

continue these trends, it could significantly reduce the force of the Establishment Clause's protection against religious preferences.

2. *Freedom of Speech — Categorical Exclusions.* — First Amendment jurisprudence has long been receptive to new mediums of communication. The Supreme Court has emphatically stated that changes in technology cannot alone justify otherwise impermissible content discrimination.¹ But the Court has been less clear about when new technologies might not qualify as mediums of expression at all, and it has noted the unique harms that new forms of communication can cause, particularly to children.² Last Term, in *Brown v. Entertainment Merchants Ass'n*,³ the Supreme Court struck down a California law that limited minors' access to violent video games, holding that the law restricted protected speech without a sufficiently compelling interest in protecting minors from psychological harm. Although the Court identified several fatal flaws in the statute, its analysis failed to address whether particular aspects of the video game medium might prevent video games from being "expressive" in the first place or might justify categorically excluding them from the First Amendment when they are directed at minors.

In 2005, California passed a law forbidding the sale or rental of a "violent video game" to a minor without the consent of a parent or other guardian.⁴ The statute covered only games in which a player's "range of options" included "killing, maiming, dismembering, or sexually assaulting an image of a human being."⁵ Furthermore, the ban was limited to depictions of violence which (i) "appeal[] to a deviant or morbid interest of minors," as found by a "reasonable person, considering the game as a whole"; (ii) are "patently offensive to prevailing standards in the community" for minors; and (iii) prevent the game as a whole from having "serious literary, artistic, political, or scientific value for minors."⁶ A coalition of video game companies challenged the statute. The district court struck down the statute under strict scrutiny: the State had not shown that preexisting industry standards were ineffective at protecting minors or that violent video games were more harmful to minors than other depictions of violence.⁷

The Ninth Circuit affirmed.⁸ Writing for the panel, Judge Callahan⁹ first found that violent video games fell outside the constitution-

¹ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

² See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

³ 131 S. Ct. 2729 (2011).

⁴ CAL. CIV. CODE § 1746.1 (West 2009).

⁵ *Id.* § 1746(d)(1).

⁶ *Id.* § 1746(d)(1)(A).

⁷ *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188, 2007 WL 2261546, at *10-11 (N.D. Cal. Aug. 6, 2007).

⁸ *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

⁹ Judge Callahan was joined by Chief Judge Kozinski and Judge Thomas.

ally unprotected sphere of obscenity, even given the law's similarity to the broad definition of obscenity for minors upheld in *Ginsberg v. New York*,¹⁰ because "[t]he Supreme Court has carefully limited obscenity to sexual content."¹¹ Applying strict scrutiny, the court warned that California could not prevail if its only interest was in "controlling minors' thoughts."¹² Rather, the State needed to demonstrate a compelling interest in shielding minors from psychological damage, and the court found that California had not done so.¹³ Beyond this, the court found that the State had failed to demonstrate that less restrictive methods of protecting children, such as rating systems, were ineffective.¹⁴ Thus, the act was not narrowly tailored to promote the State's interest.¹⁵

The Supreme Court affirmed.¹⁶ Writing for the Court, Justice Scalia¹⁷ first stated that the First Amendment applies to video games, which convey ideas "through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)."¹⁸ Thus, "ever-advancing technology" does not disturb the bedrock First Amendment principle against content discrimination.¹⁹ However, Justice Scalia recognized that narrow exceptions exist: several content-based areas, including obscenity, incitement to criminal activity, and fighting words, have been held to lie outside the First Amendment.²⁰ Assessing these categorical exclusions, the Court described its recent decision in *United States v. Stevens*,²¹ which invalidated a ban on depictions of extreme animal cruelty.²² *Stevens* refused to create a categorical exclusion based on a simple comparison of the value of speech to its social costs,²³ instead emphasizing that such ex-

¹⁰ 390 U.S. 629 (1968); *see id.* app. A at 646. Like the obscenity restrictions upheld in *Ginsberg*, the three requirements of the California law specifically referred to the material's effects on "minors." CAL. CIV. CODE § 1746(d)(1)(A).

¹¹ *Video Software Dealers*, 556 F.3d at 959.

¹² *Id.* at 962.

¹³ *Id.* at 964.

¹⁴ *Id.* at 965.

¹⁵ *Id.*

¹⁶ *Brown*, 131 S. Ct. at 2742.

¹⁷ Justice Scalia was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

¹⁸ *Brown*, 131 S. Ct. at 2733; *see also id.* at 2737 n.4 ("Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not constitutional ones.").

¹⁹ *Id.* at 2733.

²⁰ *Id.*

²¹ 130 S. Ct. 1577 (2010).

²² *Id.* at 1592.

²³ *See id.* at 1585.

clusions must be based on historical trends of prohibitions on speech.²⁴ The Court rebuffed California's claim that violent video games fell into such a traditionally proscribed category: the obscenity exception was limited to "depictions of 'sexual conduct'" and thus did not apply.²⁵

The Court also rejected the argument that the statute isolated a less protected category of speech because its sales restriction was limited to minors. The majority acknowledged that, since *Ginsberg*, the constitutional definition of obscenity applied to speech to minors has been broader than the definition used for adults.²⁶ However, Justice Scalia explained, *Ginsberg* merely "adjust[ed] the boundaries of an existing category of unprotected speech"²⁷ in the context of minors and did not grant states the "free-floating power" to create new unprotected content-based categories.²⁸ To bolster its finding of protection for video games, the Court pointed to the lack of a "longstanding tradition in this country of specially restricting children's access to depictions of violence"²⁹ and emphasized the high levels of violence in children's literature and high school curricula.³⁰ Justice Scalia also rejected suggestions that the interactivity of the video game medium justified denying it First Amendment protection.³¹

Having found video games to be protected by the First Amendment, the Court applied strict scrutiny to California's content-based regulation.³² The State had not shown the causal relationship needed to demonstrate that "the curtailment of free speech [was] actually necessary" to avoid harm to minors.³³ Specifically, since even the weak correlation between video games and aggressive feelings also appeared when minors viewed violence on television or even pictures of a gun,³⁴ a limitation to violent video games was "wildly underinclusive."³⁵ The majority also found the law to be underinclusive for the purpose of preventing psychological harm because it permitted relatives to purchase video games for minors.³⁶ Finally, Justice Scalia contested the State's allegedly substantial need to reinforce parental monitoring, cit-

²⁴ See *Brown*, 131 S. Ct. at 2734 (stating that *Stevens* required "persuasive evidence" of "a long . . . tradition of proscription" in order to hold content outside the First Amendment).

²⁵ *Id.* (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)); see also *id.* ("Our cases have been clear that the obscenity exception . . . does not cover whatever a legislature finds shocking.").

²⁶ *Id.* at 2735.

²⁷ *Id.*

²⁸ *Id.* at 2736.

²⁹ *Id.*

³⁰ *Id.* at 2736-37.

³¹ *Id.* at 2737-38.

³² *Id.* at 2738.

³³ *Id.*

³⁴ *Id.* at 2739.

³⁵ *Id.* at 2740.

³⁶ *Id.*

ing the effectiveness of the voluntary industry rating system, and pointed out that the law’s application to all minors — not just those whose parents disapproved of violent video games — made the regulation overinclusive.³⁷ As an overbroad and underbroad attempt at achieving two goals — “(1) addressing a serious social problem and (2) helping concerned parents control their children” — the California law could demonstrate neither compelling interest nor narrow tailoring.³⁸

Justice Alito³⁹ concurred in the judgment, but would have held the video game restrictions void for vagueness.⁴⁰ He emphasized that the need to give fair notice of criminalized conduct is heightened in the First Amendment context “because of [the] obvious chilling effect” of vague restrictions.⁴¹ Justice Alito noted that the California statute resembled the obscenity standards provided in *Miller v. California*,⁴² but he identified two critical differences. First, the threshold requirements of the *Miller* test were much clearer than those of the video game law in demarcating societal norms: certain depictions of killing or maiming have long been seen as “suitable features” of entertainment for minors.⁴³ Second, the three narrowing prongs of the video game statute relied strongly on “undefined societal or community standards.”⁴⁴ Because no broadly shared norms about the suitability of violent imagery for children could provide a foundation for the statute, Justice Alito would have found that the law did not provide fair notice and was unconstitutionally vague.⁴⁵

Although he would not have reached the First Amendment question, Justice Alito questioned the majority’s reasoning. He criticized the Court’s reliance on *Stevens*, which he noted had concerned a law applied to all persons, not merely to minors lacking parental consent.⁴⁶ Further, the concurrence argued that the Court’s ruling would weaken, rather than reinforce, the industry’s voluntary rating system.⁴⁷ Finally, Justice Alito emphasized the stark differences between video games, with their highly immersive environments, and previous forms of entertainment, highlighting future technological possibilities such as three-dimensional imagery.⁴⁸ Given the “astounding” images of vi-

³⁷ *Id.* at 2740–41.

³⁸ *Id.*

³⁹ Justice Alito was joined by Chief Justice Roberts.

⁴⁰ *Brown*, 131 S. Ct. at 2742 (Alito, J., concurring in the judgment).

⁴¹ *Id.* at 2743 (quoting *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997)).

⁴² 413 U.S. 15 (1973); *see id.* at 24.

⁴³ *Brown*, 131 S. Ct. at 2745 (Alito, J., concurring in the judgment).

⁴⁴ *Id.* Beyond the elements explicitly referring to community standards, Justice Alito noted that the phrase “deviant or morbid interest” also implicitly incorporates such standards. *Id.*

⁴⁵ *Id.* at 2746.

⁴⁶ *Id.* at 2747.

⁴⁷ *See id.* at 2747–48.

⁴⁸ *Id.* at 2748–49.

olence and antisocial themes present in some releases,⁴⁹ the concurrence predicted that future games could “allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.”⁵⁰ Justice Alito argued that the realistic interactivity of video games was of a different nature than readers’ personal involvement with books,⁵¹ and he suggested that this characteristic might justify treating video games differently from other mediums.⁵²

Justice Thomas dissented, contending that the original understanding of “the freedom of speech” did not include “a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.”⁵³ He argued that the “practices and beliefs” of the founding generation included absolute parental authority.⁵⁴ Puritan traditions gave fathers absolute power to check their children’s depraved tendencies.⁵⁵ John Locke’s and Jean-Jacques Rousseau’s more charitable views of children also supported strict parental governance, including parents’ “total authority over what their children read,”⁵⁶ to ensure that children received proper influences.⁵⁷ Thus, Justice Thomas concluded, the First Amendment could not possibly have been understood “to include an unqualified right to speak to minors” without parental consent.⁵⁸ Moreover, he argued, this original understanding is consistent with precedent: though “the government may not unilaterally dictate what children can say or hear,” the Court had repeatedly treated parental authority as consistent with individual liberty and had never upheld an unqualified right to speak to minors.⁵⁹ As a result, the California video game law did not generally implicate the First Amendment and would survive a facial challenge.⁶⁰

Justice Breyer dissented, arguing that respondents had not made the strong showing needed to prevail on a facial challenge.⁶¹ Disput-

⁴⁹ *Id.* at 2749.

⁵⁰ *Id.* at 2750.

⁵¹ *Id.* (“[O]nly an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game.”).

⁵² *Id.* at 2751.

⁵³ *Id.* (Thomas, J., dissenting).

⁵⁴ *Id.* at 2752 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in the judgment)) (internal quotation mark omitted).

⁵⁵ *Id.*

⁵⁶ *Id.* at 2757.

⁵⁷ *See id.* at 2753–55. Legal understandings in the early Republic reflected this conception of parental authority. *See id.* at 2757–58 (discussing parental rights to children’s labor and services).

⁵⁸ *Id.* at 2759.

⁵⁹ *Id.* at 2760 (“[I]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.” (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)) (internal quotation marks omitted)).

⁶⁰ *Id.* at 2761.

⁶¹ *Id.* at 2761–62 (Breyer, J., dissenting).

ing the argument that the California law was vague, Justice Breyer noted that its terms and its reliance on historical standards were no broader or vaguer than the “nudity” category approved in *Ginsberg*.⁶² He agreed that “depictions of violence” did not comprise a completely unprotected category,⁶³ but he argued that the games’ potential harm to children — like the risks posed by providing legal assistance to a terrorist group — would justify the statute’s narrow exclusion without producing a new unprotected category.⁶⁴ Justice Breyer found that California had a compelling interest in supporting “discharge of [parental] responsibility” and providing for “the well-being of its youth.”⁶⁵ Furthermore, he noted that the significant teaching capabilities of video games have unique effects on children due to their “susceptib[ility] to negative influences.”⁶⁶ Video games thus have a greater risk of leading to violent real-life actions than do “passive media,”⁶⁷ and the statute therefore significantly furthered California’s interest.⁶⁸ Justice Breyer concluded that the Court’s result “creates a serious anomaly in First Amendment law” by granting vastly differing levels of protection to depictions of nudity and depictions of violence.⁶⁹

Although the Court convincingly found California’s video games statute to be unconstitutional, its analysis gave too little consideration to the distinctive features of immersive interactive mediums. The majority considered the audience’s interaction with the medium mainly when reaching two conclusions: that violent video games were not an extension of a class of speech unprotected as to adults, and that the State had not demonstrated a sufficient nexus between video games and harm to minors.⁷⁰ But at other points in the analysis, the Court failed to consider aspects of the audience’s virtual experience of violent actions which might have placed video games outside First Amendment protection — particularly given the statute’s limitation to an audience of minors.⁷¹ The majority should have more thoroughly dis-

⁶² *Id.* at 2763–65.

⁶³ *Id.* at 2762.

⁶⁴ *Id.* at 2763 (citing *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)).

⁶⁵ *Id.* at 2767 (alteration in original) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)) (internal quotation marks omitted).

⁶⁶ *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

⁶⁷ *Id.* at 2769. Justice Breyer cited empirical studies finding “causal evidence that playing these games results in harm.” *Id.* at 2768 (emphasis omitted); see also *id.* apps. A–B at 2771–79 (compiling list of relevant studies in appendices).

⁶⁸ *Id.* at 2767.

⁶⁹ *Id.* at 2771.

⁷⁰ *Id.* at 2735–38, 2739–40 (majority opinion).

⁷¹ There are theoretical underpinnings for an “audience-based” theory of the First Amendment that focuses on the overall effects of speech on the marketplace of ideas. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424 (1996).

cussed whether the interactive component of video games places them outside the First Amendment entirely, at least with regard to minors.

To begin with, the majority stated that video games generally receive First Amendment protection, but its brief justification for this presumption would apply equally to a wide swath of activities not generally considered speech. The Court appeared preoccupied with rebutting an argument that video games, as entertainment, were unprotected, and thus its opinion properly noted that the First Amendment also covers nonpolitical speech.⁷² But it is unclear why the presence of literary devices “such as characters, dialogue, plot, and music” should be the touchstone for whether an activity “communicate[s] ideas” and is thus protected.⁷³ Plenty of other familiar activities, from live sporting events to slot machines to amusement park rides, may also involve these elements — even “plot” — and yet the First Amendment does not require scrutiny of applicable regulations.⁷⁴ Likewise, paintball and target shooting may convey “age-old themes” such as “[s]elf-defense, protection of others,” and “fighting against overwhelming odds”⁷⁵ to the same extent that video games do, thus limiting those themes’ relevance to categorical determinations.⁷⁶ And the argument that video games are a “medium for communication,”⁷⁷ while sports are not, ignores the fact that both activities share many similar means of conveying ideas — for instance, specialized equipment and preexisting rules that govern the actions of participants. Calling video games a “medium” is not a sufficient explanation for why Pong should categorically lie inside the First Amendment but table tennis should not. The Court might have found that video games, like sporting events,

⁷² *Brown*, 131 S. Ct. at 2733 (“[W]e have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”).

⁷³ *See id.*

⁷⁴ Roller coasters, for instance, routinely feature elaborate music and plot elements. *See, e.g., Rock ‘n’ Roller Coaster Starring Aerosmith*, WALT DISNEY WORLD, <http://disneyworld.disney.go.com/parks/hollywood-studios/attractions/rock-n-roller-coaster-starring-aerosmith/> (last visited Oct. 2, 2011) (describing ride’s soundtrack and storyline involving Aerosmith and riders traveling across Los Angeles to a concert). But there is no serious contention that safety regulations of such rides — including mandatory inspections and insurance policies, *see, e.g.,* FLA. STAT. ANN. § 616.242(7), (9) (West 2007) — must be narrowly tailored to serve a compelling state interest. While safety regulations are directed at the physical aspects of the ride rather than at the content elements, California’s law too would not be directed at ideas if it instead proscribed simulated violent actions themselves based on the neurological harms they induce. *See infra* note 79.

⁷⁵ *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577–78 (7th Cir. 2001) (Posner, J.) (describing the video game *THE HOUSE OF THE DEAD* (Sega of America 1996)).

⁷⁶ *Cf. City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one’s friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”).

⁷⁷ *Brown*, 131 S. Ct. at 2733.

are not inherently expressive⁷⁸ and that the “restriction of expression incidentally produced” by regulating the “conduct” of video game players need not trigger First Amendment scrutiny at all.⁷⁹

Even assuming that video games may be considered a protected medium of communication as to adults, the differences between adults’ and minors’ perceptions of these games’ interactive nature may support finding a categorical First Amendment exception for the games as to minors. Compared with adult obscenity cases, *Ginsberg* demonstrates two separate nuances of categorical exclusion doctrine in the context of minors. First, the same speech can be unprotected as to minors but protected as to adults. Although the “‘girlie’ magazines” covered by the statute in *Ginsberg* were not obscene as to adults,⁸⁰ the Court held them to be outside the First Amendment when communicated to minors.⁸¹ Second, the categorical exclusion analysis may consider the psychological harm that speech causes to its immediate listeners for an audience of minors, but not of adults. States may regulate adult obscenity because of its effects on the rest of society,⁸² but the Court emphasized in *Stanley v. Georgia*⁸³ that the First Amendment prohibits content-based restrictions on adults’ speech that are meant to improve the morals of the restrained individuals.⁸⁴ Yet *Ginsberg* contradicted this theory for minors, upholding restrictions motivated by obscenity’s effects on children themselves.⁸⁵

⁷⁸ Justice Scalia himself reached a similar conclusion with regard to nude dancing in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), in which he voted to uphold a regulation against such dancing, “not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.” *Id.* at 572 (Scalia, J., concurring in the judgment).

⁷⁹ *Id.* at 576. To be sure, finding that the provision of video games to minors is unprotected speech would not end the inquiry. Under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), even a category of speech lying outside the First Amendment is not subject to “content discrimination unrelated to [its] distinctively proscribable content.” *Id.* at 383–84. Thus, a state could not ban only games that communicated ideas about violence — for instance, games with highly violent imagery. But the California law did not apply to all such games: it covered only those games containing extremely violent acts in “the range of options available to a player.” CAL. CIV. CODE § 1746(d)(1) (West 2009). This limitation would be adequately connected to the inexpressive “conduct” element of video games under *R.A.V.*, *cf.* 505 U.S. at 385–86, so long as the harm from carrying out vividly simulated violent acts was qualitatively different from the effects of viewing violent imagery — perhaps because of the added psychological effects of a player’s conscious choice to inflict violence, *see Brown*, 131 S. Ct. at 2750 (Alito, J., concurring in the judgment).

⁸⁰ *Ginsberg v. New York*, 390 U.S. 629, 631, 634 (1968).

⁸¹ *Id.* at 637–38.

⁸² *See Roth v. United States*, 354 U.S. 476, 484 (1957) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming *social* importance.” (emphasis added)).

⁸³ 394 U.S. 557 (1969).

⁸⁴ *Id.* at 565–66; *see also id.* at 568 (striking down a law banning adults’ possession of obscenity within the home).

⁸⁵ *Ginsberg*, 390 U.S. at 640.

These special considerations for minors suggest that ill effects on them may support exclusion of certain speech to minors from First Amendment protection. None of the Court's precedents would bar the creation of such a category based on a showing of sufficient harm. True enough, *Ginsberg* did not purport to define a separate category of unprotected speech for minors, but instead "adjust[ed] the definition of obscenity" for that age group.⁸⁶ But the distinction between the two frameworks is tenuous, especially since the reasons for regulating obscenity for minors differ from those regarding obscenity for adults: protecting "the well-being of [a state's] youth"⁸⁷ is a sufficient justification for a separate exclusion.⁸⁸ Furthermore, while *Stevens* rejected the idea that "an ad hoc balancing of relative social costs and benefits" could support a categorical exclusion,⁸⁹ its emphasis on historical precedent makes little sense when applied to new technologies. While the use of new *mediums* cannot justify content discrimination,⁹⁰ the particular *harm* at issue, namely psychological harm from repeatedly carrying out simulated actions, is conceptually new. Beyond "societal implications that [may] become apparent only with time,"⁹¹ technology that allows minors to experience virtual acts of graphic violence may have neurological effects that differ from those of other mediums — or that are currently unknown.⁹² Rather than automatically finding the speech to be protected under *Stevens* due to the lack of a historical trend, courts considering such harms should analogize to other activities to determine whether a categorical exclusion is warranted.

While a decision to hold video games unprotected as to minors would depend on proof of the asserted harm, the psychological damage alleged in *Brown* would have supported such an exclusion. As Justice Breyer noted, the interactive elements of video games may be more salient for minors because the teaching function of video games is par-

⁸⁶ *Id.* at 638; see also *Brown*, 131 S. Ct. at 2735 (describing *Ginsberg* as expanding "an existing category of unprotected speech").

⁸⁷ *Ginsberg*, 390 U.S. at 640.

⁸⁸ Nor does *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), support the majority's claim that categorical exclusions for minors must involve expansions of existing categories. See *Brown*, 131 S. Ct. at 2735–36. *Erznoznik* invalidated a ban on all portrayals of nudity at drive-in movie theaters as overbroad, because "[c]learly all nudity cannot be deemed obscene even as to minors." 422 U.S. at 213. But the opinion did not indicate whether "some other legitimate proscription," based not on "the flow of information to minors" but on proven psychological harms, might support a categorical exclusion limited to young audiences. *Id.* at 213–14.

⁸⁹ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

⁹⁰ See *Brown*, 131 S. Ct. at 2733.

⁹¹ *Id.* at 2742 (Alito, J., concurring in the judgment).

⁹² Justice Breyer's reliance on existing scientific studies, see *id.* at 2767–70 (Breyer, J., dissenting), is in some tension with Justice Alito's concern about current incomplete understandings of interactive mediums, see *id.* at 2742 (Alito, J., concurring in the judgment). But both views support some judicial deference to legislatures in "assess[ing] the implications of new technology." *Id.*

ticularly effective for young minds.⁹³ More fundamentally, minors may be less capable of cordoning off behavior in the immersive environment of the game from real life. While the average adult might look past video games' interactivity to view them as essentially "stories,"⁹⁴ children might view them as arenas for action.⁹⁵ Even if providing the opportunity to take a repeated violent action might be said to communicate an idea to an adult, the activity aspect may predominate for a minor.⁹⁶ The potentially unique psychological impact of violent video games on minors may place those games within the freedom of speech for adults but not for minors, like the material at issue in *Ginsberg*.⁹⁷ Thus, because of the nature of the video game medium and of minors' interactions with it, the Court could readily have found video games to be protected as to adults but categorically excluded from the First Amendment as to minors.

The Court's opinion in *Brown* was suffused with skepticism about finding narrow categories of communication to a particular audience to be unprotected speech. But Justice Thomas, in dissent, showed openness to just such a narrow, audience-based exclusion by arguing that speech to minors without parental consent fell outside the original understanding of "the freedom of speech," regardless of its medium.⁹⁸ As Justice Scalia noted, the lack of any precedent supporting Justice Thomas's view weakens its force.⁹⁹ However, the majority ignored a narrower categorical approach with a much stronger pedigree in case law. The Court could have found video games not to be inherently expressive at all, or to be categorically excluded as to minors. Despite these missed opportunities to account for the peculiarities of the medium, the Court reached a sensible outcome in *Brown*. Defects such as the weakness of California's empirical evidence of psychological effects and the vagueness problems that Justice Alito described made the California law a poor attempt to address an avowed "social problem."¹⁰⁰

⁹³ See *id.* at 2767–68 (Breyer, J., dissenting).

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

⁹⁵ See *Brown*, 131 S. Ct. at 2768–69 (Breyer, J., dissenting). Demonstrating its lack of emphasis on the activity component of video games, the majority repeatedly mentioned the games' "depictions" of violence and made an anomalous reference to the "viewing of violent video games." *Id.* at 2737 n.4 (majority opinion) (emphasis added). These characterizations may have confused the Court's analysis, as the statute was expressly limited to only those games where extreme violence can be carried out by a player. See *supra* note 79.

⁹⁶ See *Brown*, 131 S. Ct. at 2768 (Breyer, J., dissenting); see also *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

⁹⁷ Because some evidence suggests that immersive and interactive experiences of violence are different in kind from depictions of violence, the lack of a historical trend of banning violent *imagery*, *Brown*, 131 S. Ct. at 2736–37, should not cut against finding video games unprotected.

⁹⁸ *Id.* at 2759 (Thomas, J., dissenting).

⁹⁹ *Id.* at 2736 n.3 (majority opinion).

¹⁰⁰ *Id.* at 2740.

However, the Court's categorical finding that video game regulations receive strict scrutiny under the First Amendment, regardless of minors' responses, will hamper its ability to account for the unique role of immersive interactive mediums in the marketplace of ideas.

3. *Freedom of Speech — Mixed Public-Private Speech.* — The Supreme Court has held repeatedly that the First Amendment protects an individual's ability to speak on matters of public import, even if the speech is profoundly controversial and hurtful.¹ In contrast, speech on matters of purely private significance receives considerably less First Amendment protection.² Last Term, in *Snyder v. Phelps*,³ the Supreme Court held that the First Amendment protects from tort liability a church that picketed 1000 feet away from a military funeral because the content, form, and context of the church's placards dealt sufficiently with matters of public concern.⁴ The *Snyder* Court was right to rule in the church's favor. However, in so doing, the Court missed an opportunity to clarify its public concern test as it pertains to cases of mixed public-private speech. The Court could have adopted an alternative approach that would have asked whether the component of the speech that caused the harm concerned matters of public import, and if so, whether exposing the speaker to liability would impermissibly collide with the First Amendment's goal of maintaining open channels for diverse social discourse.

For more than twenty years, members of the Westboro Baptist Church ("Westboro" or "the church") have picketed funerals to communicate their belief that God penalizes the United States and its military for tolerating homosexuality.⁵ In March 2006, Westboro's pastor, Fred Phelps, and six members of his congregation traveled to Westminster, Maryland, to picket the funeral of Matthew Snyder ("Matthew"), a marine who died in Iraq in the line of duty.⁶ From a small plot of public land approximately 1000 feet from the funeral location,⁷ the picketers displayed messages that conveyed both general social critiques ("God Hates the USA," "Pope in hell," and "America is doomed") and criticism directed at the military or Matthew's funeral

¹ See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964); *Bridges v. California*, 314 U.S. 252, 270–71 (1941).

² See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (citing *Connick*, 461 U.S. at 146–47).

³ 131 S. Ct. 1207 (2011).

⁴ *Id.* at 1219.

⁵ *Id.* at 1213.

⁶ *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571–72 (D. Md. 2008). Albert Snyder, Matthew's father, listed the time and location of the funeral in several local newspapers. *Id.* at 571, 577.

⁷ *Snyder*, 131 S. Ct. at 1213. The day before the funeral, the Westboro members also picketed in Annapolis, Maryland, at the Maryland State House and at the United States Naval Academy. *Id.* at 1223 (Alito, J., dissenting).