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CALIFORNIA'S INTEREST IN SCHWARZENEGGER V. ENTERTAINMENT MERCHANTS ASSOCIATION

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California’s Interest in Schwarzenegger v. Entertainment Merchants Association

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INTRODUCTION

In Schwarzenegger v. Entertainment Merchants Association, video game merchants challenge on First Amendment grounds a California law regulating sales of extremely violent “deviant or morbid” video games to children under eighteen years of age.¹ The issue presented to the Supreme Court is whether California’s interest in protecting children from serious psychological or neurological harm that can result from playing these games is sufficient to justify infringing the children’s First Amendment right to receive the “speech.”² The issue, as framed and argued on appeal, fails to identify completely the children’s First Amendment interests at risk on both sides of the controversy. This article analyzes California’s interest in regulating children’s access to the most violent video games in light of the relevant scientific research and constitutional jurisprudence. This article concludes that the Supreme Court should uphold California’s challenged sales regulation because it most likely furthers children’s liberty interests and freedom to exercise their First Amendment rights, as opposed to infringing upon such rights.

This article proceeds in three parts. Part I briefly summarizes the challenged California law and the Ninth Circuit’s reasoning in finding that the law violates the First Amendment. Part II reviews the scientific research showing that violent video games pose a far greater risk of harm to children than adults; presents some new empirical data exposing children’s risk of dysfunctional brain activity resulting from their excessive use of violent video games; discusses the emerging epidemic of video game “addiction”; and offers expert opinion extrapolated from the empirical data. Part III argues that the issue in Schwarzenegger v. Entertainment Merchants Association has been framed incompletely. A more comprehensive review of the scientific data and constitutional policies reveals that California’s interest in limiting children’s access to violent video games is to preserve their liberty interests, including their First Amendment rights, by safeguarding their long-term capacity to be able freely to choose their thoughts, ideology, and lifestyle. This article concludes that the empirical data and other scientific evidence sufficiently support California’s sales regulation and that the Court should uphold it in accordance with the reasoning of Ginsberg v. New York.

¹ The terms “children” and “minors” are used interchangeably herein, and refer to persons less than eighteen years of age. The term “adolescents” refers to persons ages thirteen through seventeen years of age.

² The Ninth Circuit found that video games are fully-protected “speech,” and declined to extend the variable constitutional analysis recognized in Ginsberg v. New York for speech believed to be harmful to children, then found that the sales regulation failed to meet strict scrutiny. See infra notes 15-22 and accompanying text. There is some federal court authority that supports the position that violent video games should not be considered protected speech to the extent that they cause alterations to children’s brain activity beyond children’s conscious awareness and without their informed consent. See infra notes 90-99 & accompanying text.

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I. THE CHALLENGED CALIFORNIA LAW & THE NINTH CIRCUIT’S OPINION

The California law at issue in Schwarzenegger v. Entertainment Merchants Association explicitly envisions a variable standard of review for First Amendment challenges to speech that can harm children consistent with the “variable obscenity” reasoning of Ginsberg v. New York. In Ginsberg, sexually explicit “girlie” magazines were determined to be “obscene” as to minors, and therefore unprotected, despite being fully protected speech as to adults. As explained by the Ginsberg Court, the New York law at issue “simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest of such minors.” This variable definition of obscenity subjects sales regulations governing sexually explicit speech to rational basis review in lieu of strict scrutiny where the purchaser is a minor.

The Ginsberg Court gave two justifications for applying a less stringent First Amendment standard of review to the sale of otherwise fully protected magazines to minor consumers. First, the law supports the parents’ right to control their children’s upbringing by making sure that parents are in control of whether their children obtain access to such magazines. Second, the state has an “independent interest” in the well-being of its youth, which empowers the state to act to safeguard children from potentially harmful materials that can impair their development. By analogy, California argues that a class of violent video games that may be fully protected speech as to adults can be regulated as to children. The California law provides that no person may sell or rent certain extremely violent video games to minors under eighteen years of age. The law defines the covered materials primarily by modeling the three-part obscenity test of Miller v. California, modified to apply to a minor’s “deviant or morbid” interest in violence as opposed to a “prurient” interest in sex. The law also imposes a labeling requirement that must appear on the front face of the video game package: a two inch by two inch (or larger) solid white

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3 The original Assembly Bill 1179 had been largely amended during the legislative session and replaced by Assembly Bill 450, which was codified at CAL. CIV. CODE § 1746-1746.5. See Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 953 & n.3 (9th Cir. 2009).
4 390 U.S. 629 (1968).
9 The law defines a “violent video game” as follows: “Violent video game” means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following: (A) Comes within all of the following descriptions: (i) A reasonable person, considering the game as a whole, would find appeals [sic] to a deviant or morbid interest of minors. (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors. (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim. CAL. CIV. CODE § 1746(d)(1). The terms “cruel,” “depraved,” “heinous,” “serious physical abuse,” and “torture” are also defined. CAL. CIV. CODE § 1746(d)(2).
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“18” outlined in black. 10

California argues that the variable obscenity doctrine should be extended to a violence-based notion of obscenity, or, in other words, that the Court should extend the reasoning of Ginsberg and find that extremely violent video games that may harm minors should be deemed unprotected speech for purposes of sales to minors. 11 As in Ginsberg, parents could still provide their children with the regulated materials if they so desire, so the law supports the parents’ right to control their children’s upbringing and access to potentially harmful materials. Also, as in Ginsberg, California has an independent interest in safeguarding the well-being of its youth, which empowers the state to limit children’s access to materials that can harm their psychological or neurological development.

Unlike Ginsberg, the California Legislature relied upon empirical evidence of harm to children resulting from exposure to violent video games. In Ginsberg, the Court essentially deferred to the state legislature, stating, “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens.’” 12 The only question for the Ginsberg Court was whether the New York Legislature rationally concluded that minors’ exposure to girlie magazines constitutes such an “abuse.” The Court answered in the affirmative, and specifically declined to require scientific proof of abuse:

“[T]he law states a legislative finding that the material condemned . . . is ‘a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.’ It is very doubtful that this finding expresses an accepted scientific fact. . . . To be sure, there is no lack of ‘studies’ which purport to demonstrate that obscenity is or is not ‘a basic factor in impairing the ethical and moral development of * * * youth and a clear and present danger to the people of the state.’ But the growing consensus of commentators is that ‘while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.’ We do not demand of legislatures ‘scientifically certain criteria of legislation.’ We therefore cannot say that [the law], in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.” 13

The Supreme Court has recently indicated that it may defer to legislative fact-finding relative to regulation of speech that may harm children. In F.C.C. v. Fox, the Court deferred to Congress’s findings that indecent, non-pornographic, non-obscene speech is harmful to children, despite a lack of empirical evidence, to uphold a Federal Communications Commission policy change on what constitutes “indecency.” The Court stated, “Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.” 14

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10 The Act requires that each “violent video game” imported into or distributed in California must “be labeled with a solid white ‘18’ outlined in black,” which shall appear on the front face of the game’s package and be “no less than 2 inches by 2 inches” in size. Cal. Civ. Code § 1746.2.
11 Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 957-958 (9th Cir. 2009).
14 F.C.C. v. Fox, 129 S. Ct. 1800, 1813 (2009) (emphasis added). See also Morse v. Frederick, 551 U.S 393 (2007) (relying in part on legislative facts concerning minors’ vulnerability to drug addiction); Deana
However, the Ninth Circuit rejected California’s legislative fact-finding and struck down the law. First, the court found that there is no violence-based notion of obscenity. Therefore, violence – no matter how graphic – is fully protected speech and cannot be regulated unless strict scrutiny is met. Prior circuit court decisions are unanimous on this issue. The Second, Sixth, Seventh, and Eighth Circuits have all rejected the argument that violent materials can be “obscene” speech, and therefore unprotected, because “obscenity” necessarily denotes explicit sexual or excretory functions.\(^\text{15}\) The Ninth Circuit refused to “boldly go where no court has gone before” in this regard, finding that sexual materials are categorically distinct from violent materials and only the former can constitute “obscenity.”\(^\text{16}\)

The Ninth Circuit rejected California’s legislative findings concerning the risks to children posed by violent video games, and therefore found that California failed to demonstrate a compelling state interest for purposes of meeting strict scrutiny.\(^\text{17}\) Despite acknowledging that the Supreme Court has recognized a “compelling interest in protecting the physical and psychological well-being of minors,”\(^\text{18}\) the Ninth Circuit independently reviewed the scientific research concerning the risks that violent video games pose to children and found that California does not have a compelling interest in preventing psychological or neurological harm to minors because the empirical evidence was insufficient to establish causal effect.\(^\text{19}\) Specifically, the court found that where the government seeks to restrict speech, it “must demonstrate that the recited harms are real, not merely conjectural, that the regulation will in fact alleviate these harms in a direct and material way,”\(^\text{20}\) and that although the court “must accord deference to the predictive judgment of the legislature, [the court’s] ‘obligation is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.’”\(^\text{21}\) The court found that no “actual problem” had been proven by California because the state failed to produce substantial evidence that violent video games in fact cause psychological or neurological harm to minors.\(^\text{22}\)

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\(^{16}\) Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 961 (9th Cir. 2009).

\(^{17}\) Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 959-961 (9th Cir. 2009).


\(^{19}\) Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 962-964 (9th Cir. 2009). The California law set forth two compelling interests: (1) “preventing violent, aggressive, and antisocial behavior”; (2) “preventing psychological or neurological harm to minors who play violent video games.” *Id.* at 954. However, California dropped the first basis for establishing a compelling interest and relied on the latter. *Id.* at 961.


\(^{22}\) Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 962-964 (9th Cir. 2009), (reviewing the empirical evidence linking violent video games with harm to minors).
Clearly, the Ninth Circuit’s opinion was driven by a de novo review of California’s legislative findings.\textsuperscript{23} The Supreme Court may or may not center its opinion on an independent review of the scientific research. The Court could engage a “common sense” analysis as it did in \textit{F.C.C. v. Fox} and decline to require empirical proof of harm,\textsuperscript{24} or it could defer to legislative fact-finding and executive policymaking similar to the deference it embraced in \textit{Morse v. Frederick}.\textsuperscript{25} More generally, Supreme Court precedent supports deference to legislative policymaking relative to public health issues where the scientific data relied upon is challenged, such as in \textit{Jacobson v. Massachusetts}.\textsuperscript{26} That is, the theory and utility of federalism includes allowing states to make social policy decisions where expert opinion may be divided, to “perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”\textsuperscript{27} Accordingly, even assuming that expert opinion is divided on the risks that violent video games pose to minors by violent video games – an assumption rejected herein\textsuperscript{28} – deference to legislative fact-finding and social policy decisions may be appropriate. On the other hand, the Court could avoid the scientific controversy and affirm the Ninth Circuit on entirely different grounds, such as overbreadth or vagueness.\textsuperscript{29} Realistically, considering the profound First Amendment issues at stake that turn on the risks that violent video games pose to children, and the fact that the lower courts focused on the empirical research in reaching their First Amendment conclusions, the Court will likely scrutinize the empirical research as well in making its constitutional ruling. The next Part reviews the research.

\section*{II. Violent Video Games and Children: The Social Science & The “Experts”}

\subsection*{A. The Empirical Data and Researchers’ Conclusions}

\textsuperscript{23} In addition, the court found that the law was not narrowly tailored even if California could establish a compelling interest. Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 964-965 (9th Cir. 2009).
\textsuperscript{24} 129 S. Ct. 1800, 1813 (2009) (“Here it suffices to know that children mimic the behavior they observe-or at least the behavior that is presented to them as normal and appropriate. . . . If enforcement had to be supported by empirical data, the ban would effectively be a nullity.”)
\textsuperscript{25} 551 U.S. 393 (2007).
\textsuperscript{26} In Jacobson v. Massachusetts, 197 U.S. 11 (1905), the Court upheld a mandatory smallpox vaccination against a due process challenge and other constitutional challenges despite the challenger’s proffered evidence of possible injurious effects of the vaccine, including death. The Court noted that most medical professionals supported the vaccine and deferred to the legislature’s judgment. \textit{Id.} at 34-36. Although Jacobson v. Massachusetts was not a speech case, it involved infringement of fundamental liberty interests in bodily integrity and medical self-determination. \textit{See}, Deana Pollard Sacks, \textit{Elements of Liberty}, 61 SMU L. Rev. 1557 (2008) (identifying factors the Supreme Court has focused on in recognizing liberty rights, including bodily integrity and medical autonomy). \textit{See also}, \textit{e.g.}, United States v. Carolene Products, 304 U.S. 144 (1938) (upholding the Filled Milk Act and deferring to Congress’s findings on the injurious effects of filled milk).
\textsuperscript{27} United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring, joined by Justice O’Connor) (federalism means that federal powers are few and defined, while states powers are broad and indefinite). \textit{See also}, \textit{e.g.}, Jacobson v. Massachusetts, 197 U.S. 11, 51 (1905) (the state has the power to “choose between” competing theories of the efficacy of smallpox vaccine in accordance with its police power to protect the public at large).
\textsuperscript{28} \textit{See infra} Part II.B.
\textsuperscript{29} This seems unlikely, however, considering how closely the challenged law tracks the language of Miller v. California. In addition, it makes little sense that the Court would grant review in such a controversial area of constitutional law in which the circuit courts are unanimous only to affirm the Ninth Circuit on other grounds.
There is no legitimate controversy about whether consumption of violent media is substantially correlated with subsequent violent behavior, particularly among children. Short-term experiments in which children are briefly exposed to mild levels of violent media that is considered age-appropriate clearly establish causation between the exposure and children’s subsequent behavior, such as the children mimicking the acts of violence immediately following the exposure. The controversy centers on causation theories that explain the correlations between long-term exposure to violence and children’s (and adults’) ultimate level of aggression, anti-social behavior, and acts of interpersonal violence. Considering that researchers specialized in the effects of media on children concur that children can be harmed by long-term exposure to violent media, it would be unethical to subject children to such media long-term in a controlled study to prove cause and effect. The researchers’ conclusions concerning the long-term effects of violent media exposure are therefore based on longitudinal and correlational studies that do not subject children to violence, and necessarily rely on theories that explain the scientific findings. This Part first reviews the empirical research and the researchers’ conclusions, then compares the credentials of the “experts” who signed amicus curiae briefs on both sides of Schwarzenegger v. Entertainment Merchants Association.

For decades, researchers who have conducted original studies on the effects of violent media on children have found significant correlations between children’s exposure to violent media and numerous problems experienced by the children. The American Academy of Pediatrics recently published a policy statement concerning violent media upon finding “consistent and significant associations” between violent media consumption and a variety of mental health problems for children and adolescents, including aggressive and violent behavior, bullying, desensitization to violence, fearful world views including “mean world syndrome,” depression, and sleep disturbances. Experts in this field concur that children’s exposure to violent media is a “socially significant cause” of later antisocial attitudes and conduct, and that a substantial correlation exists between such exposure and subsequent aggressive and/or antisocial behavior. Violent video

30 Although a number of proclaimed experts signed an amicus curiae brief in support of the video game merchants suggesting that no correlation exists between consumption of violent media and harm to children, this position is contradicted by decades of research conducted by leading researchers who are specialized in the effects of violent media on children. See infra notes 75-81 & accompanying text.
31 Telephone interview with Craig Anderson, Director of the Center for the Study of Violence, Iowa State University (Dec. 9, 2010).
32 Email from Elizabeth Gershoff, Associate Professor, Department of Human Development and Family Sciences& Population Research Center, University of Texas (December 17, 2010).
33 See American Academy of Pediatrics, Policy Statement – Media Violence, 124 PEDIATRICS 1495-1497 (2009) (discussing the dangerous effects of violent media on children). Indeed, the strength of the associations between consumption of media violence and health problems found in meta-analyses is nearly as strong as the association between cigarette smoking and lung cancer, and greater than the associations between calcium intake and bone mass or condom usage and sexually-acquired HIV infection – associations accepted by the medical community without question. Id. at 1497. See also Youth Violence: A Report of the Surgeon General (Jan. 2001) (discussing data on youth violence and the effects of violent media), available at www.surgeongeneral.gov/library/youthviolence (reviewing statistics on youth violence and the effects of violent media on youth violence). In one report, 3500 studies reviewed the relationship between media violence and violent behavior, and all but 18 found a relationship. See also Marybeth Hicks, Reject violent video games (Nov. 11, 2009) (discussing the popularity of first person shooter games), available at http://www.washingtonpost.com/news/2009/nov/11/hicks-reject-violent-video-games/.
34 Social scientists believe that exposure to violent media causes antisocial behavior in children, and that the media influence children cognitively over a period of time. See, e.g., VICTOR C. STRAUSBURGER, ADOLESCENTS AND THE MEDIA: MEDICAL AND PSYCHOLOGICAL IMPACT 37 (1995) (the research on media
games likely pose the greatest risk to children among all forms of violent media due to their interactive nature, whereby children perpetrate virtual acts of violence to gain points. It is undisputed that interpersonal violence is now a more prevalent health risk for children, adolescents, and young adults than infectious disease, cancer, or congenital disorders.

These researchers also concur that children’s vulnerable developmental state explains the correlations between exposure to violent media and the associated problems. It is a matter of common knowledge that children and adolescents are acutely impressionable and vulnerable to negative influences. This is due to the fact that children’s brains go through phases in which they rapidly assimilate experiences to form perceptions of the world, and act upon those perceptions. Children generally have curtailed constitutional rights compared to adults in recognition of their developmental state and periods of critical learning and physical growth, which render them acutely vulnerable to lasting harm caused by negative influences or neglect.

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35 See American Academy of Pediatrics, Policy Statement – Media Violence, 124 Pediatrics 1498 (2009) (results of three recent interactive-media-violence effects showed greater risk of interactive media than passive viewing of violent media: “these rapidly growing and ever-more-sophisticated [interactive violent video games] have indicated that the effects of child-initiated virtual violence may be even more profound than those of passive media such as television . . . [as] the child or teenager is “embedded” in the game and uses a “joystick” (handheld controller) that enhances both the experience and aggressive feelings.”).


37 See F.C.C. v. Fox, 129 S. Ct. 1800, 1813 (2009) (“Here it suffices to know that children mimic the behavior they observe”).

38 See infra notes 40–48 and accompanying text.

39 Compulsory education is an example. Children’s liberty interests and free will are outweighed by the state’s interest in assuring their literacy and civic responsibility, which is very difficult to achieve post-childhood due to minors’ critical periods of language development, inter alia. Children can also be removed from their parents’ custody against their will in their best interests according to the state where the parents...
Breakthroughs in understanding children’s brain development have been made possible through magnetic resonance imaging (MRI) technology. Of particular relevance are relatively recent MRI studies that reveal enormous brain activity during adolescence in the prefrontal cortex – the area responsible for moral development and judgment. Adolescents’ brains are in a critical period of rapid growth that neuroscientists refer to as “exuberance,” during which they quickly form neural connections and schemas that influence their perception of the world and appropriate social conduct. In addition, a “pruning” process discards weak or undeveloped associations in favor of associations that have been reinforced based on the adolescents’ experiences during this critical period of brain development.

Brain scan studies conducted by neuroscientist Jay Giedd at the National Institutes of Health confirm that, “the adolescent brain undergoes a massive remodeling of its basic structure, in areas
that affect everything from logic and language to impulses and intuition." 43 The adolescent brain is undergoing a metamorphosis and is “wildly exuberant and receptive” to influence, 44 which means that adolescents are much more susceptible to brain activity alterations resulting from harmful influences than parents or educators previously understood. 45 The frontal lobes in particular, the brain’s so-called “chief executive,” are among the last areas to reach a stable, grown-up state, and may not be fully developed until well past the age of 20. 46 Adolescence, some neuroscientists warn, may be one of the worst times to expose a brain to drugs and alcohol or even a steady diet of violent video games, because the adolescent brain is acutely vulnerable and “many things can go wrong.” 47 As Giedd puts it: “If that teenage brain is still changing so much, we have to think about what kinds of experiences we want that growing brain to have.” 48 Exemplary child brain activity research was conducted at the Indiana University School of Medicine and published in 2002. The Indiana researchers found through functional magnetic resonance imaging (fMRI) that adolescents with “conduct disorder,” i.e., a high level of aggression and antisocial behavior, have different brain structures and different brain activation patterns than non-aggressive adolescents, and that among non-aggressive adolescents, there were differences in brain function depending on the amount of previous violent video game exposure. The Indiana researchers also found that normal children who had consumed a large amount of violent video games demonstrated altered brain activity patterns that mirrored the brain activity patterns of children who suffer from conduct disorder. 49 Children’s brain scan data supports longstanding learning theories on how the brain creates and maintains associations that affect behavior. Canadian psychologist Donald O. Hebb opined in 1940 that “neurons that fire together wire together,” a theory known as “Hebb’s Law.” 50 That is, associations created in the mind repeatedly can become connected to one another cognitively, resulting in cognitive associations or “schemas” that become implicit over time and operate beyond conscious awareness, yet affect judgment and behavior. 51 The Indiana research is a

45 BARBARA STRAUCH, THE PRIMAL Teen 13-14 (2003) (babies and teenagers undergo the greatest changes to brain structure and function). See also infra notes 52-61 and accompanying text (reviewing research on brain activity alterations that can be caused by violent video games).
51 See, e.g., Deana A. Pollard, Unconscious Bias and Self Critical Analysis: The Case For A Qualified Evidentiary Equal Employment Opportunity Privilege, 74 WASH. L. REV. 913, 917-920 (1999) (explaining how schemas are created and maintained); Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489 (2005) (exemplifying how implicit biases manifest in judgment and perception of events); Justin D.
poignant indication that consumption of violent video games among normal children can produce through repetition brain “wiring” similar to that in socially problematic children.

Very recent research confirms that altered brain activity can be produced by excessive use of violent video games. In one study, currently in press, researchers documented the physical brain activity of college students grouped as “high-gamers” or “low-gamers,” depending on their level of prior violent video game consumption, to monitor brain activity manifesting cognitive associations that the subjects made among three types of images: 1) positive social images, such as a smiling baby; 2) violent images, such as a man holding a knife to a woman’s throat; and 3) non-violent unpleasant images, such as a disfigured face. The low-gamers’ brain activity in response to images in the first category was very different from their brain activity in response to the second and third categories, which were similar. To the contrary, high-gamers’ brain activity patterns showed a similar reaction to images in the first and second categories, which was different from their reactions to the third category. This can be explained by cognitive associations: a high consumption of violent video games can cause the brain to associate or “wire” violent images with happiness or positive feelings (manifested by the high-gamers’ brain activity manifesting associations between violence and a smiling baby), but not other negative concepts such as disfigurement. To the contrary, low gamers demonstrated similar brain activity when viewing violence and disfigurement, but different brain activity when viewing images such as a smiling baby, manifesting a different set of cognitive associations.

Researchers who have specialized in the effects of violent media concur that sufficient consumption of violent media has been proven to cause subsequent aggression, and that the mechanism is usually a slow, cumulative, desensitizing cognitive process that can lower


55 Telephone interview with Craig Anderson, Director of the Center for the Study of Violence, Iowa State University (Dec. 9, 2010).

56 See, e.g., Victor C. Strausburger, Barbara J. Wilson & Amy B. Jordan, Children, Adolescents, and the Media 175-178 (2d ed. 2009) (discussing the prevailing theories of causation explaining the correlation between violent media and violent behavior). Although children are known to mimic violent behavior immediately after exposure to violent images, this is distinguishable from the slow, cumulative effects of violent media that are believed to desensitize children to violence systematically, which can lead to lower inhibitions to perpetrating violence. Telephone Interview with Craig Anderson,
children’s inhibition to violence, desensitize them to violence and cause them to view violence as normal or acceptable, and “prime” them to identify with and copy violent behavior as a means of conflict resolution. Violent video games are especially effective in this regard, as the players actively and repeatedly perpetrate acts of violence as “first person shooters.”

Exposure to large quantities of “first-person shooter” games appear to program children cognitively to recall and execute violent responses swiftly, which can extend into real life situations. All of this is consistent with cognitive learning theory explaining how the brain creates entrenched schemas such as racial stereotypes resist change).

Craig Anderson, the Director the Center for the Study of Violence at Iowa State University, is among the researchers specialized in violent media effects who believe that the decades of research linking children’s consumption of violence with subsequent violent and other antisocial behavior can be explained by children’s developmental vulnerability to cognitive programming that adults do not share. That is, an adult’s fully developed brain is more resistant to manipulation of cognitive associations, so adults’ consumption of violence does not place them at the same degree of risk for altered cognitive associations, just as adult brains are resistant to changing entrenched schemas generally. Similarly, children whose consumption of violence results in

57 Social scientists believe that exposure to violent media causes antisocial behavior in children, and that the media influence children cognitively over a period of time. See, e.g., VICTOR C. STRAUSBURGER, ADOLESCENTS AND THE MEDIA: MEDICAL AND PSYCHOLOGICAL IMPACT 37 (1995) (the research on media violence and its effect on behavior is “compelling and clear,” aggression is a learned behavior, media violence is a “socially significant” cause of violence in society, and young children are particularly vulnerable); MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES, REPORT OF THE FEDERAL TRADE COMMISSION, ii (September, 2000), available at www.ftc.gov/reports/violence/vioreport.pdf (most of the research on the effect of media violence on children reveals a “high correlation” between exposure to media violence and aggressive and/or violent behavior). VICTOR C. STRAUSBURGER, BARBARA J. WILSON & AMY B. JORDAN, CHILDREN, ADOLESCENTS, AND THE MEDIA 156-194 (2d ed. 2009) (discussing the effects of media violence on children and teenagers, such as its contribution to aggressive behavior); Research demonstrating correlations between viewing violent media and aggressive behavior date back to the mid 1980s. See Edward Donnerstein & Daniel Linz, Mass Media Sexual Violence and Male Viewers: Current Theory and Research, 29 AM. BEHAV. SCI. 601 (1986); Russell G. Geen & Susan L. Thomas, The Immediate Effects of Media Violence on Behavior, 42 J. SOC. ISSUES 7 (1986); L. Rowell Huesmann, Psychological Processes Promoting the Relation Between Exposure to Media Violence and Aggressive Behavior by the Viewer, 42 J. SOC. ISSUES 125 (1986); Brendan G. Rule & Tamara J. Ferguson, The Effects of Media Violence on Attitudes, Emotions, and Cognitions, 42 J. SOC. ISSUES 29 (1986); Charles W. Turner et al., Naturalistic Studies of the Long-Term Effects of Television Violence, 42 J. SOC. ISSUES 51 (1986); cf. Emily Campbell, Comment, Television Violence: Social Science vs. The Law, 10 LOY. ENT. L.J. 413 (1990) (analyzing research).

58 See supra note 35. “First-person shooter” means that the player personally executes the killings by manipulating a hand-held device, such as in the most popular Call of Duty game series, published by Activision.

59 See infra notes 69-72 and accompanying text.


antisocial cognitive “wiring” also cannot easily change their brain patterns once they reach adulthood.

According to Anderson, longitudinal research concerning the effects of violent video games on children indicates a number of long-term effects, including personality changes that occur without the children’s awareness. These behavioral changes probably reflect structural changes to brain functioning that affect judgment and behavior. Consistent with longstanding and established tenets of cognitive learning theory, repeated exposure to violence through video games increases children’s aggressive thinking, including hostile attribution, causes children to experience aggressive feelings, and desensitizes them cognitively to accept acts of violence as normal and socially appropriate. Exposure to violence is also known to produce a loss of empathy for victims of violence and a decrease in pro-social helpful behavior to others in need of assistance.

The recent data on physical brain activity manifesting cognitive “wiring” may also be explained by the fact that humans are programmed to imitate and are especially primed to do so during childhood and adolescence when the brain is undergoing rapid reorganization to solidify perceptions of the self and social values. As explained by UCLA neurologist and pioneer brain-scanner John Mazziotta, “We’re creatures of imitation, that’s how we learn.” According to Mazziotta, the brain must learn to inhibit inappropriate actions, including imitation, because a critical aspect of brain development is “progressive inhibition.” Exposure to violent video games can alter children’s brain activity patterns, which in turn probably leads to disinhibition toward violence and subsequent acts of aggression and antisocial conduct. Indeed, the Supreme Court recently took judicial notice that children “mimic the behavior they observe - or at least the behavior that is presented to them as normal and appropriate,” which is consistent with learning theory.

California’s interest with respect to the vulnerability of children to harmful media influences seems clearly to constitute a compelling state interest. California also has an interest in addressing the growing problem of adolescents’ video game “addiction.” Parents of violent video game connoisseurs often express concern about the addictive nature of the games, and are often acutely aware of the games’ propensity to cause radical personality changes, enormous drops in academic performance, and even vitamin deficiencies. Children and adolescents (as well as

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62 Telephone interview with Craig Anderson, Director of the Center for the Study of Violence, Iowa State University (Dec. 9, 2010). Most of the studies to date concern physical aggression and violent media, although newer research reveals altered brain activity patterns that can result from consumption of violent video games. See supra notes 49-54 and accompanying text.
63 Telephone interview with Craig Anderson, Director of the Center for the Study of Violence, Iowa State University (Dec. 9, 2010).
67 The Ninth Circuit’s opinion seems silly in regard to its refusal to recognize California’s compelling interest, particularly since the Supreme Court has recognized that states have a compelling interest in the psychological well-being of children. See supra note and accompanying text. To the extent that the research may insufficiently prove cause and effect, this issue should be addressed as part of the nexus and tailoring analysis of strict scrutiny, not the issue of whether the state has a compelling interest.
68 For example, a thirteen-year-old boy from Aspen, Colorado enjoyed skiing and other outdoor activities until he became addicted to violent video games upon receiving one for Christmas. Thereafter, his personality changed radically, he lost interest in outdoor activities, and he became deficient in Vitamin D as a result. Today, his parents regret allowing him to have the video games three years ago, and have battled
some adults) often revolve their lives around playing the games, which have been called
addictive as cocaine. Very recent research has shown similar brain activity patterns relative to
excessive use of video games and substance abuse. Thus, childcare professionals have begun to
divide parents on how to deal with children’s violent video game obsession. In 2007, the
American Psychiatric Association issued a statement addressing the problem of children’s
excessive use of video games and explained that an official diagnosis of “video game addiction”
has been proposed for inclusion in the 2012 version of the Diagnostic and Statistical Manual of
Mental Disorders (DSM-V).

with his addiction since. It is hard to imagine that anyone lucky enough to live in Aspen would prefer
indoor video games to skiing and other outdoor activities, but this is the nature of the video game addiction.
Interview with L.E. (mother), January 5, 2011 (Aspen, Colorado). The author, as mother or stepmother to
two teenage boys, is personally familiar with the addictive nature of the games and the anxiety and
hostility they can cause, and in particular, the arguments that arise when a parent deprives a child of the
games.

Video gaming is “taking over the lives of kids,” and may cause a “clinical impulse control disorder,” an
addiction akin to compulsive gambling. Kimberly Young, Clinical Director for On-Line Addition, as
reported by WebMD, available at http://www.webmd.com/mental-health/features/video-game-addiction-
no-fun. Dr. Young likens video game addiction to cocaine addiction in that the video game addict seeks to
change the way they feel by escaping into a fantasy world as opposed to ingesting a drug. The lure of
fantasy is most prominent in role-playing video games, as a child can become dominant in the game
regardless of his social life in the real world, making the virtual world more appealing than the real world.
Psychiatrist Michael Brody defined addiction, including addictive behavior, by the following criteria: 1) the
person needs more and more of a substance to keep him going; 2) if the person does not get more of the
substance or behavior, he becomes irritable and miserable. Id.

See, e.g., Doug Hyun Han, Jun Won Hwang & Perry F. Renshaw, Bupropion Sustained Release
Treatment Decreases Craving for Video Games and Cue-Induced Brain Activity, 18 EXPERIMENTAL AND
CLINICAL PSYCHOPHARMACOLOGY 297 (2010); Doug Hyun Han, Nicolas Bolo, Melissa A. Daniels, Lynn
Arenella, In Kyoon Lyoo, and Perry F. Renshaw, Brain activity and desire for Internet video game play,
___ COMPREHENSIVE PSYCHIATRY ___ (article in press), available at

The American Psychiatric Association issued the following statement on June 25, 2007, “Psychiatrists
are concerned about the wellbeing of children who spend so much time with video games that they fail to
develop friendships, get appropriate outdoor exercise or suffer in their schoolwork. Certainly a child who
spends an excessive amount of time playing video games may be exposed to violence and may be at higher
risks for behavioral and other health problems.” See American Psychiatric Association Considers “Video

“The APA defines mental disorders in the Diagnostic and Statistical Manual of Mental Disorders. Since the current
dition, DSM-IV-TR, does not list “video game addiction,” the APA does not consider “video game
addiction” to be a mental disorder at this time. If the science warrants it, this proposed disorder will be
considered for inclusion in DSM-V, which is due to be published in 2012. Revising DSM requires a year-
long, rigorous process – one that is transparent and open to suggestions from our colleagues in the medical
and mental health communities and the public. All changes to DSM will be based on the latest and best
science. To date, the APA has named the chair and co-chair of the DSM-V Task Force – David Kupfer,
M.D., and Darrel Regier, M.D., M.P.H., respectively – and is in the process of establishing the full task
force, which will have overall responsibility for DSM-V’s development.” See American Psychiatric
Association Considers “Video Game Addiction,” available at
http://www.sciencedaily.com/releases/2007/06/070625133354.htm. See also Sherry Rauh, Video Game
Addiction No Fun, WEBMD.COM (2010), available at http://www.webmd.com/mental-
health/features/video-game-addiction-no-fun (video game addiction is “absolutely” real, a “clinical
impulse control disorder.”)
In sum, recent studies appear to confirm researchers’ longstanding belief that children’s immature brains render them particularly vulnerable to the harmful effects of violent media generally, and especially violent video games due to their interactive and repetitive nature. Similar research concerning minors’ lack of intellectual, moral, and executive maturity persuaded legislatures and the Supreme Court that capital punishment of minors is unconstitutional.\textsuperscript{73} Research concerning minors’ physiological immaturity and vulnerability to addiction animated the Court to limit protection of speech that appeared to advocate the use of marijuana in Morse v. Frederick.\textsuperscript{74} There is little question that children are quite different from adults on many levels. The empirical data and researchers’ conclusions concerning the risks of harm to children posed by violent video games seem clearly sufficient to warrant sales regulations to child purchasers.

B. The “Expert” Opinions Presented in Amicus Briefs

The Supreme Court was presented with much of this research in amicus curiae briefs filed in support of California in Schwarzenegger v. Entertainment Merchants Association. The Court was also presented with numerous amicus curiae briefs filed in support of the merchants, whose proclaimed “experts” undermined and contradicted the enormous body of research briefed herein. Considering the conflicting expert opinions contained in the amicus curiae briefs, the Court should engage a Daubert-type critical review of the relative credentials and credibility of the these experts before considering any of the opinions proffered in their various briefs.

There is an enormous disparity of qualifications between the experts who support California and the experts who support the merchants. The thirteen experts who authored the appended Statement of Video Game Violence to the scientific brief filed in support of California are the most recognized media effects researchers from the United States, Japan, and Germany, including Leonard Berkowitz, Edward Donnerstein, Brad J. Bushman, L. Rowell Huesmann, Douglas A. Gentile, and Craig Angerson.\textsuperscript{75} Twelve of these thirteen researchers have published relevant original research in top tier peer-reviewed scientific journals.\textsuperscript{76} Over one hundred additional

\textsuperscript{73} See Roper v. Simmons, 543 U.S. 551, 564-571 (2005) (recognizing that juveniles’ brains and character are not fully developed and that the majority of states prohibit capital punishment of juveniles, concluding that capital punishment for crimes committed under the age of 18 is unconstitutional). See also Graham v. Florida, 130 S. Ct. 2011, 2038 (2010) (a minor’s immaturity, susceptibility to negative influences, and “transitory” character render him less morally culpable than an adult who commits the same crime); Mary Beckman, Crime, Culpability, and the Adolescent Brain, 305 SCIENCE MAGAZINE (July 30, 2004) available at http://www.deathpenaltyinfo.org/node/1225 (the brain’s frontal lobe, which exercises restraint over impulsive behavior, does not begin to mature until age 17); Mark Moran, Adolescent Brain Development Argues Against Teen Executions, 38 PSYCHIATRIC NEWS 8 (2003) (the instinctual part of the brain develops first, and areas such as the prefrontal cortex that help to control emotions develop later).

\textsuperscript{74} The Morse v. Frederick Court found that “[d]rug abuse can cause severe and permanent damage to the health and well-being of young people,” including more severe physical and psychological reactions to drugs, a greater likelihood of addiction, and poorer rates of rehabilitation once they become chemically dependent as compared with adults. Morse v. Frederick, 551 U.S. 393, 407 (2007).

\textsuperscript{75} See Brief of Amicus Curiae of California State Senator Leland Y. Yee, Ph.D, the California Chapter of the American Academy of Pediatrics, and the California Psychological Association in Support of Petitioners, 2010 WL 2937557.

\textsuperscript{76} Telephone interview with Craig Anderson, Director of the Center for the Study of Violence, Iowa State University (Dec. 9, 2010). A complete excel spread sheet comparing the violent media effects research (or lack thereof) produced by all “expert” signatories to amicus briefs filed in Schwarzenegger v. Entertainment Merchants Association is (Note to editors: the excel sheet is on file with me, and may be available online soon or could be appended to this article). As explained by the spread sheet, the data was derived through a PsycINFO search analyzing whether the “experts” had published research containing
experts endorsed the Statement, including Victor Strausburger and Barbara J. Wilson, who recently published a treatise compiling hundreds of studies on the effects of media on children and adolescents. 77 Five experts in this group have been the president of the International Society for Research on Aggression, four of whom co-authored the appended Statement. 78

To the contrary, of the eighty-two “expert” signatories to the scientific brief filed in support of the merchants, 79 only one has ever published relevant original research in a peer-reviewed scientific journal that is arguably top tier, and that publication reported some evidence of the same type of harmful violent media effects as is typically found in this research domain. 80 At least two of these “experts” own or work for video game companies. 81 None of these experts specialize in violent media effects and children.

The Court should feel obligated to analyze critically the social science that animates the First Amendment controversy in Schwarzenegger v. Entertainment Merchants Association. The Court should compare the credentials of the “experts” who signed amicus curiae briefs and weigh the value of the briefs accordingly—a critical analysis that the Ninth Circuit failed to conduct. The Court should also recognize the financial incentives of the “friends of the court” who support the merchants: of the thirty-one amicus curiae briefs filed with the Court, twenty-seven were filed in support of the merchants, most of which were filed by persons and entities financially interested in the outcome of the case, such as the International Game Developers Association, the Microsoft Corporation, the Chamber of Commerce of the United States of America, Vindicia, Inc., Activision Blizzard, Inc., 82 and ID Software, LLC. Considering the very serious risks that violent video games pose to children, the lack of credibility among the experts supporting the merchants, and the enormous profits at risk among the amici supporting the merchants, 83 the Court should exercise its judgment in this case critically and cautiously.

III. CALIFORNIA’S REAL INTEREST: PROTECTING CHILDREN’S LIBERTY

original data that tested for a media violence effect on an outcome variable related to aggression or prosociality, and “top tier” journals were defined in accordance with the 2009 Web of Science reports concerning the five-year impact factor.


78 Email from Craig Anderson, Director of the Center for the Study of Violence, Iowa State University (Dec. 21, 2010).

79 See Brief of Social Scientists, Medical Scientists, and Media Effects Scholars as Amici Curiae in Support of Respondents, 2010 WL 3697191.

80 See J.D. Ivory and S. Kalyaraman, The effects of technological advancement and violent content in video games on players’ feelings of presence, involvement, physiological arousal, and aggression, 57 JOURNAL OF COMMUNICATION 532-555 (2007). In addition, no major aggression or violent media effects researcher signed the brief supporting the video merchants, with the possible exception of Kevin Beaver. Email correspondence from Craig Anderson, Director of the Center for the Study of Violence, Iowa State University (Dec. 21, 2010).

81 Randy Brown is the “Chief Technology Officer” for Virtual Heroes, and Richardo Javier Rademacher Mena is the founder of Futur-E-Scape, LLC.

82 Activision has reaped approximately $3 billion in sales for the Call of Duty game series alone and owns other popular video game series, such as the Tony Hawk, Spiderman, and James Bond series. See, e.g., http://www.activision.com/index.html#games/en_US; http://en.wikipedia.org/wiki/List_of_Activision_games.

83 See, e.g., supra note 82.
The issue before the Court, as framed, fails to capture the full panoply of children’s liberty interests at risk in Schwarzenegger v. Entertainment Merchants Association. The issue has been framed as whether the California law infringes upon children’s liberty rights to purchase extremely violent video games that appeal to them. The issue, as framed, puts California in the position of defending its so-called “infringement” on children’s liberty interests.

There is great irony to the way in which the issue has been framed if one considers California’s real interest in this case: to protect and preserve children’s psychological health to enable them to exercise fully their intellectual liberty both as children and adults. While the challengers focus on children’s First Amendment “right” to uninhibited access to the most violent video games, California seeks to protect children’s future uninhibited intellectual freedom – the essential value protected by the First Amendment. The Court should consider risks to children’s liberty on both sides of the debate, as children’s core, long-term liberty interests could be at greater risk if the Court affirms the Ninth Circuit.

Liberty is a fiercely protected right with a variety of definitions, interpretations, and social ramifications tied to a variety of constitutional clauses. It is the essence of American freedom and the cornerstone of constitutional analysis. Normally, liberty arguments arise in the context of state action that deprives an individual of liberty interests protected by the Bill of Rights. Although liberty is normally viewed as an individual right protected from government infringement, this does not preclude the government from acting to protect individual liberty. The state has an interest in protecting its citizens’ liberty under its parens patriae and police powers and does so in numerous ways, such as by requiring informed consent in medical cases. Such measures preserve individuals’ freedom to make personal choices based on complete information.

Liberty jurisprudence has been chaotic in some of its manifestations, but its core meaning can be discerned from some of the Court’s most profound constitutional passages. At its core, the term “liberty” embraces each individual’s right to develop his mind and body in accordance with free will and the dictates of his conscience. Liberty includes choosing one’s own belief system, occupation and hobbies, and interpersonal relationships and lifestyle. The Court’s earliest pronouncement on the implied fundamental rights encompassed by the Liberty Clause of the Fourteenth Amendment captures this concept:

“[L]iberty . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”

Justice Brandeis made a similar pronouncement concerning the relationship between liberty and happiness a few years later in Whitney v. California:

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84 See Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the First Amendment into the liberty aspect of the Due Process Clause of the Fourteenth Amendment).
86 See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (liberty includes the right of sexual privacy and lifestyle choices).


“Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”

Liberty means freedom to develop one’s faculties and the ability to make choices about one’s life based on informed personal choice free from unfair and manipulative influences. It is the ability to interpret the world in accordance with one’s untainted cognitive processing and to make life choices based on free access to information, ideas, and the individual moral and religious values that (theoretically) flow from a uninhibited marketplace of ideas. To the extent that another person interferes with individual self-determination, this is antithetical to liberty, and such interference has been harshly punished relative to fraudulent commercial transactions motivated by profit, for example, because tricking someone into making choices contrary to his best financial interests is considered un-American and a violation of his basic rights. Fraudulent commercial speech is therefore unprotected speech and subject to punishment.

Subliminal manipulation by means of otherwise fully protected speech has also been determined to be unprotected speech. In 1990 and 1991, federal courts in Nevada and Georgia analyzed whether subliminal messages embedded in music that allegedly caused teen suicides were entitled to First Amendment protection. Both courts found that subliminal messages were unprotected speech, based on the speech-recipient’s lack of knowledge that his brain was being manipulated.

The Nevada court found that subliminal messages do not advance First Amendment values and are therefore unprotected because the public’s constitutional right to avoid subliminal messages trumps any subliminal speech rights that the speaker may have. The court found that subliminal messages do not advance the major theories underlying the First Amendment – the marketplace of ideas, self-government, and self-actualization – because subliminal messages do not provoke robust debate or advance the free flow of ideas, and indeed constitute the “antithesis” of these values because they influence and manipulate the thoughts and behavior of the listener without

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89 This marketplace of ideas concept has been criticized based on research that people do not, or cannot, make good choices among ideas in the marketplace due to cognitive errors, inter alia. See, e.g., Derek E. Bambauer, Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas, 77 U. COLO. L. REV. 649 (2006) (cognitive psychology research undermines the concept that an unregulated market produces accurate information or truth).
his knowledge or consent. Subliminal communications are not really speech at all, because they infringe upon the freedom of thought and mind that the First Amendment seeks to protect.

The court also found that the First Amendment protects individuals to be free from intrusive speech, particularly if they are “bombarded” with it, because speech is a powerful weapon to control others’ minds. The court concluded: “The freedom to exercise one’s thoughts is essential to the exercise of other constitutional rights. If an individual is not protected in his thoughts and behavior, the right of privacy becomes meaningless . . . when an individual is subjected to subliminal messages without his knowledge and consent, his privacy rights outweigh any free speech rights of the person or entity publishing the subliminal message.”

The Georgia court followed the Nevada court’s reasoning to find that subliminal messages contained in otherwise fully protected speech rendered it unprotected or much less protected in accordance with its similarity to false and misleading commercial speech and other forms of speech “extremely limited in their social value,” relegating such speech “to a class worthy of little, if any, first amendment constitutional protection.” The court characterized subliminal messages as speech that “sneaks into the brain” without the listener’s knowledge or consent, rendering it unworthy of the First Amendment protection that inures to speech that allows the listener the opportunity to consider the speech and decide what to do with it – the justification for an unregulated marketplace of ideas.

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93 Vance v. Judas Priest, 1990 WL 130920 (Nev. Dist. Ct. 1990) at *25. See also, e.g., David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 335-346 (1991) (arguing that speech that advocates ideas through reasoning should be the most protected under the First Amendment).
97 Vance v. Judas Priest, 1990 WL 130920 (Nev. Dist. Ct. 1990) at *32. The Court found that in order for liability to attach to producers of subliminal messages that allegedly cause harmful consequences on the part of listeners, intent is a necessary element, making an analogy to invasion of privacy. Id. at *10. Ultimately, the court found no intent, and no liability. Id. at *14.
99 The court distinguished subliminal speech from “preconscious suggestion,” the latter constituting garbled or unintelligible but audible speech that allows the listener an opportunity consciously to attempt to discern the meaning. Waller v. Osbourne, 763 F. Supp. 1144, 1149 (M.D. Ga. 1991). In finding that the plaintiffs’ experts demonstrated only preconscious suggestions, the court reasoned that the speech was protected by the First Amendment unless the plaintiffs could show that it falls within a category of unprotected speech, i.e., that it was obscene, defamatory, incites imminent lawless activity, or constitutes fighting words. Id. at 1150.
The subliminal speech cases support the concept that, to the extent that violent video games alter children’s brain functioning without their knowledge or consent, they constitute “speech” that undermines First Amendment values, at least in part. A complete constitutional analysis in *Schwarzenegger v Entertainment Merchants Association* must take into consideration the First Amendment values at risk on both sides of the case. Just as it is no defense that a consumer chose to listen to music if he was unaware of subliminal messages embedded in it, a child’s desire for, and choice to play, violent video games should not trump the state’s interest in protecting the child from harmful effects that the child can neither appreciate nor consent to competitently.

Accepting, as California has, that children’s use of violent video games can cause their brain activity to be altered in a destructive manner that may be irreversible or extremely resistant to change after the critical period of brain development concludes, the California law could be viewed as preserving children’s unadulterated cognitive functioning and freedom to choose their beliefs and lifestyle free from harmful influences. This concept of safeguarding children from psychological “abuse” to allow them to mature into adulthood without “impaired” morality and development animated the Court to defer to the New York Legislature in *Ginsberg v. New York.* 100 Although the challenged California law does not prohibit children’s use of violent video games, the law may inhibit some children’s access to the games and, importantly, expresses public policy that could alert parents and their children to the risks posed by violent video games, which the government deemed serious enough to warrant regulation. The expressive function of the law furthers societal awareness about the risks posed by violent video games, and such enlightenment advances the liberty interests of both parents and children.

**CONCLUSION**

The Supreme Court’s primary task in *Schwarzenegger v. Entertainment Merchants Association* is to identify California’s interest in the challenged legislation in order to determine the appropriate level of constitutional scrutiny. The empirical research indicates that the harmful effects to children that consumption of violent video games can produce go far beyond desensitizing children to violence, and may deprive them of intellectual free-will later in life. It is unconscionable to deprive any person of the most precious aspect of liberty – the ability to self-actualize in accordance with the dictates of one’s unadulterated conscience – before the person has a fair shot of maturing physically, cognitively, and emotionally such that his choices are truly his own.

California’s attempt to regulate children’s consumption of violent video games should be viewed as protecting and preserving children’s liberty and their future access to the marketplace of ideas, not inhibiting these rights unconstitutionally as the challengers have argued. If liberty means anything, it means that every person should be allowed to grow into adulthood free from harmful, potentially life-long influences that he neither understands nor has the capacity to accept. From a psychological perspective, children represent the most vulnerable group of Americans that are most in need of protection from harmful media influences. The government has not just the authority to act to protect them, but a moral obligation to do so. The Supreme Court should uphold California’s sales regulation in recognition of children’s developmental vulnerability consistent with the variable reasoning of *Ginsberg v. New York.*

100 390 U.S. 629, 641 (1968).