Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Advocacy

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Brown v. Entertainment Merchants Association, 564 U.S. ___ (2011)

The Entertainment Merchants Association (EMA) is a trade organization that represents the interests of the home entertainment industry. In 2005, the California state legislature passed a law, patterned after laws banning pornography, that prohibited companies from selling or renting "violent video games" to minors. The EMA asked the local federal court to issue an injunction, prohibiting California officials from enforcing that law. The court agreed and the injunction was sustained by the Court of Appeals for the Ninth Circuit. California's Governor Edmund (Jerry) Brown appealed to the Supreme Court of the United States.

An interesting alliance of prominent First Amendment scholars, media associations, the Chamber of Commerce for the United States, libertarian public interest groups, the American Civil Liberties Union, consumer groups, technology groups, and Microsoft filed briefs urging the Supreme Court to strike down the ban on violent video games. The brief for the Comic Book Legal Defense Fund said,

> *California's bid to censor video games is the latest of a long history of moral panics that date back to the early nineteenth century. These recurring campaigns are typified by exaggerated claims of adverse effects of popular culture on youth based on pseudo-scientific assertions of harm that are little more than thinly-veiled moral or editorial preferences. Such censorship crusades have been mounted against dime novels, ragtime music, cinema, comic books, television, and now, video games.*

Several states and conservative public interest groups urged the Supreme Court to sustain the California law. The brief for the Eagle Forum Education and Legal Defense Fund maintained,

> *Does playing violent video games lead to aggressive or violent behavior? Yes, and nearly as much as the other major indicator of youth violence: gang membership. Playing violent video games ranks almost as high as gang membership as the number one tell-tale sign among youth for a propensity to commit violence. . . . Playing violent video games is a far bigger risk factor than other familiar indicators of youth violence. For example, playing violent video games is three times greater as a risk factor for aggressive/violent behavior than engaging in substance abuse, being from a broken home, having a low IQ or even having abusive parents.*

The Supreme Court by a 7–2 vote declared that California could not ban the sale of violent video games to minors. Justice Scalia maintained that video games were constitutionally protected speech and that bans on violent games were presumptively unconstitutional content discriminations. Why did Justice Scalia think video games were constitutionally protected speech? Was he correct? Compare how Justices Scalia and Breyer assessed the evidence of harm. Who was correct? What do you think explains the diversity of organizations supporting the constitutional right to sell violent video games to minors?

JUSTICE SCALIA delivered the opinion of the Court.

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. . . {V]ideo games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to

distinguish politics from entertainment, and dangerous to try. . . . Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—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). That suffices to confer First Amendment protection. Under our Constitution, "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." . . .

The most basic of those [First Amendment] principles is this: "[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." . . . There are of course exceptions. . . . These limited areas—such as obscenity, . . . incitement, . . . and fighting words—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." . . .

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. . . [W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs. . . .

. . . California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct."

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. . . "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." . . . . No doubt a State possesses legitimate power to protect children from harm . . . , but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." . . .

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." Cinderella's evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. . . . In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. . . . And Golding's *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island.

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California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. . . . As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. . . .

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. . . . The State must specifically identify

an "actual problem" in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution. . . . That is a demanding standard. . . .

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. . . .

California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." . . . They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

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. . . Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. . . . Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child's or putative parent's, aunt's, or uncle's say-so suffices. That is not how one addresses a serious social problem.

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But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). App. 86. The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell "M" rated games to minors only with parental consent. . . . In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, "the video game industry outpaces the movie and music industries" in "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated products at retail." . . . This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest.

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires.

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California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. . . .

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

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. . . There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.

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Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. . . . The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." . . . Vague laws force potential speakers to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." . . .

Here, the California law does not define "violent video games" with the "narrow specificity" that the Constitution demands. . . .

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For better or worse, our society has long regarded many depictions of killing and maiming as suitable features of popular entertainment, including entertainment that is widely available to minors. . . .

Because of this feature of the California law's threshold test, the work of providing fair notice is left in large part to the three requirements that follow, but those elements are also not up to the task. In drafting the violent video game law, the California Legislature could have made its own judgment regarding the kind and degree of violence that is acceptable in games played by minors (or by minors in particular age groups). Instead, the legislature relied on undefined societal or community standards.

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The terms "deviant" and "morbid" are not defined in the statute, and California offers no reason to think that its courts would give the terms anything other than their ordinary meaning. . . . A "deviant or morbid interest" in violence, therefore, appears to be an interest that deviates from what is regarded—presumably in accordance with some generally accepted standard—as normal and healthy. Thus, the application of the California law is heavily dependent on the identification of generally accepted standards regarding the suitability of violent entertainment for minors.

There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court's landmark obscenity cases in the 1960's, obscenity had long been prohibited . . . and this experience had helped to shape certain generally accepted norms concerning expression related to sex.

There is no similar history regarding expression related to violence. As the Court notes, classic literature contains descriptions of great violence, and even children's stories sometimes depict very violent scenes.

Although our society does not generally regard all depictions of violence as suitable for children or adolescents, the prevalence of violent depictions in children's literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite "deviant" or "morbid" impulses.

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For these reasons, I conclude that the California violent video game law fails to provide the fair notice that the Constitution requires. And I would go no further. . . .

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The Court's opinion distorts the effect of the California law. I certainly agree with the Court that the government has no "free-floating power to restrict the ideas to which children may be exposed," but the California law does not exercise such a power. If parents want their child to have a violent video game, the California law does not interfere with that parental prerogative. Instead, the California law

reinforces parental decisionmaking. . . [M]inors are prevented from purchasing certain materials; and parents are free to supply their children with these items if that is their wish.

Citing the video-game industry's voluntary rating system, the Court argues that the California law does not "meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The Court does not mention the fact that the industry adopted this system in response to the threat of federal regulation, a threat that the Court's opinion may now be seen as largely eliminating. Nor does the Court acknowledge that compliance with this system at the time of the enactment of the California law left much to be desired or that future enforcement may decline if the video-game industry perceives that any threat of government regulation has vanished. Nor does the Court note, as Justice BREYER points out, that many parents today are simply not able to monitor their children's use of computers and gaming devices.

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Finally, the Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. Any assessment of the experience of playing video games must take into account certain characteristics of the video games that are now on the market and those that are likely to be available in the near future.

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In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in "ethnic cleansing" and can choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.

If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.

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It is certainly true, as the Court notes, that "'[l]iterature, when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.'" But only 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. . . . When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.

JUSTICE THOMAS, dissenting.

The Court's decision today does not comport with the original public understanding of the First Amendment. . . . The practices and beliefs of the founding generation establish that "the freedom of speech," as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians. I would hold that the law at issue

is not facially unconstitutional under the First Amendment, and reverse and remand for further proceedings.

When interpreting a constitutional provision, "the goal is to discern the most likely public understanding of [that] provision at the time it was adopted." . . . Because the Constitution is a written instrument, "its meaning does not alter." . . .

As originally understood, the First Amendment's protection against laws "abridging the freedom of speech" did not extend to *all* speech. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." . . . .

In my view, the "practices and beliefs held by the Founders" reveal another category of excluded speech: speech to minor children bypassing their parents. . . . The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents. . . . The founding generation would not have considered it an abridgment of "the freedom of speech" to support parental authority by restricting speech that bypasses minors' parents.

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. . . [T]he notion that parents have authority over their children and that the law can support that authority persists today. For example, at least some States make it a crime to lure or entice a minor away from the minor's parent. . . . Every State in the Union still establishes a minimum age for marriage without parental or judicial consent. . . . Individuals less than 18 years old cannot enlist in the military without parental consent. And minors remain subject to curfew laws across the country, and cannot unilaterally consent to most medical procedures. . . .

Moreover, there are many things minors today cannot do at all, whether they have parental consent or not. State laws set minimum ages for voting and jury duty. . . .

The Court's constitutional jurisprudence "historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . Under that case law, "legislature[s][can] properly conclude that parents and others, teachers for example, who have . . . primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." . . .

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JUSTICE BREYER, dissenting.

In determining whether the statute is unconstitutional, I would apply both this Court's "vagueness" precedents and a strict form of First Amendment scrutiny. In doing so, the special First Amendment category I find relevant is not (as the Court claims) the category of "depictions of violence," but rather the category of "protection of children." This Court has held that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults." . . . . And the "'regulatio[n] of communication addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults.' . . ." . . .

. . . In my view, California's statute provides "fair notice of what is prohibited," and consequently it is not impermissibly vague. . . .

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. . . All that is required for vagueness purposes is that the terms "kill," "maim," and "dismember" give fair notice as to what they cover, which they do.

California only departed from the [*Miller v. California* (1973)] formulation in two significant respects: It substituted the word "deviant" for the words "prurient" and "shameful," and it three times added the words "for minors." The word "deviant" differs from "prurient" and "shameful," but it would seem no less suited to defining and narrowing the reach of the statute. . . .

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What, then, is the difference between . . . *Miller* on the one hand and the California law on the other? It will often be easy to pick out cases at which California's statute directly aims, involving, say, a character who shoots out a police officer's knee, douses him with gasoline, lights him on fire, urinates on his burning body, and finally kills him with a gunshot to the head. (Footage of one such game sequence has been submitted in the record.) . . . . The California law clearly *protects* even the most violent games that possess serious literary, artistic, political, or scientific value. . . . And it is easier here . . . to separate the sheep from the goats at the statute's border. That is because here the industry itself has promulgated standards and created a review process, in which adults who "typically have experience with children" assess what games are inappropriate for minors.

There is, of course, one obvious difference: The statute [in obscenity cases] concerned depictions of "nudity," while California's statute concerns extremely violent video games. But for purposes of vagueness, why should that matter? . . . .

After all, one can find in literature as many (if not more) descriptions of physical love as descriptions of violence. Indeed, sex "has been a theme in art and literature throughout the ages." For every Homer, there is a Titian. For every Dante, there is an Ovid. And for all the teenagers who have read the original versions of Grimm's Fairy Tales, I suspect there are those who know the story of Lady Godiva.

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Video games combine physical action with expression. Were physical activity to predominate in a game, government could appropriately intervene, say by requiring parents to accompany children when playing a game involving actual target practice, or restricting the sale of toys presenting physical dangers to children. . . . But because video games also embody important expressive and artistic elements, I agree with the Court that the First Amendment significantly limits the State's power to regulate. And I would determine whether the State has exceeded those limits by applying a strict standard of review.

Like the majority, I believe that the California law must be "narrowly tailored" to further a "compelling interest," without there being a "less restrictive" alternative that would be "at least as effective." . . . I would not apply this strict standard "mechanically." . . . Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying "compelling interests," the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, "the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide."

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California's law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. . . . All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17.

. . .

The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the "basic" parental claim "to authority in their own household to direct the rearing of their children," which makes it proper to enact "laws designed to aid discharge of [parental] responsibility," and (2) the State's "independent interest in the well-being of its youth." . . . And where these interests work in tandem, it is not fatally "underinclusive" for a State to advance its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish.

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There are many scientific studies that support California's views. Social scientists, for example, have found *causal* evidence that playing these games results in harm. Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period. . . .

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Some of these studies take care to explain in a commonsense way why video games are potentially more harmful than, say, films or books or television. In essence, they say that the closer a child's behavior comes, not to watching, but to *acting* out horrific violence, the greater the potential psychological harm. . . .

Experts debate the conclusions of all these studies. Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions. (I list both sets of research in the appendixes.) I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.

Eleven years ago, for example, the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association released a joint statement, which said:

> "[O]ver 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children . . . [and, though less research had been done at that time, preliminary studies indicated that] the impact of violent interactive entertainment (video games and other interactive media) on young people . . . may be *significantly more severe* than that wrought by television, movies, or music."

. . .

Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature's conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases. . . . The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all. . . .

I can find no "less restrictive" alternative to California's law that would be "at least as effective." The majority points to a voluntary alternative: The industry tries to prevent those under 17 from buying extremely violent games by labeling those games with an "M" (Mature) and encouraging retailers to restrict their sales to those 17 and older. . . . But this voluntary system has serious enforcement gaps. When California enacted its law, a Federal Trade Commission (FTC) study had found that nearly 70% of unaccompanied 13- to 16-year-olds were able to buy M-rated video games. . . .

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This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children—by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the First Amendment does not disable government from helping parents make such a choice here—a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children.