.cfm/about-jay>.

decision in *Brown*.¹¹⁰ The push by politicians to move for more restrictions on video games is already in motion, and the more it is tailored toward Supreme Court approval, the more likely a law restricting the sale of certain video games will be legally defensible in the First Amendment arena.¹¹¹

In 1999 after the Columbine High School shooting when, publicly at least, video games were not as big of a violent albatross on society, questions abounded as to why two high school kids could commit a mass killing their school. Shortly thereafter, the Columbine Tapes were released. The tapes were made by the two shooters, Eric Harris and Dylan Klebold, to be viewed in the aftermath of the shooting and to give insight into their goals.¹¹² In the video both Harris and Klebold made many references to their favorite video game, *Doom*.¹¹³ Harris even named his shotgun after a character in *Doom*.¹¹⁴ *Doom* is a first person shooter role player game in which players must fight and kill invading demons.¹¹⁵ The game is one of the most famous and best selling video games ever but has also created a great deal of controversy with its high levels of graphic violence and satanic overtones.¹¹⁶ In the aftermath of the Columbine shooting the question that was constantly asked was whether there was some connection between the violent video games and the shooting, or at the very least did a gaming system somehow help to inspire the killers?¹¹⁷

While questions about gun violence and video games are asked after minor shootings and on smaller levels, it is the mass shootings like Columbine, Aurora and Sandy Hook that capture

¹¹⁰ Brown.

¹¹¹ Id.

¹¹² Nancy Gibbs and Timothy Roche, *The Columbine Tapes*, TIME (Dec. 12, 1999), <http://www.time.com/time/magazine/article/0,9171,35870,00.html>.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Mike Nizza, *Tying Columbine to Video Games*, NEW YORK TIMES (Jul. 5, 2007), <http://thelede.blogs.nytimes.com/2007/07/05/tying-columbine-to-video-games/>

the imagination of legislatures and the nation as a whole and which, along with additional research and studies will be the impetus behind any eventual First Amendment caselaw denying video games First Amendment protection. When an “art’s” main purpose is to kill, maim, steal and torture, it will be difficult for advocates of the video game industry to stand up and say there is something positive to take out of that art, though they certainly will try. Freedom of expression and speech is not an unlimited right. Advocates tying video games to violence at this point are not asking for anything even approaching a complete ban. The simple goal for them is to make it more difficult for children to gain access to the more violent games. As congress continues to push for more research, inquiries and action, we should have an answer to the question of whether there is a clear connection between violence and video games sooner rather than later.

VI. MAKING THE CASE FOR JUDICIAL AND LEGISLATIVE CURBS ON VIOLENT VIDEO GAMES

Based upon current national dialogue and the open-ended majority decision in *Brown v. EMA* there is little doubt that the Supreme Court will revisit the question of what type of first amendment protection video games should receive. The impetus for this will most likely arise from state as opposed to federal initiative. Clearly, the issue of gun control, while capturing the public imagination and eliciting considerable emotional support, continues to flounder on the national legislative level and has not received sufficient congressional support to render the purchase of weapons and ammunition more difficult for the general public. At the same time, the stigma of violent video games continues to develop. In response to this dilemma, states will likely attempt to take the matter into their own hands, as California did in enacting the law that prompted the *Brown* case, and pass other laws that curb the sale of violent video games. Any law of this type will face the same level of scrutiny from the video game industry that the

California law did. When this issue is revisited on the Supreme Court level it will arise out of a state law restricting access to violent video games. It would be foolish to believe a law restricting violent video games on the adult level would be enforced. Therefore the law, as the California law did, would restrict minors' access to violent video games. In order to avoid a repeat of the *Brown* decision though, the writers and sponsors of the law must take into account a number of factors the majority in *Brown* made clear were necessary and critical for a law to withstand judicial scrutiny.

The conflict that pits the video game industry against proponents of First Amendment freedom of speech for video games is sure to face a multitude of challenges in the near future. At the conclusion of their concurring opinion, Justices Alito and Roberts invited future challengers to their decision.¹¹⁸ Contained in that invitation were clear directions as to how the current layout should be challenged. The concurrence supported future legislative inquires and efforts to address "what is perceived by some to be a significant and developing social problem."¹¹⁹ The ultimate problem with the California statute was the way in which it was framed. Any future challenge must be framed to address the compelling government interest necessary to pass the strict scrutiny test the majority used to judge the law. As strict scrutiny is the highest constitutional standard, the state legislature that passes this law must address a number of areas in order to pass constitutional muster.

Based upon the decision in *Brown*, in the current makeup of the Court there are four justices who either support, or seem more inclined to support, a state law restricting the sale of video games.¹²⁰ Both the two dissenting justices and the concurring justices have set standards that with more research and better statutory writing could fairly easily pass constitutional

¹¹⁸ *Brown* at 2751.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2732.

muster.¹²¹ The issue that is before the state legislatures is that the majority requires any state law similar to the California law to pass strict scrutiny, which will take both further research and a significant overhaul to the structure of any law and specifically as to the compelling nature of the particular statute. The difficulty of creating such a statute becomes even more challenging when considering the majority's supportive language towards the ESRB rating system. Therefore, for a challenge to pass, it must achieve the following:

- First, any bill must show an “actual problem” to pass strict scrutiny.¹²² This can be achieved through further research demonstrating that there is a “direct causal link” between violent video games and the harm they cause to minors.¹²³ The support California brought in *Brown* was not nearly enough and the majority dismissed it for failing to serve a compelling interest.¹²⁴ The support brought did not make a distinction between violence in video games and violence emanating from the effects of a child watching shows as seemingly innocuous as “Bugs Bunny” or “Road Runner.”¹²⁵ Researchers have a great burden to overcome before they can achieve the compelling standard. The ten million dollar grant for research contained in the President Obama's gun initiative would have pushed research ahead. Future grants would certainly benefit the cause.
- Once researchers have found a compelling connection, the burden will shift to the legislatures who will write up any state law on the topic. The Supreme Court criticized the structure and language of the California statute for being both underinclusive and

¹²¹ Id.

¹²² Id. at 2738.

¹²³ Id.

¹²⁴ Id.

¹²⁵ Id. at 2739.

overinclusive.¹²⁶ The California statute was considered underinclusive for the same reason it failed to show that video games were individually dangerous.¹²⁷ The Court found that if the law were to hold video games to such a standard then it needed to hold shows like *Bugs Bunny* and *Road Runner* to the same standard.¹²⁸ Beyond that, the Court also takes issue with the fact that parents are given right to make the decision to put such dangerous material in the hands of children. The majority stated that a “parental veto” that enables some children to obtain violent games simply because their parents do not care about the danger games makes the law overinclusive.¹²⁹ The underinclusive and overinclusive nature of the law, according to the majority, stops the law from being narrowly tailored as the strict scrutiny test requires for the law to be constitutional.¹³⁰ The burden of formulating a law that is not overinclusive or underinclusive again will fall to the framers of the law. The majority has given the framers a clear blueprint for success that any framer should use to get a law passed.

The new research that must be found that directly links violent video games to harming children and making them more violent will, in addition to showing a compelling interest, eliminate the danger of the law being underinclusive. If research shows that violent video games are more dangerous than the “*Bugs Bunny* or *Road Runner*”, the law will not be underinclusive with respect to other children’s programming. Additionally, the law might have to consider placing restrictions on parents enabling their children to play violent games that cause mental

¹²⁶ Id. at 2741.

¹²⁷ Id.

¹²⁸ Id. at 2739.

¹²⁹ Id. at 2736.

¹³⁰ Id. at 2739

harm and desensitization to violence.¹³¹ The majority's logic in its claim that the California statute is overinclusive because some children's parents do not care about their children playing the violent games and will allow it, ignores the potential danger of these games.¹³² If research can demonstrate a direct link this logic will be narrowly tailored. Other laws that curb the sale of alcohol, cigarettes and pornography could also be considered overinclusive under this logic. Some parents may still allow their children, specifically teenagers to drink alcohol, smoke cigarettes or watch pornography. Therefore, researchers must find this direct link between violent video games and harm to minors in order for a law to be considered narrowly tailored.

While both Justices Thomas and Breyer dissented in *Brown*, each did so for entirely different reasons, making the 7-2 majority even more daunting a defeat to overcome.¹³³ Justice Thomas' dissent is one that is unlikely to be supported by a majority in the near future without an overhaul of the current Court.¹³⁴ Thomas does not believe minors are fully protected by the First Amendment and parents are the authority over children when it comes to freedom of speech and the First Amendment.¹³⁵ The majority opinion did not give much credence to Thomas' opinion and did not address its processes with a hint toward future discussion.¹³⁶ When it came to Justice Breyer's dissent though, the majority opinion did consider its merits.¹³⁷

Justice Breyer's dissent appealed to the need for the Court to protect children from what Breyer considered inherently obscene material.¹³⁸ Breyer's decision equates violent video games to pornography and would, if agreed to by the rest of Court consider the "overexclusiveness" of

¹³¹ Id. at 2739.

¹³² Id. at 2741.

¹³³ Id. 2751, 2761.

¹³⁴ Id. at 2751.

¹³⁵ Id.

¹³⁶ Id. at 2733.

¹³⁷ Id. at 2748.

¹³⁸ Id. at 2766.

Brown to be narrowly tailored because of the danger of violent video games.¹³⁹ While the majority did not agree that video games are obscene for purposes of First Amendment protection, they hinted that revisiting the issue was not something they would be adverse to if certain conditions were met.¹⁴⁰ The failure of the California law to stand up to judicial scrutiny according to the Court, was its failure to definitely prove a link between violent video games and subsequent violence.¹⁴¹ The problem with the language of this part of the decision is that there have, in fact, been studies that corroborate the theory championed by Senator Yee and others that there is a connection between minors playing violent video games and violence.¹⁴² On the other hand, proponents of First Amendment protection for video games have similarly claimed that their studies show no connection between violent video games and gun violence and believe the issue stems more from mental illness than from simply playing video games.¹⁴³

The dichotomy between the two sets of studies puts the Supreme Court in a precarious position and will ultimately force them to decide what level of proof is necessary for restrictions of the sale of video games to be implemented by any and all states.

Any majority decision that holds that violent video games do not have First Amendment protection due to the obscene nature of the genre will face intense backlash from the video game industry for First Amendment challenges. Any decision favoring a statute that restricts the sale of violent video games to minors will need to be based on conclusive studies that prove that violent video games are uniquely dangerous to minors and are so dangerous that they must be considered obscene to the level of pornography to fulfill both the compelling and narrowly

¹³⁹ Id. at 2741.

¹⁴⁰ Id. at 2739.

¹⁴¹ Id.

¹⁴² Brief for Petitioner at 7, *Brown v. EMA*, 131 S.Ct. 2729. (S.Ct. 2011) (No. 08-1448) (2010 WL 2937557).

¹⁴³ *Brown* at 2739.

tailored standards of strict scrutiny. Any state law that is ultimately upheld by the Court must look like this.

CONCLUSION

Legislating limits on the right of minors to purchase certain violent video games does not violate their First amendment freedoms. A restriction limiting a minor's ability to purchase the games is in line with other First Amendment jurisprudence and is in line with other restrictions minors face in the marketplace. As more research is done that aims to connect violent video games to violence in children, the Supreme Court will certainly revisit the issue they addressed in *Brown*. At the very least, based on the current discussion in Washington, legislation will be passed that may suppress children's rights when it comes to purchasing violent video games. Parents and educators have a responsibility to teach minors that video games are for entertainment purposes only. As such, I propose an MPAA type system for video games in which certain games cannot be sold to minors without a parent or guardian being present, similar to an MPAA "R" rating and in which certain games cannot be sold to minors at all, similar to an MPAA "NC-17" rating. Though the issue of violence and video games cannot be addressed in a simple way, restrictions must be put in place to limit the rights of minors in this area, if only to protect them from themselves.