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The Real Call of Duty: A Need for Change in Supreme Court Precedents Surrounding Violent  
Video Games

A soldier covered in blood is running through a wasteland of debris in a deserted town. Buildings and roads have been destroyed only to be replaced by a significant number of dead bodies scattered across the ground. The sky is dark as the soldier walks slowly into the center of town. Nothing moves. Everything is almost too quiet until a massive explosion erupts behind him and sends him running away in fear. The soldier frantically runs until he finds protection under a flipped car. He sighs a breath of relief as he waits for his next move in safety. After a few minutes, he stands and slowly walks out from under the car. He is ready to fight. But just as he turns to head back into battle, an enemy soldier jumps from the roof of car and slits his throat with a large machete killing him instantly. Suddenly, the screen goes dark as a child screams at the top of her lungs and throws a hard object toward the blackness. No, as plausible as it is, this is not a scene from Steven Spielberg's next epic war drama. Instead, a middle-schooler has just thrown her video game console at her parents' television set after losing a heated round of *Call of Duty: Black Ops III*.

Situations similar to the one above are occurring all over the United States. Young children are playing increasingly graphic violent video games more frequently than ever before. In 2015 over 150 million Americans reported to have played a form of video games; 44 million of those users were under the age of eighteen (Lofgren, sec. 1). The rapidly growing video game industry produces over \$12 billion dollars in profits annually and affects large numbers of

children in the United States (Norcia, sec. 3). The growing number of underage video games users has prompted some states to enact laws restricting the sale of violent video games to minors. Debates about the legality of such restrictions have resonated across the country culminating in the landmark 2011 Supreme Court case *Brown vs. Entertainment Merchants Association* in which the Court ruled that states cannot prohibit the sale of video games to minors (Dunkelberger 1660).

I am working on the topic of the legality of placing restrictions on the sale of violent video games to minors and believe that under current First Amendment obscenity and state interest precedents these restrictions are technically unconstitutional. In this paper I will argue that the Supreme Court has a duty to expand the obscenity tests found in the *Miller* and *Ginsberg* cases to include statements on violence and to reevaluate the state interest in protecting minors from violent video games, potentially allowing for restrictions on violent video games to be constitutional. Knowing the intense violent content of modern video games, the psychological effects of the games, and the games' realistic interactivity will help me to argue that the Court needs to change its stance. This information should help my readers better understand that states should be allowed to place restrictions on violent video games because the games can be detrimental to a developing child. Understanding violent video games is important to my readers because they need to realize the potential effects of what has now become an extremely common practice among most young people in the United States. I conclude my argument with a list of potential regulating systems that states could implement if restrictions are deemed constitutional.

Currently, the United States Supreme Court judges cases involving the breach of First Amendment rights based on preceding cases. Under *Brown vs. Entertainment Merchants Association*, the Court referred to the 1973 *Miller v. California* case and the 1968 *Ginsberg v.*

*New York* case to justify their ruling that violent video games pass the obscenity test and do not correlate to any previous sales restriction of inappropriate content to minors (Tsesis 508). The *Miller* case, dealing with the legality of pornographic material, produced a three-pronged system that the Court uses to classify obscene and unprotected speech; for speech to be considered unprotected it must pass all three provisions (508). The “Miller Test” classifies speech as obscene based on “(1) whether an ‘average person’ relying on ‘contemporary community standards’ would find the work ‘taken as a whole, appeals to the prurient interest’; (2) whether it ‘depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law’; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (508).” Because the test does not have an explicit “violent conduct” clause, the Court ruled that violent video games are protected speech and can not legally be restricted. Additionally, the *Ginsberg* case, dealing with the sale of pornographic material to a minor, created the precedent of “variable obscenity” (Dunkelberger 1681). Under this provision, certain expressions can be considered obscene and unprotected when experienced by a minor (1681). Because the *Ginsberg* case dealt specifically with sexual material, the Court viewed the case as means to protect minors from just sexual obscenity. In the *Merchants Association* case, the Court ruled that violent games do not qualify for “variable obscenity” because the precedent only prohibits minors from viewing explicit sexual conduct (1681). Both the *Miller* and *Ginsberg* cases allow the Court to classify violent video games as protected speech and to prohibit restrictions on the sale of them.

Due to the intense graphic content of violent video games, the United States Supreme Court should add provisions involving violence to the *Miller* and *Ginsberg* precedents in order to protect minors. In 2015 alone multiple hardcore violent video games were released. According to

an article by Jonathan Beach, some of the most graphic images include a scene from the 2015 *Metal Gear Solid 4: Guns of the Patriots* game in which players must accomplish tasks as armed combatants. Beach writes, “Snake, a character in the game, crawls agonizingly through a seeming never-ending corridor of radioactive torture inside Outer Haven. Otacon, Snake’s partner, desperately begs him not to give up, to forget about the pain.” This scene graphically depicts various torture methods using gun and radioactive violence as the users must navigate their character down the torturous hallway. Images such as this are gruesome and unnerving, making them obscenely violent. Other images from other games include realistic depictions of murder, rape, and torture. Even in his dissenting opinion on *Brown v. Entertainment Merchants Association* justice Stephen Breyer writes, “But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13 year-old of an interactive videogame in which he actively, but virtually, binds and gags the woman, then tortures and kills her?” (Herard 523). Breyer makes the important comparisons between sexual and violent conduct. Both forms are inappropriate and should be blocked from minors. Breyer’s quote clearly highlights the fact that violent video games should be considered obscene and unprotected speech. Under the *Merchants Association* case, I would have recommended that the Supreme Court add a “violent conduct” clause in the second provision of the Miller Test. Under this new rule, judges would be forced to classify certain violent video games, particularly ones with intense, gory images, as obscene in future cases. Including “violent conduct” would also add violence to the “variable obscenity” principle found in *Ginsberg*, potentially legalizing the prohibition of minors purchasing violent video games. The thin line between sexual and violent conduct would ultimately allow for the precedents behind *Miller* and *Ginsberg* to change.

In addition to rulings on the lack of obscenity, the United States Supreme Court based its decisions in *Brown vs. Entertainment Merchants Association* on the interest of state. Based on the principle of strict scrutiny combined with the skepticism surrounding the effects of violent video games, the Court ruled that the state has no major compelling interests in placing restrictions on the sale of violent video games (Dunkelberger 1659). According to the Cornell University Law School dictionary, “Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. To surpass strict scrutiny, the legislature must have passed the law to further a ‘compelling governmental interest,’ and must have narrowly tailored the law to achieve that interest.” In the *Merchants Association* case, the Court ruled that California had no explicit interest in allowing restrictions on the sale of violent video games. This ruling is most likely based on the lack of scientific evidence surrounding the long-term effects of violent video games. Because of this discrepancy, the Court believed that violent video games posed no potential threat to states. The Court maintains that without fundamental proof that violent video games promote aggressiveness, antisocial behaviors, and neurological defects states can not place restrictions on the sale of them (Dunkelberger 1660). Without a compelling state interest, violent video games will not receive less than strict scrutiny from Court, making restrictions on them unconstitutional.

The current evidence supporting the links between temporary aggression and playing violent video games serve as a clear indicator of potential state interest surrounding violent video games. Because realistic violent video games have not been around for a good amount of time, finding connections between playing the games and long-term effects, such as criminal activity, are hard to come by. However, numerous studies have been published that exhibit the short-term effects of violent video games. Recently, an article in the *Psychiatric Times* written by Gaël

Fournis and Nidal Nabhan Abou summarizes a list of psychological studies conducted over the past fifteen years on violent video games. Fournis and Abou conclude that while there is still debate surrounding the connections between violent video games and criminal activity, the links between temporary outbursts of aggression and the use of violent video games are very prominent. The authors write, “Data has shown an increase in aggressive moods or thoughts and hostility after playing violent video games and suggested impairment of prosocial behavior.” Through short-term effects involving aggressiveness, violent video games do affect the mind of users. Violent video games promote aggression and temporary antisocial behavior. The Court should view these findings with no skepticism; violent video games do cause behavioral changes in players. The consistent proof of short-term aggressiveness caused by violent video games is a strong piece of evidence that can be used to argue for state interest. While the games cannot yet be linked to severe criminal activity, the repeat of temporary aggression on video game users could lead to severe psychological damage. The Supreme Court needs to consider these effects before too much damage has been done to underage users. Overall, the proven short-term negative effects of violent video games should serve as a basis for state interest in placing restrictions of the sale of violent video games.

In addition to the already proven effects of violent video games, the realistic interactivity of violent video games, separating them from other forms of media, should serve as another basis for state interest. Video games differ from other forms of entertainment, such as movies and books, because the consumer is directly involved with the action. Video game players have the ability to control the plotline and actions of the characters in the story (Dunkelberger 1659). The interactivity aspect affects users every time they turn on the game. The blatant reminder of interactivity can even be found in a two-minute trailer for *Call of Duty: Black Ops III*. The

narrator includes, “Weapons don't have judgment. Soldiers do. What happens when the soldier becomes the weapon?” Players can literally “become the weapon” and virtually commit acts of violence. This major difference from other forms of entertainment should cause the Court to consider violent video games as a pressing state interest. People have the ability to virtually murder and hurt others. The strong control minors have over violent video games puts them directly at risk for possible harm. The Court needs to realize that violent video games are of great state interest and deserve to receive a ruling without strict scrutiny in order to protect young people.

The need for the Supreme Court to change its precedents on obscenity and state interest concerning violent video games is imperative. But, suppose the Court does in fact change its reasoning and rulings allowing states to place prohibitions on minors from purchasing violent video games. Various sale restriction systems exist that states could implement. First, the current “system” in the United States is a voluntary self-regulatory rating system set up by the Entertainment Software Association, an independent company. The ESA gives video games their ratings but has no authority to enforce who can buy the games based on their labels (Dogruel and Joeckel 678). If ruled constitutional, states will be permitted to implement new mandatory regulatory systems such as the system almost enacted in California or the USK system in Germany. The initial regulation system in California prohibited the sale of violent video games to persons under 18 with a \$1000 fine for each infraction (Dunkelberger 1662). The law also required stricter ratings from the ESA (1662). This system would work well and would prevent harmful material from reaching young people. Slightly less restrictive is the USK system in Germany. Under this process, a semi-governmental body creates ratings for video games based on German legislation that clearly protects minors from harmful content (Dogruel and Joeckel

678). While the actual purchasing system is self-regulatory, the initial ratings and legality of the games are closely monitored by government agencies (678). Under this system, minors do not receive full protection like in California but receive more than under the current system in the United States. If deemed constitutional, states could first implement a process similar to Germany's and then move to stricter restrictions if needed.

The United States Supreme Court has a duty to change the precedents surrounding the obscenity and state interest precedents of enacting sales restrictions on violent video games. Violent games should be considered obscene under the Miller Test based on their explicit graphic content. The games should also be considered of great state interest based on the evidence supporting the negative effects of the games and the games' realistic interactivity. If ruled legal, states have multiple options for implementing a stronger regulatory system. Understanding the legality of placing restrictions of the sale of violent video games is extremely important. With over 97% of teenagers playing video games in the United States, restrictions on violent video games have never been more useful (Norcia, sec. 3). The growth of the video game industry should serve as the wake-up call for the Supreme Court to change their precedents and ruling. Unless we want to see more aggressive middle-schoolers and more broken television sets, the Supreme Court must change its outlook on the sale of violent video games.



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