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From Research Conclusions to Real Change: Understanding the First Amendment's (Non)Response to the Negative Effects of Media on Children by Looking to the Example of Violent Video Game Regulations

Renee Newman Knake

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FROM RESEARCH CONCLUSIONS TO REAL CHANGE: UNDERSTANDING THE FIRST AMENDMENT'S (NON)RESPONSE TO THE NEGATIVE EFFECTS OF MEDIA ON CHILDREN BY LOOKING TO THE EXAMPLE OF VIOLENT VIDEO GAME REGULATIONS

*Renee Newman Knake**

Through the careful examination of a case taken up by the U.S. Supreme Court during the 2010 Term, Schwarzenegger v. Entertainment Merchants Ass'n, this article assesses a new perspective on the issue of regulating children's access to mass media.

The dominant influence of mass media on children is recognized by experts across many disciplines, including child development, communication theory, psychology, sociology, and medicine. Numerous studies demonstrate potential harm to children from exposure to mass media and marketing sources. Nevertheless, courts have been reluctant to recognize such consequences, primarily on the basis of First Amendment and free speech concerns. Indeed, in a significant line of cases the courts have invalidated every legislative effort to regulate children's access to violent video games. This legal reluctance presents a major barrier to the real world application of and benefit from research conclusions regarding the impact of media violence and consumer culture on children. While research of this nature has supported attempts at industry self-regulation or voluntary compliance with ethical guidelines, such efforts have achieved little success.

* Assistant Professor of Law, Michigan State University College of Law; J.D. University of Chicago Law School (1999). An earlier draft of this article was selected for presentation at the Children and the Law Junior Scholars Workshop hosted by Washington and Lee Law School in July 2009. Many thanks to all of the participants, especially Sacha Coupet, Vivian Hamilton, Joan Shaunessey, and Robin Fretwell Wilson for their comments and suggestions. Kevin Saunders deserves thanks as well for helpful feedback on this article as does Barbara Bennett Woodhouse for her inspiration and words of encouragement. I am grateful to Michigan State University College of Law for support in the research and writing of this article, including a generous summer research stipend. Additionally, the Michigan State University Law Library provided excellent research assistance coordinated by Jane Edwards and executed by Sarah Pulda. Tyler Gaastra, Christopher Iannuzzi, and Carrie Waggoner provided valuable editorial assistance. This article is based in part on a paper presented at the November 2009 Michigan State University Children's Central Conference, which was honored with an Innovation Award from MSU Children's Central and the Michigan Children's Trust.

The disconnect between law and social science has led scholars like Professor Barbara Bennett Woodhouse to propose a reframing of the issues. She calls for a paradigm shift from family law's traditional approach of the parent-child-state triangle to recognize the influence of what she terms "mass-media marketing." She proposes a new "child-centered approach to environmental ethics," or in her words "ecogenerism," and suggests that those who advocate for protection of children from the harms of mass media and marketing have much to learn from the environmental law and ethics movement.

Woodhouse's proposal offers an appealing perspective for those who support regulation of children's access to harmful media. The real issue, however, is whether ecogenerism will evolve from academic theory to actual practice. This article tests her theory by revisiting the line of violent video game cases to evaluate whether her ecogenerist perspective can achieve any real change in the courts' decisions. Particular attention is devoted to challenges presented by First Amendment free speech protections with a primary focus on the Ninth Circuit's decision in Schwarzenegger to invalidate a California statute prohibiting the sale or rental of violent video games to minors, a case that the Supreme Court is poised to soon decide. While some speculate that the Supreme Court is unlikely to reverse the Ninth Circuit's decision given the uniform position of other courts on this issue, this article reveals that an ecogenerist perspective demands a reversal by the Court precisely for that reason. Should the Court affirm the Ninth Circuit's invalidation of the statute, the article concludes by proposing recommendations for future research and regulatory efforts from an ecogenerist perspective.

I. INTRODUCTION

THIS article explores the implications of applying an ecogenerist¹ paradigm shift to reframe First Amendment jurisprudence regarding regulations that target the negative effects of mass media and marketing on children. The dominance of media influence on children is recognized by scholars across many disciplines, including child development, communication theory, psychology, sociology, and medicine.² Nu-

1. See generally Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85 (2004) [hereinafter Woodhouse, *Reframing*] (discussing the ecology of children, the effects of mass-media marketing on children, and the environmental approach to regulating these effects).

2. See, e.g., Karen E. Dill & Jody C. Dill, *Video Game Violence: A Review of the Empirical Literature*, AGGRESSION & VIOLENT BEHAV., Winter 1998, at 407, 408; Douglas A. Gentile, Muniba Saleem & Craig A. Anderson, *Public Policy and the Effects of Media Violence on Children*, 1 SOC. ISSUES & POL'Y REV., Dec. 2007, at 15, 17-20 [hereinafter Gentile, *Public*] (conducting a comprehensive overview of existing research on media violence effects); Douglas A. Gentile & Craig A. Anderson, *Violent Video Games: Effects on Youth and Public Policy Implications*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 225-46 (Nancy E. Dowd, Dorothy G. Singer, & Robin Fretwell Wilson eds., 2006) [hereinafter Gentile, *Violent*] (reviewing the history of violent video games and research of

merous studies demonstrate potential harm to children from exposure to mass media and marketing sources.³ The prevalence of childhood obesity and the increase of violent behavior in adolescents are among the list of potential negative effects.⁴

Legislators at the federal, state, and local levels have made frequent attempts to address the media's perceived negative influence on children, ranging from taxation of certain media to limitations or complete bans on access.⁵ Over the past decade, at the federal level alone, Congress has introduced dozens of bills related to the media's impact on children.⁶ Administrative agencies like the Federal Communications Commission (FCC)⁷ and the Federal Trade Commission (FTC)⁸ also have been active in regulatory endeavors and policy change.

In contrast to legislatures and agencies, the courts historically have been reluctant to recognize media's effects on children; for example, courts have invalidated every regulatory limit on children's access to violent video games or similar materials, primarily on the basis of First Amendment and free speech concerns.⁹ Only rarely have courts upheld

video game effects); Press Release, Am. Acad. of Pediatrics et al., Joint Statement on the Impact of Entertainment Violence on Children (July 26, 2000) [hereinafter Joint Statement].

3. See, e.g., Gentile, *Public*, *supra* note 2, at 25–36 (finding that a strong case exists for concluding that exposure to media violence causes aggressive and violent behavior based upon the fact that the three most commonly used research designs—experimental, cross-sectional, and longitudinal studies—yield similar results); see also *infra* notes 12–17 and accompanying text.

4. For discussion on increased violent behavior or aggression attributed to media violence, see generally *id.* and Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. MICH. ST. U. DET. C.L. 51, 67–69 (2003) [hereinafter Saunders, *Regulating*] (summarizing laboratory, field, and correlation studies involving media violence and observing “[d]espite shortcomings in any given experiment, the aggregate of social science and psychological research clearly demonstrates a connection between media violence generally and real world violence”). For discussion on childhood obesity and media marketing influences, see generally Jess Alderman, Jason A. Smith, Ellen J. Fried & Richard A. Daynard, *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90 (2007) (reviewing legal responses to the marketing of junk food to children and the childhood obesity epidemic).

5. For example, in 2008, New Mexico State Representative Gail Chasey introduced the Leave No Child Inside Act (H.B. 583, 48th Leg., 2d Sess. (N.M. 2008)) requiring New Mexico consumers to pay an excise tax on the purchase of video games and related equipment, the proceeds of which would be used to fund outdoor education for children. See also cases discussed *infra* Part III.B.

6. See Survey of Proposed Federal Legislation Regarding Media and Marketing Harm to Children 1999–2009 (on file with author).

7. See generally FCC, *In the Matter of Violent Television Programming and Its Impact on Children*, 22 FCC Rcd. 7929 (2007).

8. See generally FTC, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF REGULATION ES-2* (2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FIFTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2007), available at <http://www.ftc.gov/reports/violence/070412marketingViolentchildren.pdf>.

9. See *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), cert. granted sub. nom. *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (Apr. 26, 2010) (No. 08-1448) (video games); *Entm't Software Ass'n v. Swanson*, 519 F.3d

laws that prohibit the marketing of harmful products to children.¹⁰ This legal reluctance presents a major barrier to the real-world application of and benefit from research conclusions regarding the impact of consumer culture and media harm on children. While the research has supported attempts at industry self-regulation (e.g., industry ratings systems and advisory labels) or voluntary compliance with ethical guidelines, such efforts have achieved little success.¹¹

The debate about regulation of media and marketing impacts on youth has been covered exhaustively in social science journals and law reviews, with well-argued positions supporting both sides.¹² On the one hand, research studies numbering in the hundreds (if not thousands, as some suggest¹³) document the harmful effects of media on children, ranging from poor nutrition to increased violence and aggression.¹⁴ Indeed, a group of leading professional health organizations, including the American Acad-

768, 770–72 (8th Cir. 2008), *aff'g* Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065 (D. Minn. 2006) (video games); Interactive Digital Software Ass'n v. St. Louis Cnty., 329 F.3d 954, 956–60 (8th Cir. 2003) (video games); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 580 (7th Cir. 2001) (video games); Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63, 64 (2d Cir. 1997) (trading cards); Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 685 (8th Cir. 1992) (motion pictures/video cassettes); Entm't Merchs. Ass'n v. Henry, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007) (video games); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006) (video games); Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823, 837 (M.D. La. 2006) (video games); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1083 (N.D. Ill. 2005), *aff'd on other grounds*, 469 F.3d 641 (7th Cir. 2006) (video games); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004) (video games); *see also* James v. Meow Media, Inc., 300 F.3d 683, 687 (6th Cir. 2002) (tort liability for manufacturers of violent video games).

10. *See, e.g.*, Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73, 75 (Cal. 1994), *rev'd on other grounds sub. nom* In re Tobacco Cases II, 163 P.3d 106 (2007) (finding unlawful the use of “Old Joe Camel” in advertising campaigns targeting minors “for the purpose of inducing and increasing their illegal purchases of cigarettes”). Notably, this case was decided on federal preemption grounds, not First Amendment issues. R.J. Reynolds argued that the state’s restrictions on tobacco advertising were preempted by the Federal Cigarette Labeling and Advertising Act but the court disagreed, and the parties reached a settlement agreement. *See generally* Settlement and Consolidation Agreement, Mangini v. R.J. Reynolds Co., No. 939359 (Cal. Sup. Ct. Sept. 8, 1997), available at <http://www.tobacco.neu.edu/litigation/hotdocs/mangini.htm>.

11. *See, e.g.*, FCC, *supra* note 7, at 7931, 7942 (finding that current program blocking technology like the V-chip and the television ratings system are ineffective in protecting children from media violence).

12. Compare MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001) [hereinafter HEINS, FRONT], and Catherine J. Ross, *Constitutional Obstacles to Regulating Violence in the Media*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE, *supra* note 2, at 291–310 [hereinafter Ross, *Constitutional*], with KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT (2003), and Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI-KENT L. REV. 3, 24–27 (2004).

13. *See* Joint Statement, *supra* note 2, ¶ 4 (finding that “over 1,000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children”). *But see* JONATHAN L. FREEDMAN, MEDIA VIOLENCE AND ITS EFFECTS ON AGGRESSION: ASSESSING THE SCIENTIFIC EVIDENCE 241 (2002) [hereinafter FREEDMAN, MEDIA] (suggesting that “the figure is wildly inaccurate” and observing that “the fact is that there are around 200 separate scientific studies that directly assess the effects of exposure to media violence on aggression or on desensitization”).

14. *See supra* notes 2–8 and accompanying text.

emy of Pediatrics, the American Medical Association, and the American Psychological Association, concluded nearly ten years ago, “based on over 30 years of research, . . . that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children,” and that this research “point[s] overwhelmingly to a causal connection between media violence and aggressive behavior.”¹⁵ More recently, a 2007 comprehensive review of experimental, cross-sectional, and longitudinal studies on media violence concluded that exposure to media violence causes aggressive and violent behavior,¹⁶ and the research continues to advance.¹⁷

On the other hand, courts and free speech advocates are concerned with any attempt to limit children’s access to material based upon content, especially if that limit might impair adult free speech rights.¹⁸ Such regulations are viewed as cutting to the very core of democratic principles as well as parental authority and autonomy. Moreover, some scholars argue that exposure to media violence does not necessarily harm children, and some even suggest that media violence provides a healthy outlet for violent tendencies children might otherwise act upon.¹⁹ Critics of the social science submit that the findings of media harms are supported by flawed research or inconclusive results and, in some cases, are even mischaracterized, exaggerated, or the opposite of what is reported.²⁰ Many of these criticisms are centered on outdated research, in some cases research conducted over twenty-five years ago.²¹ The primary scientific-based study supporting the position that no correlation exists between

15. See Joint Statement, *supra* note 2, ¶ 4.

16. See Gentile, *Public*, *supra* note 2, at 25–36.

17. See, e.g., Brad J. Bushman & Craig A. Anderson, *Comfortably Numb: Desensitizing Effects of Violent Media on Helping Others*, *PSYCHOL. SCI.*, Mar. 2009, at 275–77 (reporting on results of two studies involving participation in violent video game play and concluding that “findings from both studies suggest that violent media make people numb to the pain and suffering of others”); Victor C. Strasburger, Amy B. Jordan & Ed Donnerstein, *Health Effects of Media on Children and Adolescents*, *PEDIATRICS*, Apr. 2010, at 756, 756 (Concluding that recent evidence from research about the effects of media on the health and well-being of children “raises concerns about media’s effects on aggression, sexual behavior, substance use, disordered eating, and academic difficulties”).

18. See generally Marjorie Heins, *On Protecting Children—From Censorship: A Reply to Amitai Etzioni*, 79 *CHI.-KENT L. REV.* 229 (2004) [hereinafter Heins, *Protecting*]; Ross, *Constitutional*, *supra* note 12.

19. See, e.g., Heins, *Protecting*, *supra* note 18, at 247–49 (summarizing the work of “humanist media scholars” and explaining that “often, the effects are cathartic, providing vicarious adventures or harmless outlets for aggression, as researchers like [David] Buckingham, [Jeffrey] Arnett, [Henry] Jenkins, and others have found”); see also Laurie N. Taylor, *Positive Features of Video Games*, in *HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE*, *supra* note 2, at 247 (arguing that for “many children certain video games can be both positive and necessary”).

20. See Heins, *Protecting*, *supra* note 18, at 241 (discussing the work of Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 *PSYCHOL. BULL.* 227 (1984), who “found several instances of researchers manipulating results to bolster their theories”). Heins further observes that “social-science researchers are subject to the usual human frailties, including the desire for prestige, career advancement, grant money, and recognition for announcing results that political leaders and at least a portion of the public want to hear.” Heins, *Protecting*, *supra* note 18, at 246.

21. See *id.* at 239–41.

media violence and increased aggression or violence in children was published several years ago²² and so could not take into account the significant advances that have occurred and are still continuing to occur in mass media research.²³

How, then, should future research and regulation respond to the courts' continued rejection of the social science? Certainly researchers can carry on pursuing studies that might provide sufficiently strong evidence to withstand challenges under the existing legal framework. Some suggest it is only a matter of time before science can meet the exacting causation standard that courts currently demand.²⁴ Legislators, for their part, can continue to draft language in the hope of achieving a sufficiently precise statute that can survive review under existing First Amendment jurisprudence. Perhaps the problem lies not with a lack of advancement in the research or a need to further refine statutory language but instead with the entire approach.

This is not the first occasion in American history where the law has failed to recognize a harm warranting action and redress. For example, as child and family law scholar Barbara Bennett Woodhouse argues, “[e]xperts who study the ecology of childhood have been sounding a warning call much like that of the early environmentalists.”²⁵ “In order to address the [environmental] crisis,” Woodhouse notes, environmental activists had to push the law “to find a new way to conceptualize the public/private dichotomy, rather than characterizing regulation as an intrusion on discrete parcels of private property.”²⁶ Likewise, perhaps the time has come for child activists to push the law to find a new way to conceptualize media and marketing impacts.

Woodhouse proposes that these issues be considered through a new branch of environmental ethics, in her words “ecogenerism,” or “a child-centered approach to environmental ethics.”²⁷ She calls for a paradigm

22. See FREEDMAN, *MEDIA*, *supra* note 13, at 200–01 (“[T]his comprehensive review of the scientific evidence leads to two clear conclusions. First . . . the research does not provide overwhelming support for either the causal hypothesis or the desensitization hypothesis. On the contrary, the evidence for both hypotheses is weak and inconsistent, with more non-supportive results than supportive results. Second . . . exposure to media violence does not cause aggression, or if it does the effects are so weak that they cannot be detected and must therefore be vanishingly small.”). If Heins’s criticism, see *supra* notes 12–18, regarding the human frailties of social science researchers is correct, though, it must be noted that Freedman’s review was commissioned by the Motion Picture Association of America. *Id.* at x.

23. Gentile, *Public*, *supra* note 2, at 25–36; see also discussion *supra* note 17 and accompanying text.

24. See Kevin W. Saunders, *Shielding Children from Violent Video Games through Ratings Offender Lists*, 41 IND. L. REV. 55, 55 (2008) [hereinafter Saunders, *Shielding*] (explaining that “each time a legislature tries to limit the access of children to violent video games, courts must examine the science anew. The continued development of social science, and the new insights being provided by neuroscience, make the possibility that courts will [uphold regulations] at some point in the future very real”) (citation omitted).

25. Woodhouse, *Reframing*, *supra* note 1, at 94.

26. *Id.*

27. *Id.* at 86.

shift and contends that those who advocate for the protection of children from the harms of mass media and marketing have much to learn from the environmental law and ethics movement.²⁸ Her proposal offers an appealing perspective for those who support regulation to protect children from media and marketing harm. The real issue, however, is whether ecogenerism can evolve from academic theory to actual practice.

This article tests Woodhouse's theory in one narrow area of mass media regulatory action—laws limiting children's access to violent video games. The line of violent video game cases serves as a good tool in this regard for several reasons. First, the state of the social science is most compelling in the video game context, because the science demonstrates a strong correlation between violent video game play and increased violent or aggressive behavior in children.²⁹ Second, legislative bodies across the country have found the social science sufficient to warrant state regulation.³⁰ Third, the courts consistently reject this same social science, a common problem for regulation of other mass media forms as well.³¹

A primary focus of this article is the Ninth Circuit's recent decision in *Video Software Dealers Ass'n v. Schwarzenegger* to invalidate a California statute prohibiting the sale or rental of violent video games to minors, a decision the Supreme Court will review during the 2010 Term.³² Some speculate that the Supreme Court is unlikely to reverse the Ninth Circuit's decision given the uniform position of other courts on this issue.³³ This article reveals that an ecogenerist perspective demands a reversal by the Court for precisely that reason.

Part II of this article provides a concise but critical summary of relevant First Amendment law, including a review of the courts' treatment of legislative efforts to regulate mass media and marketing effects on children. Part III considers Professor Woodhouse's proposal for a paradigm shift and evaluates the efficacy of her ecogenerist principles by applying them to the violent video game cases. Part IV concludes that principles of ecogenerism support a reversal of the Ninth Circuit's decision in *Schwarzenegger* notwithstanding the significant First Amendment con-

28. See *id.* at 85–86.

29. See *id.* at 116 (“A child who plays interactive video games featuring violence is more likely to behave violently.”).

30. See *id.* at 121 (discussing the experiences of federal agencies attempting to regulate in this area).

31. *Id.* at 104–05.

32. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), cert. granted sub nom. *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (Apr. 26, 2010) (No. 08-1448). Oral argument in the case is set for November 2, 2010.

33. See Linda Greenhouse, *The Court As Mr. Fix-It?*, N.Y. TIMES, Apr. 30, 2010, at A19 (opining that it is “baffling” that the court would hear the case because of the consistent rulings in the lower courts); see also Bill Mears, *High court accepts case over violent video games*, CNN (Apr. 27, 2010), available at http://articles.cnn.com/2010-04-26/justice/scotus.violent.video.games_1_violent-video-games-ratings-system-gaming-industry?_s=PM:CRIME (pointing out such laws have been “rejected”). See also *supra* note 9 for examples of similar regulations the court has rejected.

cerns involved. Should the Supreme Court decline to do so, this article offers recommendations for future research and regulation.

II. THE LAW'S (NON)RESPONSE TO THE NEGATIVE EFFECTS OF MASS MEDIA ON CHILDREN

A. UNDERSTANDING THE FIRST AMENDMENT OR WHY LEGISLATIVE ACTION CONSISTENTLY MEETS JUDICIAL REJECTION

Concern exists for a wide range of media content viewed by children, including (but not limited to) material that promotes commercialism, poor self-image, unhealthy diet, and violent or aggressive behavior.³⁴ While all of these issues are significant to children's well-being, violent video game content has been the subject of frequent regulatory attempts³⁵ and thus is a primary focus here. Another area of heightened regulatory attention has been sexual material, particularly material considered indecent but not rising to the level of obscenity, which, as discussed more fully below, does not enjoy First Amendment protection.³⁶ This article touches on, without fully exploring, the regulation of children's access to indecent material because exposure to such material raises concerns relevant to the violent video game debate.³⁷

The law governing the constitutionality of regulating mass media harm to children is difficult to navigate or predict. Different standards apply depending on the nature of the regulation (e.g., content-based, content-neutral, or something in between), the form of media subject to regulation (e.g., broadcast and cable television, film, radio, video games, the Internet, etc.), and the degree of constraint imposed. The complexity multiplies when these forms of media converge. For example, should a different standard apply to a television show depicting graphic sex or violence aired during the day on broadcast television than to the same show made available on the Internet, a DVD, or a cellular telephone? Furthermore, in the few cases where the Supreme Court has addressed questions critical to the constitutional analysis in this area, the opinions are highly fact driven and have proven difficult to apply in similar but not directly related contexts.

One point of clarity is that any regulation of children's access to media must not violate the free speech clause of the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech."³⁸ This protection has been extended by the courts to cover me-

34. See, e.g., *Gentile, Public*, *supra* note 2, at 25–36.

35. See discussion of cases cited *infra* notes 144–98 and accompanying text.

36. See *id.* at 143; see also Alan Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 625–34 (2005).

37. For a comprehensive discussion of indecency and children, see generally HEINS, FRONT, *supra* note 12. See also Garfield, *supra* note 36, at 625–34.

38. U.S. CONST. amend. I (made applicable to the states by U.S. CONST. amend. XIV).

dia like television,³⁹ radio,⁴⁰ motion pictures,⁴¹ video games,⁴² and the Internet.⁴³ The Supreme Court has long recognized that the First Amendment protects “[e]ntertainment, as well as political and ideological speech.”⁴⁴ Acknowledging the complexity of First Amendment law in this context, Professor Alan Garfield, in his comprehensive review of law and policy relevant to government censorship of speech for children, has gleaned “three overarching principles” to guide understanding: first, in some circumstances the government may deny children access to speech that cannot be denied to adults; second, children have certain free speech rights that can “trump the government’s interest in censorship” regulation; and third, if a regulation designed to protect children “incidentally denies adults access to speech,” serious constitutional concerns are raised.⁴⁵

Laws designed to limit children’s access to harmful media usually are content-based and, therefore, subject to strict scrutiny.⁴⁶ This is often the death knell for a statute, since laws subject to strict scrutiny are presumed invalid.⁴⁷ Strict scrutiny requires that the government show a compelling interest in regulating the subject matter and use the least restrictive means in achieving that interest.⁴⁸ The purpose of strict scrutiny is to protect speech, even if it is controversial, unpopular, unhealthy, or violent.⁴⁹ Strict scrutiny is an incredibly difficult test to satisfy. Nowhere is this more apparent than in the context of government efforts to regulate children’s access to various forms of mass media and marketing. Professor Catherine Ross has written exhaustively on the serious difficulties governments face in satisfying the strict scrutiny standard, particularly with respect to demonstrating a compelling interest.⁵⁰ She acknowledges,

39. See, e.g., *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 826–27 (2002) (applying First Amendment protections to strike down regulations on cable television).

40. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748–51 (1978) (applying the First Amendment and upholding a federal law banning indecent language from radio broadcast).

41. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (finding that motion pictures fall under the First Amendment).

42. See, e.g., *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 956–58 (8th Cir. 2003) (holding that violent video games are protected speech under First Amendment but noting the lower court’s conclusion to the contrary).

43. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (invalidating the Communications Decency Act’s regulation of indecent material on the Internet).

44. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

45. Garfield, *supra* note 36, at 569–70 (citations omitted).

46. See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (applying strict scrutiny to content-based speech restrictions).

47. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

48. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”) (citations omitted).

49. See, e.g., *id.* at 826 (“The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.”)

50. See generally Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000).

conversely, that it is “not necessarily impossible” to create regulations governing controversial speech and children so long as the targeted speech is carefully defined and tied to a specific harm.⁵¹ To overcome these difficulties, she counsels:

[L]egislatures and administrative agencies would need to demonstrate that the speech actually harms children, that the private market or other means are unable to provide remedies for parents who seek them, and that the regulation would actually facilitate the choices made by parents, including all of the diverse views of non-conformist parents.⁵²

To date, no legislative body or administrative agency has successfully accomplished this task, at least according to the reviewing courts.

Certain categories of speech are subject to less protection or no protection at all. For example, “defamation, incitement, obscenity, and pornography produced with real children” are not protected speech under the First Amendment.⁵³ Likewise, certain forms of media, such as broadcast radio, receive less protection, as seen in *FCC v. Pacifica Foundation*.⁵⁴ For purposes here, the notable categories are incitement and obscenity, along with the *Pacifica* case, which offers a possible argument for a lower level of scrutiny, at least for broadcast media. The incitement and obscenity category are both addressed in turn below in the context of violent video game regulations. *Pacifica* is taken up briefly later in the article.

1. *Applying Incitement and Obscenity to Violent Video Game Regulations*

a. Incitement

The exception of incitement from free speech protection is based upon the Supreme Court case *Brandenburg v. Ohio*, which held that the government may regulate otherwise protected speech if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵⁵ Some have made the case that violent media may be regulated under this exception. The argument has failed because social science evidence has not demonstrated that video media directs or incites violent acts. For example, in *American Amusement Machine Ass’n v. Kendrick*, the Seventh Circuit rejected the studies submitted by the city to support a violent video game ordinance because the research failed to prove (1) that video games caused someone to commit an act of violence rather than simply aggressive behavior or (2) that video games caused an

51. *Id.* at 523.

52. *Id.*

53. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

54. 438 U.S. 726, 748–50 (1978).

55. 395 U.S. 444, 447 (1969).

increase in the average level of violence.⁵⁶ Another problem with the incitement exception is timing, for “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”⁵⁷ Thus, to satisfy *Brandenburg*, the government would have to show that a violent act occurred immediately after exposure to the violent media.⁵⁸

b. Obscenity

Obscenity has been defined by the Supreme Court as “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁵⁹ Obscene speech receives no First Amendment protection, which means that speech falling under this definition can be regulated.⁶⁰ In seeking similar treatment of violent material, academics and legislators have reasoned that courts ought to extend the obscenity exception to violence. The leading proponent is Professor Kevin Saunders, who maintains that extreme violence, by definition, is obscene and should be treated as such under the First Amendment.⁶¹ As a Washington federal district court considering this argument explained:

The Latin root “obscaenus” literally means “of filth” and has been defined to include that which is “disgusting to the senses” and “grossly repugnant to the generally accepted notions of what is appropriate.” [Thus,] [g]raphic depictions of depraved acts of violence, such as the murder, decapitation, and robbery of women in [the video game] *Grand Theft Auto: Vice City*, fall well within the more general definition of obscenity.⁶²

56. 244 F.3d 572, 578–79 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001). For other courts rejecting the incitement exception in the context of violent video game legislation, see *Entm’t Merchs. Ass’n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097, at *5 (W.D. Okla. Sept. 17, 2007); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 832–33 (M.D. La. 2006); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 652 (E.D. Mich. 2006); *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1073 (N.D. Ill. 2005); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1187 n.3 (W.D. Wash. 2004).

57. *Free Speech Coal.*, 535 U.S. at 253; *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

58. See, e.g., *Blagojevich*, 404 F. Supp. 2d at 1073 (finding the *Brandenburg* test unmet in context of violent video games).

59. *Miller v. California*, 413 U.S. 15, 24 (1973). The Supreme Court first recognized the obscenity exception in *Roth v. United States*, 354 U.S. 476, 492 (1957), but *Miller* sets forth the test as it currently is applied.

60. *Miller*, 413 U.S. at 23.

61. See generally KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION* 202 (1996) [hereinafter SAUNDERS, *VIOLENCE*] (“establish[ing] a basis in constitutional law and theory for the inclusion of violence within the concept of obscenity”); see also Saunders, *Regulating*, *supra* note 4, at 78–93 (“conclud[ing] that the ordinary language meaning of ‘obscene,’ the case law in constitutionally relevant periods, and the first amendment [sic] policy arguments that justify the obscenity exception all speak just as well to violence as to sex”).

62. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004) (citation omitted).

And as the Seventh Circuit has noted, “[i]n common speech, indeed, ‘obscene’ is often just a synonym for repulsive, with no sexual overtones at all.”⁶³ Both courts declined, however, to adopt the broad, common definition of obscenity.⁶⁴ Like all other courts considering this argument, they limited the legal definition of obscenity to sex-related material.⁶⁵ The argument that violence should be treated as a separate category excepted from First Amendment protection has been equally unsuccessful. Invariably, courts apply strict scrutiny to invalidate regulations prohibiting children’s access to violent materials.⁶⁶

c. Variable Obscenity/Harmful to Minors

Another argument advanced in a number of cases⁶⁷ is that extreme violence can be regulated under *Ginsberg v. New York*.⁶⁸ In *Ginsberg*, the Supreme Court held that a state may prohibit the sale of sexually explicit materials to children even when those materials would not be considered obscene for adults.⁶⁹ The statute at issue criminalized the sale of material to minors that the legislature found to be “harmful to minors” and was intended to target material containing nudity as well as sexual descriptions, what the Court called “‘girlie’ magazines.”⁷⁰ In upholding the statute, the Court observed that, based upon an “exigent interest in preventing distribution to children of objectionable material, [the government] can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.”⁷¹

To reach this result, the Court applied the concept of a “variable obscenity” to find that non-obscene materials could be treated as obscene for minors.⁷² “In other words,” the Court explained, “the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quaran-

63. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001).

64. *See Maleng*, 325 F. Supp. 2d at 1185 (“Nevertheless, the Supreme Court has found that, when used in the context of the First Amendment, the word ‘obscenity’ means material that deals with sex.”); *see also Kendrick*, 244 F.3d at 574 (same).

65. *See Maleng*, 325 F. Supp. 2d at 1185.

66. *See, e.g.*, discussion of cases cited *infra* Part III.B.

67. *See, e.g.*, discussion of cases cited *infra* Part III.B.

68. *See generally* 390 U.S. 629 (1968).

69. *Id.* at 636–37.

70. *Id.* at 631–32. The term “harmful to minors” was intended to address sex-based material, and defined by the statute as material:

in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

Id. at 646.

71. *Id.* at 636 (citation omitted).

72. *Id.*; *see also* SAUNDERS, VIOLENCE, *supra* note 61, at 49–50.

ted.”⁷³ Thus, *Ginsberg* allows a state to define obscenity in a variable way, applying one definition to adults and another to children. Classifying the materials as such allowed the Court to apply the rational basis test to uphold the challenged statute.⁷⁴ The Court offered two justifications: (1) “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society”⁷⁵ and (2) the government “has an independent interest in the well-being of its youth.”⁷⁶

Following this reasoning, so the argument goes, extremely violent material is also harmful to minors and deserves no First Amendment protection. Thus, a statute limiting children’s access to violent media would survive as long as it “was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.”⁷⁷ Though courts often acknowledge the justifications of parental authority and children’s well-being, no court has relied on them to apply rational basis review to violent media laws, and all courts have rejected the argument to extend *Ginsberg* to materials unrelated to sex, as discussed more fully in Part III.⁷⁸

2. Other Constitutional Concerns

Also important to note in discussing constitutional issues for media regulation are concerns that the challenged language is vague, under-inclusive, or overbroad. Courts will strike a law as “unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted.”⁷⁹ For example, in *Entertainment Software Ass’n v. Foti*, the court found Louisiana’s regulation on children’s access to violent video games unconstitutionally vague because it “fails to provide specific definitions of prohibited conduct: many of its terms, such as ‘morbid interest,’ have no clear meaning; and there is no explanation of crucial terms such as ‘violence.’”⁸⁰ Likewise, another frequent constitutional challenge is under-inclusiveness, particularly given that violent images appear in a variety of media forms and industries.⁸¹ In reviewing other cases that addressed legislative efforts to limit children’s access to violent video games, the *Foti* court observed that “[c]ourts have noted that this

73. *Ginsberg*, 390 U.S. at 636 (citation omitted).

74. *Id.* at 643.

75. *Id.* at 639.

76. *Id.* at 640.

77. *Id.* at 641.

78. See, e.g., *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009), cert. granted sub nom. *Schwarzenegger v. Entm’t Merchs. Ass’n*, 130 S. Ct. 2398 (Apr. 26, 2019) (No. 08-1448) (observing that “the State confirmed that it is asking us to boldly go where no court has gone before. We decline the State’s entreaty to extend the reach of *Ginsberg* and thereby redefine the concept of obscenity under the First Amendment.”).

79. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 910 (2d ed. 2002).

80. *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 835–36 (M.D. La. 2006).

81. See, e.g., *id.* at 833.

type of facial under inclusiveness undermines the claim that the regulation materially advances [the government's] alleged interests."⁸² Last, courts are concerned with overbreadth, meaning that the language of the regulation covers more than what the purported governmental interest intends. For example, in *Video Software Dealers Ass'n v. Maleng*, the court found a ban on video games containing any violence toward a "public law enforcement officer" overbroad because the restricted materials even included "laudable struggles against evil authority figures . . . [and] unintentional harm."⁸³

B. THE FORM OF MEDIA MATTERS, SOMETIMES

The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems."⁸⁴ Accordingly, before moving on to consider the ecogenerist invitation to reframe the debate on child protective media restrictions, it is helpful to summarize the concerns unique to particular media forms. This discussion is not meant to be comprehensive but touches on key issues for several categories of media and serves as a useful background for assessing the holdings of the violent video game cases taken up in Part III.

1. *Television and Radio*

Broadcast television and radio represent two areas where the Supreme Court has been willing to extend less protection, at least in the case of indecent speech. In upholding a federal law banning indecent language from radio broadcasts, the Court in *FCC v. Pacifica Foundation* cited the unique concerns of broadcast media, namely its presence in the privacy of the home and its accessibility to children, to justify less First Amendment protection.⁸⁵ *Pacifica* was extended to broadcast television in *Action for Children's Television v. FCC*, which upheld the FCC's rules establishing time limits for indecent broadcasting.⁸⁶ But in the case of cable television, courts have rejected legislative efforts to regulate indecency and likely would do the same for other subscription media such as satellite radio.⁸⁷

As for regulating violence on television, the only successful legislation has been the Parental Choice in Television Programming Section of the

82. *Id.*

83. 325 F. Supp. 2d 1187, 1190 (W.D. Wash. 2004).

84. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1976).

85. *Id.* at 748-49.

86. *See Action for Children's Television v. FCC*, 59 F.3d 1249, 1260-62 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996).

87. *See Robert Corn-Revere, Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?* 30 S. ILL. U. L.J. 243, 249-58 (2006); *see also United States v. Playboy Entm't Grp.*, 529 U.S. 802, 826-27 (2000) (holding that a provision of the federal Telecommunications Act of 1996 requiring cable operators either to scramble sexually explicit channels in full or limit such programming to certain hours was unconstitutional).

Telecommunications Act,⁸⁸ in which Congress implemented what is commonly known as the V-chip⁸⁹ along with the requirement of a voluntary ratings system on both broadcast and cable television. Proponents were hopeful that the V-chip would effectively provide parents the ability to control children's exposure to harmful television, but the FCC and others have documented the failings of this system.⁹⁰ Subsequent legislative attempts to regulate broadcast violence have been unsuccessful.⁹¹ While the FCC recently issued a report finding that Congress could constitutionally regulate excessively violent programming harmful to children under *Pacifica*,⁹² the courts are likely to disagree.⁹³

2. Marketing and Advertising

For the most part, attempts to place limits on marketing and advertising to children have met a fate similar to that of violent video game regulations.⁹⁴ Even efforts to regulate advertising of products that are illegal for children to possess have been viewed with great suspicion by the courts, though some regulations have been permitted, such as a ban on television tobacco advertisements.⁹⁵ Because of First Amendment concerns, the FTC has encouraged industry self-regulation, and, accordingly, the motion picture, music, and electronic game industries have developed extensive ratings systems.⁹⁶ Though in practice, as demonstrated by FTC

88. See Telecommunications Act of 1996, Parental Choice in Television Programming, Pub. L. No. 104-104, § 551, 110 Stat. 56, 139 (1996) (codified in scattered sections of 47 U.S.C.).

89. *Id.*

90. See FCC, *supra* note 7, at 7931.

91. See, e.g., Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005); Broadcast Decency Enforcement Act of 2005, H.R. 310, 109th Cong. (2005); Broadcast Decency Enforcement Act of 2004, S. 2056, 108th Cong. (2004).

92. See FCC, *supra* note 7, at 7940.

93. See Faith M. Sparr, *The FCC's Report on Regulating Broadcast Violence: Is the Medium the Message?* 28 LOY. L.A. ENT. L. REV. 1, 10-12 (2007) (criticizing the FCC's report as a cursory overview at best, lacking in realistic proposals, and failing to address the inadequacies of the social science findings as well as the high hurdles imposed by the First Amendment or the regulations proposed).

94. See generally Randolph Kline, Samantha Graff, Leslie Zellers, & Marice Ashe, *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603 (2006) (reviewing legal difficulties in controlling the effects of mass media advertising and marketing of unhealthy products to children and proposing strategies for future efforts).

95. See *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584-85 (D.D.C. 1971), *aff'd sub nom. Capital Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972). Most restrictions on tobacco advertising, however, have been invalidated. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-67 (2001). Indeed, the American Civil Liberties Union already has expressed concern with advertising restrictions contained in the recently adopted federal Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). See Letter from ACLU to U.S. Senate (June 1, 2009), available at http://www.aclu.org/free_speech/aclu_letter_senate_family_smoking_prevention_and_tobacco_ctrl_act/ (calling for narrowing on First Amendment grounds of advertisement restrictions).

96. See FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FIFTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING AND ELECTRONIC GAME INDUSTRIES*, *supra* note 8.

studies, these ratings systems have proven ineffective.⁹⁷

3. Internet

Congress has made several efforts to protect children from harmful Internet content, notably through the Communications Decency Act⁹⁸ and the Child Online Protection Act.⁹⁹ These efforts also have failed when challenged on First Amendment grounds.¹⁰⁰ One exception has been *United States v. American Library Ass'n*,¹⁰¹ where the Supreme Court upheld the Children's Internet Protection Act,¹⁰² requiring schools and libraries that receive federal aid to install filters on all computers.¹⁰³ Another area of emerging media is online social networks such as Facebook or MySpace. Here, concerns may extend far beyond violent content exposure to include protection from sexual predators, identity theft, and reputational harms.¹⁰⁴ Regulation has yet to occur, but it is important to recognize that advances in technology will only continue to present new kinds of media where potential harm to children ought to be examined and, if appropriate, regulated.¹⁰⁵

4. Video Games

One aspect of the video game that some contend make it unique from other media is the highly interactive nature.¹⁰⁶ It has been suggested that

97. FTC, *supra* note 96. For further discussion of efforts to control harmful marketing to children, see FTC, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION*, *supra* note 8.

98. See Communications Decency Act (CDA) of 1996, 47 U.S.C. § 223 (2000), *partially invalidated by Reno v. ACLU*, 521 U.S. 844 (1997).

99. See Child Online Protection Act, 47 U.S.C. § 231 (2000), *invalidated by Ashcroft v. ACLU*, 542 U.S. 656 (2004).

100. See *Ashcroft v. ACLU*, 542 U.S. at 660–61 (holding that the Child Online Protection Act violated the First Amendment); *Reno v. ACLU*, 521 U.S. at 882 (holding that the Communications Decency Act violated the First Amendment).

101. 539 U.S. 194, 209–14 (2003) (plurality opinion). Efforts to extend the reasoning of *American Library* for regulations limiting children's access to violent media have been unsuccessful. See, e.g., *Entm't Merchs. Ass'n v. Henry*, No. Civ-06-675-C, 2007 WL 2743097, at *4 (W.D. Okla. Sept. 17, 2007).

102. See Children's Internet Protection Act, 47 U.S.C. § 254(h) (2000).

103. *Am. Library Ass'n*, 539 U.S. at 199.

104. See Sheerin N. S. Haubenreich, *Parental Rights in MySpace: Reconceptualizing the State's Parens Patriae Role in the Digital Age*, 31 HASTINGS COMM. & ENT. L.J. 223, 253–54 (2009) (arguing that future reputational harm justifies government interest in regulating children's access to the Internet).

105. See *id.* at 249–53. See also Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 160 (2004) (arguing that courts ought to consider whether emerging media like video games are deserving of the same First Amendment protection as political speech and suggesting that failure to do so “poses a crowding-out problem: a situation where media content that has little value for a democratic society crowds out the kind of political and public interest speech that, according to Alexander Meiklejohn, the First Amendment is intended to protect”).

106. The interactive nature of video games frequently is raised in the context of school shootings where the assailants appeared to be heavily influenced by violent video game play. For a discussion of school shooting cases in which violent video games were involved, see Saunders, *Regulating*, *supra* note 4, at 52–55. See also *James v. Meow Media, Inc.*, 300

this characteristic makes it all the more important (and justifiable) to regulate children's access.¹⁰⁷ The courts considering this position have disagreed. For example, Judge Posner, writing for the majority in *Kendrick*, dismissed the interactivity of video games as no different from literature, movies, or television.¹⁰⁸ There have been few attempts to regulate sex-based content in video games, with only those regulations directly targeting obscenity surviving.¹⁰⁹ A handful of states have enacted laws that require video game sellers to post signs containing information about the availability of an industry rating system to aid in the selection of games.¹¹⁰ To date, none of these laws have been challenged. As discussed more fully in Part III.B, no law limiting children's access to violent video games has successfully withstood legal challenge despite numerous attempts.

C. REMAINING QUESTIONS

The myriad unsuccessful attempts to address mass media and marketing harm to children, only a sample of which are highlighted here, raise two key questions. First, at what point, if ever, will courts recognize a category of speech that causes harm to minors, such as extremely violent material, as undeserving of First Amendment protection? Second, given that courts consider current social science insufficient to justify regulation of harmful media under the First Amendment strict scrutiny test, how should future research and regulation be structured? As Part III reveals, the ecogenerist perspective advocated by Professor Woodhouse offers at least an initial response to both points of inquiry.

F.3d 683, 687–88 (6th Cir. 2002) (denying tort relief to parents of students killed when classmate discharged firearms in school who sued video, film, and Internet companies that produced violent material alleged to have influenced the killer).

107. See, e.g., Saunders, *Regulating*, *supra* note 4, at 71–72 (discussing causation and video games). Saunders observes that “[t]he interactivity of the violent video game in which the player himself responds using virtual violence would seem more likely to lead the player to respond with violence in future situations than would simply viewing characters on a screen,” but also concedes that research of violent video games “has not developed to the point” to support this conclusion. *Id.* at 71–72.

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

109. *Compare Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 643 (7th Cir. 2006) (invalidating statute that criminalized the sale or rental of sexually explicit video games to minors), with MD. CODE ANN., CRIM. LAW § 11-203 (LexisNexis 2009) (criminalizing the sale and display of obscene materials to minors).

110. See, e.g., WASH. REV. CODE § 19.188.040 (2007) (requiring video game retailer to “post signs providing information to consumers about the existence of a nationally recognized video game rating system, or notifying consumers that a rating system is available, to aid in the selection of a game if such a rating system is in existence”).

III. BRIDGING THE DIVIDE BETWEEN SOCIAL SCIENCE AND THE FIRST AMENDMENT: DOES ENVIRONMENTAL LAW OFFER A SOLUTION?

A. LOOKING TO ENVIRONMENTAL LAW AND ETHICS

The law's continued inability to recognize the negative effects of media and marketing on children—harm documented by social science and the medical community—has led some legal scholars to “examine this disconnect between law and reality . . . [by considering] the effect of the media and advertising industries on children's socialization.”¹¹¹ Professor Laura Rosenbury and others recognize that the traditional model, focusing on the role of parents and the state in the lives of children, fails to account for ways that the media and advertising “industries supplement, and often supplant, parental and state authority over children.”¹¹²

Perhaps the most radical proposal for reframing these issues has come from Professor Barbara Bennett Woodhouse, who:

argues for an EcoGenerist paradigm, based on ecological principles developed in the environmental arena, informed by the principle of generism, or the primacy of supporting and nurturing the next generation. She analogizes the violence in culture, with its known negative effects on children, to a toxic substance in children's environment, and calls upon us to learn from environmentalists how to think about and address the toxic qualities of children's cultural and social environment.¹¹³

For Woodhouse, “[a]n ecogenerist is committed to maintaining and restoring a healthy social and physical environment for the benefit of the next generation and generations to come.”¹¹⁴ She has employed her ecogenerism theory to advocate for reform to child welfare and protection laws in a variety of ways,¹¹⁵ but for purposes of this article the most

111. Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 849 (2007).

112. *Id.*; see also Garfield, *supra* note 36, at 602 (discussing justifications for “child-protection censorship” under a “harm theory” and a “parental support theory”); Etzioni, *supra* note 12, at 4 (proposing an alternative model that balances the “two core values” of free speech and protection of children).

113. Nancy E. Dowd, *Introduction* to HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE, at xxiii–xxiv (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006). This article provides a summary of ecogenerism but does not fully explore all dimensions of Woodhouse's proposed “canon of environmental ethics as the model for thinking about children's environmental protection.” Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 424 (2005) [hereinafter Woodhouse, *Ecogenerism*]. For a more detailed explanation of ecogenerism, see generally Woodhouse, *Ecogenerism*, *supra*, at 441–47; Woodhouse, *Reframing*, *supra* note 1, at 146–49.

114. Barbara Bennett Woodhouse, *Race, Culture, Class, and the Myth of Crisis: An Ecogenerist Perspective on Child Welfare: Keynote*, 81 ST. JOHN'S L. REV. 519, 528–29 (2007) [hereinafter Woodhouse, *Race*].

115. See, e.g., Woodhouse, *Ecogenerism*, *supra* note 113 (examining ecogenerism in the contexts of advertising targeted to children and the erosion of free play space); Woodhouse, *Race*, *supra* note 114, at 520–30 (examining ecogenerism in relation to foster care and child custody).

relevant aspect is her suggestion that the lessons learned by environmentalists can be drawn upon by those seeking to address media harm to children.¹¹⁶ Prior to the emergence of modern environmental law, state and local government could not “manag[e] the competing demands between the needs of local businesses, the need to grow, and resource protection.”¹¹⁷ Similarly, the competing demands associated with regulating media effects on children have become unmanageable.

According to Woodhouse, “mass-media marketing is not a benign entrepreneurial enterprise—it is a potentially destructive assault on children’s environment that we must strive to understand and attempt to regulate.”¹¹⁸ She uses the term “mass-media marketing” to describe what she characterizes as a “force . . . having a deleterious effect on the culture of childhood”¹¹⁹ and identifies several ways in which this force “has changed the ecology of childhood.”¹²⁰ These influences include the dominance of advertising, a diminished role of parents and adults in the lives of children, the disparate impact of adverse media effects on minority and poor children, and the harmful effects of violent or sexual media on children.¹²¹ “Mass-media marketing,” argues Woodhouse, “has displaced parental authority as the primary force in socializing our children, with profound impact on the social and cultural environment of childhood.”¹²²

In regulating mass media harm, ecogenerist theory “would place children at the center of the analysis rather than at the periphery.”¹²³ Accordingly, where the First Amendment focuses primarily on protection of adult free speech rights in evaluating regulatory limits on children’s access to harmful media, environmental law is primarily concerned with the level of toxins to which the most vulnerable are exposed.¹²⁴ Likewise, under an ecogenerist model, media harm decisions should prioritize concern about the level of “toxic” media to which children are exposed over free speech interests.¹²⁵ In other words, following ecogenerist principles

116. In some ways, this article can be understood as a response to Woodhouse’s call to “advocate for children . . . to articulate and promote what [she has] termed ‘environmental ethics for children,’” a process that “involve[s] either rethinking and rejecting, or consciously reaffirming, ethical frameworks that pervade our laws and policies.” Woodhouse, *Ecogenerism*, *supra* note 114, at 433–34. Here, the rethinking involves questioning traditional application of First Amendment principles in the context of children’s access to modern media, especially violent video games.

117. Carol M. Browner, *Environmental Protection: Meeting the Challenges of the Twenty-First Century*, 25 HARV. ENVTL. L. REV. 329, 330 (2001).

118. Woodhouse, *Reframing*, *supra* note 1, at 94–95.

119. *Id.* at 97.

120. *Id.* at 101.

121. *Id.* at 101–09.

122. *Id.* at 85.

123. Barbara Bennett Woodhouse, *Cleaning Up Toxic Violence: An EcoGenerist Paradigm*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 429 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006) [hereinafter Woodhouse, *Cleaning*].

124. *See id.*

125. *See* Woodhouse, *Race*, *supra* note 114, at 528 (“Instead of elevating individual liberty above all other values, [ecogenerism] would highlight the interconnectedness of all systems including our social systems.”).

would shift the focus of inquiry to children and future generations. This kind of reprioritization of traditional liberties has been applied by the Supreme Court in other contexts related to children.¹²⁶ As Woodhouse writes, “[i]nstead of elevating individual liberty above all other values, [ecogenerism] would highlight the interconnectedness of all systems including our social systems.”¹²⁷

Woodhouse also draws upon a variety of environmental ethics theories to reexamine traditional conceptions about media harm to children. For example, she observes that environmentalists’ “deep ecology” solves problems by pushing beyond the surface and replacing “the dominant Western paradigm [of] Newtonian Science, which assumes that nature can be divided into parts,” with a “relational [model] that sees all organisms” as interrelated.¹²⁸ She looks to “ecofeminism,” particularly its “emphas[is on] the connection between the actions and fates of individuals and the future of the relationships and ecological communities that are necessary . . . for the next generation to survive and thrive.”¹²⁹ Other relevant theories include “[s]ustainable development” and “restoration ecology,” which focus on prevention and balance.¹³⁰ Similarly, she notes the parallels between environmentalists’ use of “[b]iological control” (i.e., use of natural organisms to fight invaders) and “media education” advocates who “seek to protect children against harmful media by exposing

126. For example, in *Belloti v. Baird* the Court observed:

“Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.” The unique role in our society of the family, the institution by which “we inculcate and pass down many of our most cherished values, moral and cultural” requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

.....

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

443 U.S. 622, 633–34, 638–39 (1979) (citations omitted). *Belloti*, of course, follows the traditional paradigm in its discussion of parental authority, whereas ecogenerism requires a child-centered approach. But the case illustrates the Supreme Court’s recognition that, in limited circumstances, interests related to children’s “growth and maturity” may be elevated over the First Amendment’s liberty concerns. *Id.* at 638–39. An ecogenerist perspective would argue that, likewise, a child-centered approach is not inconsistent with our tradition of individual liberty, indeed, it is a “basic presupposition[]of the latter.” *Id.* at 638.

127. Woodhouse, *Race*, *supra* note 114, at 528.

128. Woodhouse, *Cleaning*, *supra* note 123, at 423; *see also* Woodhouse, *Reframing*, *supra* note 1, at 138.

129. Woodhouse, *Cleaning*, *supra* note 123, at 423.

130. *Id.* at 424.

them to materials and media inputs that educate them to be critical consumers.”¹³¹

One particularly relevant lesson environmentalists offer the movement to protect children from harmful media is how to “avoid[] paralysis in the face of scientific uncertainty and natural flux.”¹³² For example, “[o]pponents of environmental regulation have launched sharp critiques at the methods used to calculate costs and benefits, claiming that they overstate the risks and underestimate the costs, and environmentalists have responded with critiques of their own, charging the opposition with manipulating the data and the methods of computations to understate the risks and inflate the costs.”¹³³ These arguments are strikingly similar to those in the media violence debate. Environmentalists successfully established a regulatory framework for evaluating empirical science in the face of uncertainty and questions about the validity of research.¹³⁴ The movement to protect children from media harm can do so as well.

Woodhouse’s proposal is persuasive on many levels. The real issue, however, is whether ecogenerism can evolve from academic theory to actual practice. The concept of ecogenerism is appealing to those frustrated by the current legal framework, but reconciling it with the First Amendment presents obstacles. Woodhouse herself recognizes this tension:

An environmental approach would . . . impinge on distinctions between speech and conduct that are integral to our thinking about intellectual freedom and the role of the First Amendment. . . . There are serious dangers to breaching the First Amendment distinctions that protect expression from content-based regulation. Not least of these is the process of identifying speech that harms. Falsely crying “fire” in a crowded theater is the classic example of harmful speech that overcomes the individual’s ability to process and filter information. But we generally assume that the individual will process and filter the message, and that it is the individual’s choice how to respond to speech, not the speech itself, which produces the harmful effects. A toxic gas can be identified as harmful through scientific testing and can be regulated or prohibited. But toxic media images?¹³⁵

When first describing the ecogenerist approach she “set aside these issues for another day,”¹³⁶ and since then has taken up the First Amendment implications only in a limited discussion related to regulation of the Internet.¹³⁷ But her proposal cannot be taken seriously without fully addressing the intersections between ecogenerism and the First Amendment. While Woodhouse may be correct that “this issue is not about

131. Woodhouse, *Reframing*, *supra* note 1, at 142.

132. *Id.* at 144.

133. *Id.*

134. *See id.* at 144–48.

135. *Id.* at 95–96.

136. *Id.* at 96.

137. *See* Woodhouse, *Cleaning*, *supra* note 123, at 427–30.

values of parental autonomy or values of free expression, but rather about values of generational justice and human flourishing.”¹³⁸ courts have made clear that free speech concerns cannot be ignored.

Environmental law, both in its early conception and in its ethical foundations, offers many useful parallels, but the comparison is less helpful in the face of the First Amendment. Whatever struggles may have been faced by the early environmentalists, establishing the framework of modern environmental law did not require fundamental reshaping of First Amendment doctrine. This is not to say that environmental law has been immune from constitutional challenge. As Professor Robert Percival explains, “[v]arious industry groups have pressed the courts to declare unconstitutional the Superfund legislation, the Endangered Species Act, the Clean Water Act, and the Safe Drinking Water Act.”¹³⁹ The nature of the challenges, however, focused primarily on Congress’s authority to regulate interstate commerce activities,¹⁴⁰ which requires a substantially lower level of scrutiny than legislation that raises First Amendment issues.¹⁴¹ Unlike the area of media harm to children, “courts have rejected (or declined to reach) virtually every constitutional challenge to the federal environmental laws.”¹⁴² No matter how strong an argument ecogenerism might offer, the Supreme Court is unlikely to apply, simply by analogy to environmental law, the lower level of scrutiny afforded to environmental regulations in the context of content-based regulations targeting protected speech.¹⁴³ Notwithstanding the difficulties the First Amendment presents, applying ecogenerist principles to the line of cases striking down violent video game regulations reveals ways in which Professor Woodhouse’s paradigm shift may very well be warranted.

B. VIOLENT VIDEO GAME REGULATION AS A CASE STUDY

Perhaps the best way to explore the practical implications of Woodhouse’s call for a paradigm shift in the context of regulating children’s access to harmful media is to use as a case study the series of court decisions invalidating laws that limit children’s access to violent video games.

138. See Woodhouse, *Reframing*, *supra* note 1, at 129.

139. Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 10 (2007) (footnotes omitted).

140. See *id.* (footnotes omitted).

141. See discussion of rational basis scrutiny *supra* notes 77–78 and accompanying text.

142. Percival, *supra* note 139, at 11. Moreover, in upholding federal environmental laws, the courts “have relied on generalized judgments made by Congress concerning the importance of national regulatory programs to prevent harm to the environment.” *Id.*

143. See, e.g., *United States v. Playboy Entm’t Group*, 529 U.S. 803, 815 (2000) (“We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech.”); see also Woodhouse, *Reframing*, *supra* note 1, at 122 (“Even among environmentalists, the notion of an environmentalist approach to abating a toxic mass-media culture may encounter opposition. Because of First Amendment concerns, even those who generally favor regulation of chemical environmental toxins or invasive exotic species might hesitate to extend regulation to potentially toxic media influences.”).

Courts have invalidated statutes and ordinances limiting children's access to violent video games in California,¹⁴⁴ Illinois,¹⁴⁵ Indiana,¹⁴⁶ Louisiana,¹⁴⁷ Michigan,¹⁴⁸ Minnesota,¹⁴⁹ Missouri,¹⁵⁰ Oklahoma,¹⁵¹ and Washington.¹⁵² The Ninth Circuit's decision in *Schwarzenegger*, declaring unconstitutional a California statute that placed limits on the sale and rental of violent video games to children, is the most recent federal appellate court decision in this area.

Before turning to the *Schwarzenegger* case, it is important to place it in the context of the other courts' rulings on violent video game regulations. A cursory review of the consistent outcome in each of these cases might lead one to abandon any future efforts to limit children's access to violent video games as a waste of time and financial resources.¹⁵³ Filtering the cases through the lens of ecogenerism, however, provides several reasons for pursuing these protections notwithstanding this precedent. The line of violent video games cases might be consistent in their conclusions, but employing ecogenerist principles shows that they also are consistently flawed in their application of strict scrutiny and rejection of social science.

1. *The Pre-Schwarzenegger Cases from an Ecogenerist Perspective: Flaws in Selecting Scrutiny and Screening Social Science*

A review of the cases leading up to *Schwarzenegger* reveals at least two areas where ecogenerism offers significant insights: the application of strict scrutiny and the analysis of the social science evidence. One of the first courts to invalidate a violent video game regulation was the Seventh Circuit in *Kendrick*, a 2001 case involving an Indianapolis ordinance requiring parents to accompany minors playing video games with "graphic

144. See *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (Apr. 26, 2010) (No. 08-1448).

145. See *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1081 (N.D. Ill. 2005), *aff'd on other grounds*, 469 F.3d 641 (7th Cir. 2006).

146. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579–80 (7th Cir. 2001).

147. See *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 836–37 (M.D. La. 2006).

148. See *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 656 (E.D. Mich. 2006).

149. See *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008), *aff'g* *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006).

150. See *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 960 (8th Cir. 2003).

151. See *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097, at *9 (W.D. Okla. Sept. 17, 2007).

152. See *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).

153. See, e.g., Clay Calvert & Robert D. Richards, *Violence and Video Games 2006: Legislation and Litigation*, 8 TEX. REV. ENT. & SPORTS L. 49, 51 (2007) (noting that the state of Illinois was required to pay to the video game industry \$510,528.64 in attorneys' fees spent challenging a violent video game law and citing a video game industry representative's argument that given the uniform precedent on this issue further litigation is a waste of taxpayer dollars).

violence" in public places.¹⁵⁴ *Kendrick* illustrates the problematic treatment of First Amendment scrutiny and the rejection of the social science that is characteristic of the violent video game cases. As to the First Amendment, the court applied strict scrutiny, dismissing the argument that violence be treated as obscenity but reached this conclusion without a meaningful consideration of the children's interests as an ecogenerist perspective would demand.¹⁵⁵ The court recognized that "the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity . . . [does not] foreclose[] a like exclusion of violent imagery," though later courts applied *Kendrick* to do exactly that.¹⁵⁶ Had the court approached the scrutiny from an ecogenerist framework, at a minimum it would have engaged in a more developed analysis of such a critical determination (one not previously considered by any other federal appellate court or the Supreme Court). The considerations articulated by Woodhouse are at least as compelling as those interests identified by the *Kendrick* court in its discussion declining to extend *Ginsberg*.¹⁵⁷ Had the court evaluated *Ginsberg* with a focus on the interests of children and preserving future generations, it would have been difficult not to extend *Ginsberg* to cover extremely violent material.

As to the social science, the primary evidence consisted of two psychological studies reported by Iowa State University Professor Craig Anderson¹⁵⁸ and a colleague.¹⁵⁹ The *Kendrick* court determined that the research did not support the ordinance because there was "no indication that the games used in the studies [were] similar to those [targeted]" and "[t]he studies d[id] not find that video games have ever caused anyone to commit a violent act."¹⁶⁰ The court was most concerned not with the

154. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001). While *Kendrick* is considered the first in the line of modern video game cases, it should be noted that a series of earlier cases held video games were not protected by the First Amendment on the basis that they should be treated "like a pinball game, a game of chess, or a game of baseball, [a]s pure entertainment with no informational element." Saunders, *Regulating*, *supra* note 4, at 93-97 (discussing early video game cases). The modern video games, however, have been afforded First Amendment protection without exception. See *supra* notes 144-152.

155. See *Kendrick*, 244 F.3d at 575-76. The court repeated and speculated about the interests of the government in enacting the ordinance and observed that children have First Amendment rights, but engaged in no meaningful examination of the issues from the perspective of the child subject to the regulation. *Id.* at 576-78.

156. *Id.* at 574.

157. *Id.* at 576-78.

158. Dr. Anderson is considered the "leading researcher" in the area of violent video games and harm to children. See Saunders, *Shielding*, *supra* note 24, at 60. As seen in the other cases discussed in this section, his work has been considered by all courts reviewing challenges to violent video game legislation. For a comprehensive list of his research in this field since 1995 see <http://www.psychology.iastate.edu/faculty/caa/recpub.html>.

159. *Kendrick*, 244 F.3d at 578 (citing Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772 (2000)). Anderson's research has been relied upon in most of the violent video game legislation, as noted in the discussion of the other cases in this section.

160. *Id.*

methodology or sufficiency of Dr. Anderson's research but that the research did not support the material targeted by the ordinance.¹⁶¹ Judge Richard Posner, writing for the panel, suggested that "a more narrowly drawn ordinance might survive a constitutional challenge," particularly if it had covered "games [that] used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be)."¹⁶² Nevertheless, courts have subsequently relied upon *Kendrick* to dismiss Dr. Anderson's research even when the research is directly related to the regulated material.¹⁶³ An ecogenerist approach, as discussed more fully in the context of the *Schwarzenegger* case below, would require a set of consistent, science-based standards for evaluating social science.

The Eighth Circuit is the only other federal appellate court, besides the Seventh and Ninth Circuits, to consider violent video game legislation. It has done so on two occasions, first in 2003 with *Interactive Digital Software Ass'n v. St. Louis County*¹⁶⁴ and again in 2008 with *Entertainment Software Ass'n v. Swanson*.¹⁶⁵ Both of these cases suffer from *Kendrick*'s flaws, a point the Eighth Circuit implicitly acknowledged in the 2008 case.¹⁶⁶ The 2003 case involved a St. Louis County ordinance making it unlawful to "sell, rent, or make available graphically violent video games to minors, or to 'permit the free play of' graphically violent video games by minors, without a parent or guardian's consent."¹⁶⁷ The court was heavily influenced by *Kendrick*, as evidenced by the devotion of a significant portion of its own opinion to a discussion of the Seventh Circuit's decision.¹⁶⁸ The Eighth Circuit applied strict scrutiny, again failing to engage in any real analysis from the viewpoint of the child.¹⁶⁹ The lower court had reviewed studies and heard testimony from Dr. Anderson and others who "found that violent video games caused psychological damage to children."¹⁷⁰ The Eighth Circuit nonetheless determined that the testimony was not the "substantial supporting evidence" required under strict scrutiny and, thus, failed to support the County's interest in preserving parental authority and the well-being of children.¹⁷¹

161. *Id.* at 579.

162. *Id.* at 579–80. *But see* Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1860, 1869–70 (2007).

163. *See* Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823, 825 (M.D. La. 2006); *see also* Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 649 (E.D. Mich. 2006).

164. *See also* Interactive Digital Software Ass'n v. St. Louis Cnty., 329 F.3d 954, 956–57 (8th Cir. 2003).

165. *See* Entm't Software Ass'n v. Swanson, 519 F.3d 768, 769–70 (8th Cir. 2008).

166. *See* discussion *infra* note 248 and accompanying text.

167. *St. Louis Cnty.*, 329 F.3d at 956.

168. *See id.* at 957, 959.

169. *Id.* at 958–60.

170. Interactive Digital Software Ass'n v. St. Louis Cnty., 200 F. Supp. 2d 1126, 1129 (E.D. Mo. 2002).

171. *St. Louis Cnty.*, 329 F.3d at 959. In reaching this result, the court incorporated language from the Supreme Court case *Turner Broad. Sys., Inc. v. FCC*, namely that when the government places restrictions on speech, "it must do more than simply posit the exis-

The 2008 Eighth Circuit case involved a Minnesota state law prohibiting “minors from purchasing or renting video games bearing a ‘Mature’ or ‘Adult Only’ rating.”¹⁷² As in the 2003 case, the court “accept[ed] as a given that the State has a compelling interest in the psychological well-being of its minor citizens.”¹⁷³ The court also considered research from Dr. Anderson, this time “a meta-analysis performed . . . in 2004 . . . [showing] that children’s interaction with violent games causes violent behavior.”¹⁷⁴ Significantly, this time the court found “that the State’s evidence provide[d] *substantial support* for its contention that violent video games have a deleterious effect upon the psychological well-being of minors.”¹⁷⁵ The court acknowledged, nonetheless, that the 2003 ruling required it to apply a “heightened standard of proof” and the court found that the “statistical certainty of causation demanded thereby” was not met.¹⁷⁶ Yet, the court also observed, “[i]n so holding, we are not as dismissive of that evidence as have been some of the courts that have found similar evidence to be inadequate to establish the causal link between exposure to violent video games and subsequent behavior.”¹⁷⁷ An ecogenerist approach would not allow the court to ignore “substantial” evidence demonstrating that playing violent video games harms children as documented by social science, even in the face of precedent. This is especially true when the precedent demands adherence to a test that fails to account for real-world consequences.¹⁷⁸ As a matter of judicial pro-

tence of the disease sought to be cured” and that the government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Id.* at 958 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994)). Reliance on *Turner* is interesting, as that case applied intermediate scrutiny, not strict scrutiny, to uphold federal must-carry broadcast provisions for cable television systems. *Turner*, 512 U.S. at 661–62. While it seems that the Eighth Circuit intended to limit the use of *Turner* to an explanation of the evidence needed to demonstrate “harm,” the government in *Schwarzenegger* used *Turner* to suggest that a less-strict standard should apply when reviewing the social science in this context and has made this a key argument in petitioning the Supreme Court for review. See *Petition for Writ of Certiorari* at *12–13, *Schwarzenegger v. Video Software Dealers Ass’n*, 130 S. Ct. 2398 (2009) (No. 08-1448), 2009 WL 1430036. *But see Entm’t Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1069 (D. Minn. 2006), *aff’d sub nom. Entm’t Software Ass’n v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (observing that “*Turner* is inapposite[, as] [t]hat case considered a statute subject to an intermediate level of scrutiny, a lesser standard than the strict scrutiny established for video games by the Eighth Circuit” and that strict scrutiny requires “substantial, actual ‘empirical support for [the government’s] belief that “violent” video games cause psychological harm to minors.’”).

172. *Swanson*, 519 F.3d at 769.

173. *Id.* at 772.

174. *Id.* at 760–70 (citing Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. ADOLESCENCE 113, 115–21 (2004)).

175. *Id.* at 772 (emphasis added).

176. *Id.* (referring to test applied in *St. Louis Cnty.*).

177. *Id.* (citing *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578–79 (7th Cir. 2001); *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d at 1051; *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d at 646, 653–59 (S.D. Mich. 2006); *Video Software Dealers Ass’n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 WL 2261546, at *11 (N.D. Cal. Aug. 6, 2007)).

178. Woodhouse makes a similar point; she observes that “the First Amendment framework seems inherently ill suited to addressing the seriousness and the complexity of the

cess, of course, the Eighth Circuit was bound by the earlier ruling and could only move away from that precedent with an en banc hearing, which was requested but denied.¹⁷⁹

During the five years that passed between the two Eighth Circuit cases, several federal district courts also invalidated violent video game regulations.¹⁸⁰ Though they all are susceptible to similar criticisms when viewed through the lens of ecogenerism, certain additional aspects of these decisions are worth a brief mention. In 2004, a Washington district court struck a state statute prohibiting the distribution to children of computer and video games containing violence against law enforcement officers.¹⁸¹ Again, the court applied strict scrutiny and declined to use the *Ginsberg* standard because the law involved violent, nonsexual, material.¹⁸² Addressing the social science, the court expressly found that the government:

[P]resented research and expert opinions from which one could reasonably infer that the depictions of violence . . . have some immediate and measurable effect on the level of aggression experienced by some viewers and that the unique characteristics of video games . . . make[] [them] potentially more harmful to the psychological well-being of minors than other forms of media. In addition, virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior.¹⁸³

Nevertheless, the court found the government's evidence was insufficient to satisfy strict scrutiny and also that the statute was "both over-inclusive and under-inclusive" in that the range of games covered by the law did not address the harms targeted by the legislature.¹⁸⁴ As with the Eighth Circuit, the court seemed uncomfortable with a test that failed to fully account for harm to children evidenced by the social science.¹⁸⁵

The next year, in 2005, an Illinois federal district court invalidated a state statute criminalizing the rental or sale of violent video games to minors.¹⁸⁶ Following *Kendrick*, the court applied strict scrutiny.¹⁸⁷ The

effects on children of growing up in a culture saturated with violence." Woodhouse, *Cleaning*, *supra* note 123, at 429.

179. *Swanson*, 519 F.3d at 768 (rehearing and rehearing en banc denied May 7, 2008) (noting that Judge Shepherd would have granted the rehearing en banc).

180. See *Granholm*, 426 F. Supp. 2d at 656; see also *Blagojevich*, 404 F. Supp. 2d at 1055; *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).

181. *Maleng*, 325 F. Supp. 2d at 1190.

182. *Id.* at 1185–86. Instead, the court applied strict scrutiny and discussed *Turner* at length for the propositions that "courts must 'accord substantial deference to the predictive judgments' of the legislature [, but] [w]here the challenged legislation restricts or limits freedom of speech, however, the courts must ensure that the legislature's judgments are based on reasonable inferences drawn from substantial evidence." *Id.* at 1187 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665, 666 (1994)) (citations omitted).

183. *Id.* at 1188.

184. *Id.* at 1189.

185. See *id.* at 1187–88.

186. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1081 (N.D. Ill. 2005).

187. *Id.* at 1078.

court considered over a dozen social science studies but found that “neither Dr. Anderson’s testimony nor his research establish a solid causal link between violent video game exposure and aggressive thinking and behavior.”¹⁸⁸ The court also considered a labeling requirement that the targeted video games contain a two-inch by two-inch sticker stating “18,” treating it as constitutionally impermissible compelled speech rather than commercial speech.¹⁸⁹

Two state statutes were invalidated in 2006, one in Michigan and the second in Louisiana.¹⁹⁰ The Michigan statute prohibited distribution of violent video games to minors, applying in part a definition incorporating language upheld in *Ginsberg*.¹⁹¹ Once again, the court applied strict scrutiny and rejected the research from Dr. Anderson and others.¹⁹² The court also found the statute’s language troubling both because it was not narrowly tailored and because it was likely to have a chilling effect on adults’ free expression.¹⁹³ The Louisiana statute “criminaliz[ed] the sale, lease, or rental of video or computer games that appeal to a minor’s morbid interest in violence.”¹⁹⁴ Relying on the line of violent video game cases, the court applied strict scrutiny to find the statute unconstitutional.¹⁹⁵

Finally, in 2007, an Oklahoma federal district court invalidated a state statute criminalizing the display, sale, or other dissemination to minors of any material deemed “harmful to minors.”¹⁹⁶ In addition to arguing for review under *Ginsberg*, the government cited *United States v. American Library Ass’n* “for the proposition that the government may make reasonable restrictions in content-based judgments on private speech,” even if the restrictions constitute “a slight inconvenience to adults.”¹⁹⁷ The court rejected both arguments, following the reasoning of the other courts on *Ginsberg* and finding *American Library* “inapposite to . . . government restrictions on private speech” as it “applied [only] in the context of a public library’s exercise of judgment in filtering the internet material it provided to patrons.”¹⁹⁸

188. *Id.*

189. *Id.* at 1081–82 (citing *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 647 (1985) (applying test for commercial speech under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566–71 (1980)); *Riley v. Nat’l. Fed’n of the Blind*, 487 U.S. 781, 786 (1988) (applying strict scrutiny as test for compelled speech).

190. *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 825 (M.D. La. 2006); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 649 (E.D. Mich. 2006).

191. *Granholm*, 426 F. Supp. 2d at 649. The statute also covered sexual material, though that portion was not challenged in the litigation.

192. *See id.* at 651–53.

193. *See id.* at 653–54.

194. *Foti*, 451 F. Supp. 2d at 825.

195. *Id.* at 831 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664–65 (1994)).

196. *Entm’t Merchs. Ass’n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097, at *1 (W.D. Okla. Sept. 17, 2007).

197. *Id.* at *4 (citation and punctuation omitted).

198. *Id.* (citation and punctuation omitted).

Applying ecogenerist principles to this line of cases addressing regulation of modern video game violence reveals serious concerns both in the courts' application of First Amendment scrutiny and in the courts' evaluation of the social science. These concerns are made all the more apparent in a careful study of the *Schwarzenegger* case.

2. Evaluating *Schwarzenegger* Under Ecogenerist Principles

Following a brief background on the statute at issue, the concept of ecogenerism is tested in the context of *Schwarzenegger* to evaluate whether the theory might have practical application. In addition to suffering from the flaws of the other cases, *Schwarzenegger* presents an opportunity to effectuate the very kind of paradigm shift ecogenerism envisions.

a. The Challenged Statute

In 2005, the California legislature passed and Governor Schwarzenegger signed into law a statute imposing restrictions and a labeling requirement on the sale or rental of violent video games to minors.¹⁹⁹ The statute defined a "violent video game" as a game that "includes killing, maiming, dismembering, or sexually assaulting an image of a human being," where the game either (1) as toward minors "...appeals to a deviant or morbid interest . . . is patently offensive to prevailing standards in the community . . . [and] lack[s] serious literary, artistic, political, or scientific value" or (2) "[e]nable[s] . . . virtual[] inflict[ion of] serious injury . . . [in an] especially heinous, cruel, or depraved [manner]."²⁰⁰ It also defined the terms "cruel," "depraved," "heinous," and "serious physical abuse" based upon federal death penalty instructions and listed as pertinent factors "infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim."²⁰¹

Significantly, the statute did not prohibit a parent or guardian from purchasing or renting the games for the minor and intentionally preserved full First Amendment protection of the material for distribution to adults.

The lower court described the kind of video game that would be subject to the statute:

Postal II involves a character who has apparently "gone postal" and decided to kill everyone he encounters. . . . The game involves shooting both armed opponents, such as police officers, and unarmed peo-

199. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), cert. granted sub nom. *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (Apr. 26, 2010) (No. 08-1448).

200. *Id.* at 953-54 (citing CAL. CIV. CODE §§ 1746-.5 (West 2009)).

201. *Id.* at 954 (citing CAL. CIV. CODE §§ 1746-.5 (West 2009)). The record indicated that these terms were used by the legislature specifically "because they survived claims of unconstitutional vagueness in *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998)." *Id.* at 954 n.7.

ple, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. The player's character makes sardonic comments during all this; for example, urinating on someone elicits the comment "Now the flowers will grow."²⁰²

Prior to adoption of the statute, "the California Legislature considered numerous studies, peer-reviewed articles, and reports from social scientists and medical associations that establish a correlation between violent video game play and increased automatic aggressiveness, aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in minors and adults."²⁰³ In addition to this social science research, the legislature also reviewed "the Federal Trade Commission's report that the video game industry specifically marketed M-rated (Mature) video games to minors, that 69% of 13 to 16-year-old children were able to purchase M-rated games, and that only 24% of cashiers asked the minor's age."²⁰⁴ Soon after the statute was signed into law, the Video Software Dealers Association (now known as the Entertainment Merchants Association) and the Entertainment Software Association filed a lawsuit in federal district court against the government challenging the statute's constitutionality.²⁰⁵ Applying the precedent from the previous violent video game legislation cases, the lower court permanently enjoined the statute as unconstitutional.²⁰⁶

On appeal, in an effort to distinguish the case from the other unsuccessful cases, the government advanced four key arguments.²⁰⁷ First, the government contended that violent material should be regulated under the variable obscenity standard in *Ginsberg*.²⁰⁸ Second, the government submitted that social science research had advanced considerably since initially evaluated by other courts and now demonstrated conclusively the requisite causal connection between playing the targeted video games

202. *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1042 (N.D. Cal. 2005) *aff'd*, 556 F.3d 950 (9th Cir. 2009) (citations omitted). The lower court "agree[d] with the [government] that *Postal II* would fall within the [statute's] definition of 'violent video game.'" *Id.*

203. Petition for Writ of Certiorari at 2, *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2009) (No. 08-1448), 2009 WL 1430036 at *2.

204. *Id.* at *2-3 (citations omitted).

205. See *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 WL 2261546 (N.D. Cal. 2007), *aff'd*, 556 F.3d 950 (9th Cir. 2009), *cert. granted sub nom. Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (Apr. 26, 2010) (No. 08-1448).

206. See *id.* at *9-10 (granting permanent injunction and finding that while the government articulated a compelling interest in regulating children's access to violent video games, the government failed to select the least restrictive means in furtherance of that interest). See also *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1042 (issuing preliminary injunction based on findings that the statute's restrictions against minors' possession of violent video games and the labeling requirement violated the First Amendment, but holding that the definition of "violent video game" was not unconstitutionally vague).

207. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 957-65 (9th Cir. 2009), *cert. granted sub nom. Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (Apr. 26, 2010) (No. 08-1448).

208. *Id.* at 957-58.

and increased violent behavior or aggression, even under a strict scrutiny review.²⁰⁹ Third, the government argued that the statute was more narrowly drawn than versions rendered unconstitutional in the other cases, as the statute did not prohibit children from playing or possessing the video games; rather, it required that a parent or guardian make the purchase but placed absolutely no restriction on adults' access to the targeted material.²¹⁰ Fourth, the government argued that the statute's requirement for a "violent video game" package to contain a sticker reading "18" was "purely commercial" in nature and should be upheld as "rationally related to the State's self-evident purpose of communicating to consumers and store clerks that the video game cannot be legally purchased by anyone under 18 years of age."²¹¹ None of these arguments persuaded the Ninth Circuit.²¹²

b. Selecting the Appropriate Level of Scrutiny

Addressing the level of First Amendment protection, the Ninth Circuit recognized the repeated resistance by other courts to include violence under the umbrella of obscenity, regardless of *Ginsberg's* holding that material may be regulated as obscene to children even if it is not obscene as to adults.²¹³ The court took care to note both the Supreme Court's historical position "consistently address[ing] obscenity with reference to sex-based materials," not violent materials, and the history of other courts rejecting requests to apply lesser protection to violent speech under the definition of obscenity or *Ginsberg*.²¹⁴ The court also expressed concern about "boldly go[ing] where no court has gone before" and thus "decline[d] the [government's] entreaty to extend the reach of *Ginsberg* and thereby redefine the concept of obscenity under the First Amendment."²¹⁵ Like all of the courts before it, the Ninth Circuit's analysis was devoid of any developed inquiry into, let alone prioritization of, the children's interests at stake or concerns for future generations.²¹⁶ In contrast, an ecogenerist approach would shift the focus from whether the targeted material may be subject to regulation under existing First Amendment obscenity jurisprudence to whether material is harmful to children, an approach that is supported (or at least not rejected) by *Ginsberg*.²¹⁷

209. *Id.* at 962–65.

210. *Id.* at 964–65.

211. *Id.* (punctuation omitted). The court declined to rule on the labeling requirement's constitutionality given that the rest of the statute was rendered invalid. *Id.* at 966–67.

212. *Id.* at 967.

213. *Id.* at 959, 960.

214. *Id.*

215. *Id.* at 961.

216. *See generally id.*

217. *See* discussion of *Ginsberg*, *supra* Part II.A. Admittedly, a shift like this in First Amendment analysis is contemplated as academic theory rather than committed to actual practice. A number of legal commentators have proposed various alternative tests, ranging from the obscenity/*Ginsberg* exception discussed here to protecting only political speech

c. Evaluating the Social Science

Not surprisingly, given the precedent from other video game violence cases, the Ninth Circuit applied strict scrutiny to evaluate the government's interest in preventing psychological or neurological harm to the brains of children playing violent video games.²¹⁸ The court "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors,"²¹⁹ but also observed, following previous courts' use of *Turner*, that "when the government seeks to restrict speech '[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'"²²⁰ The court also drew upon language from a subsequent opinion in the *Turner* litigation: "[a]lthough we must accord deference to the predictive judgments of the legislature, 'our obligation is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'"²²⁰

The government's evidence to prove harm consisted primarily of research by Dr. Anderson and his colleagues.²²¹ In an effort to respond to the previous courts' rulings dismissing social science evidence, the government focused on Dr. Anderson's 2004 meta-analysis study (i.e., a "quantitative method for integrating existing studies") demonstrating a link between exposure to violent video games and increased aggressive behavior, cognition, and affect as well as cardiovascular arousal and decreased helping behavior.²²² The court found the research unconvincing, however, citing Dr. Anderson's own disclaimers regarding the small sample size, lack of longitudinal studies, and limited focus on children under

though ultimately none of these alternative tests has been adopted. See Garry, *supra* note 105, at 140–41, 60. For other alternative proposals, see Saunders, *Regulating*, *supra* note 4. Woodhouse's theory of ecogenerism stands apart from these various proposals, however, in its calling for a child and future generational focus based on environmental concerns. See Woodhouse, *Ecogenerism*, *supra* note 113, at 241–42. For another source of authority where children's interests are taken into account when evaluating content-based restrictions, see the Convention on the Rights of the Child, art. 17, U.N. Doc. A/RES/44/25, Nov. 20, 1989, 28 I.L.M. 1448, 1462–63, available at <http://www.un.org/documents/ga/res/44/a44r025.htm> (requiring signatories to "ensure that the child has access to information and material" but qualifying this in allowing "appropriate guidelines for the protection of the child from information and material injurious to his or her well-being").

218. *Schwarzenegger*, 556 F.3d at 961.

219. *Id.* at 962 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)) (citations omitted).

220. See *id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)).

221. *Id.* at 963.

222. *Id.* at 963 n.16 (citing Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. ADOLESCENCE 113 (2004)). See also Appellants' Opening Br. 29, *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (2008) (No. 07-16620), 2008 WL 412514 at *29 [hereinafter App. Open Br.] ("For example, in 2004 (nearly four years after Judge Posner's opinion . . . striking down a similar but less specific law), Dr. Anderson reported that an 'updated meta-analysis reveals that exposure to violent video games is significantly linked to increases in aggressive behaviour, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behaviour.' Dr. Anderson explained that '[e]xperimental studies reveal this linkage to be causal.'" (quoting Anderson, *An Update on the Effects of Playing Video Games*, 24 J. ADOLESCENCE 113, 113–22 (2004)).

the age of eighteen.²²³ The court disregarded social science evidence from other sources on similar grounds.²²⁴ Concluding that the evidence “does not support the Legislature’s purported interest in preventing psychological or neurological harm,” the court seemed most concerned with the lack of evidence establishing “a causal link between minors playing violent video games and actual psychological or neurological harm.”²²⁵ The court recognized that the research established a *correlation* between violent video game play and increased violent or aggressive behavior but determined that *causation*—not correlation—should be the primary focus.²²⁶ The court’s conclusion regarding the value of causation evidence over correlation evidence was not grounded in the social science but was merely a substitution of its own judgment for that of the legislature.²²⁷

There are a number of other ways an ecogenerist approach might be applied to address concerns related to social science. Just as environmental law is centered on empirical research,²²⁸ many of the violent video game cases also focused heavily on empirical research (or the lack of such research) in evaluating the legislature’s justifications for enacting regulations.²²⁹ Yet, each court approached the analysis in its own unique way, without reference to a uniform set of standards, other than passing mention of the fact that other courts had rejected similar, sometimes outdated, evidence in prior cases. As an alternative, Woodhouse proposes: “Imagine a regulatory scheme designed to preserve the environment for children’s healthy development that relied on established evidence-based benchmarks similar to those in various environmental laws.”²³⁰ Such a scheme could adjust the current balancing of protection for children against adult free speech rights to allow for appropriate regulation drawn from objective criteria supported by scientific evidence, not ideological positions.²³¹

Whether ecogenerism’s evidence-based set of benchmarks would have altered the outcome of *Schwarzenegger* is uncertain, but the court’s opinion reflects the need for that sort of measure. Acknowledging a “lay review” of the evidence and that the government is not required “to demonstrate a scientific certainty,”²³² the court nonetheless required such

223. See *Schwarzenegger*, 556 F.3d at 963.

224. See *id.* at 963–64.

225. *Id.* at 964.

226. *Id.*

227. See *id.*

228. Woodhouse, *Reframing*, *supra* note 1, at 147.

229. See, e.g., *Schwarzenegger*, 556 F.3d at 964; *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578–79 (7th Cir. 2001).

230. Woodhouse, *Ecogenerism*, *supra* note 113, at 442 (citation omitted). For concerns related to the use of empirical evidence or a set of specific, science-based criteria in the context of evaluating media harm to children, see Garfield, *supra* note 36, at 589–92, 608–16.

231. One way to accomplish this might be to apply *Turner*’s intermediate scrutiny test for evaluating the social science, an argument advanced by the government in its petition to the Supreme Court for review. See *supra* note 171 and accompanying text.

232. *Schwarzenegger*, 556 F.3d at 963–64.

certainty. Moreover, it is virtually impossible, given the varied standards employed by the courts, to discern what amount of evidence, if any, a court would find sufficient to uphold legislation of this nature. If, in fact, long-term empirical proof of a direct causal link is required, it may very well be that such evidence is unobtainable, especially to the extent harm might be caused to children in the laboratory research setting.²³³

The environmentalist concept of the “precautionary principle” is also relevant here.²³⁴ This principle, explains Woodhouse, “made explicit in various environmental treaties and conventions, holds that we should not require scientific certainty about the precise effects of a course of conduct before regulating it, if the possible risks of leaving it unregulated may be serious or irreversible.”²³⁵ Thus, Woodhouse concludes that research clearly establishing but falling short of conclusively proving a causal connection between harm to children and exposure to media violence could be relied upon by legislators in adopting regulations so long as it is rooted in science—not popular opinion.²³⁶ If this were the standard, then the outcome of *Schwarzenegger* surely would be different, as the court readily acknowledged that a correlation between harm to children and exposure to media violence had been established.²³⁷

d. Narrowly Tailored Language and Less Restrictive Alternatives

Regarding the government’s argument that the statute was more narrowly tailored than other states’ previous efforts, the court again disagreed and found the burden to show that no less restrictive alternatives were available was not met.²³⁸ Specifically, the court listed other alternatives, such as a voluntary rating system, parental controls on modern gaming systems, and enhanced education campaigns, even if such options might not be as effective.²³⁹ Ecogenerism reveals the disingenuous nature of alternatives like industry self-regulation or parental control, which profess to be solutions but fail in actual practice.²⁴⁰ As Woodhouse explains:

233. See, e.g., Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences and Juvenile Justice*, 2005 UTAH L. REV. 695, 724–25 [hereinafter Saunders, *Disconnect*]; Brian Varstag, *Does Video Game Violence Sow Aggression?*, 291 J. AM. MED. ASS’N 1822, 1822 (2004); see also App. Open. Br., *supra* note 222, at *37 (“Never has a state been required to perform experiments on children in order to justify legislation seeking to protect them from harm. No responsible governing body would ever consider doing so.”). See also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (“There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.”).

234. Woodhouse, *Ecogenerism*, *supra* note 113, at 439 (citation omitted).

235. *Id.* (citation omitted).

236. *Id.* at 440–41.

237. Woodhouse, *Reframing*, *supra* note 1, at 126.

238. *Schwarzenegger*, 556 F.3d at 964–65.

239. *Id.* at 965.

240. Woodhouse, *Reframing*, *supra* note 1, at 126.

Parent-activated internet filters, V-chips, and special web zones to which parents may subscribe their children, all fail to protect the child whose parent is either uninterested or unable to enforce (or afford) these child-safe zones. Moreover, individualized parental control may be a wholly ineffective alternative to government regulation. As with contagious diseases and firearms, when one child in a peer group is exposed to risk, the entire group is potentially exposed.²⁴¹

The *Schwarzenegger* court relied on these purported solutions to find that the government failed to show that no less burdensome alternatives existed.²⁴² The ecogenerist perspective reveals why the court should not have done so.

e. The Reality of a Paradigm Shift

Despite the courts' continued insistence that extreme violence in video games is protected speech under the First Amendment and subject to strict scrutiny review, the Supreme Court has never addressed the issue directly.²⁴³ The Court soon will do so, however, in *Schwarzenegger*, as the Court granted certiorari and will consider the case during the 2010 Term.²⁴⁴ The *Schwarzenegger* petition argues, much in the spirit of Woodhouse's ecogenerism, that "[d]espite the lack of a split among the circuit courts, this is an issue of national importance. . . . [and] [a]fter 40 years, this Court should consider extending *Ginsberg* to help states meet a new, modern threat to children."²⁴⁵ This appeal invites the Court to enact the paradigm shift that ecogenerism demands in this area of the law.²⁴⁶ While some speculate that the Court is unlikely to do so given the uniform holdings of other courts on this issue,²⁴⁷ an ecogenerist perspec-

241. *Id.* (citation omitted); see also FCC, *supra* note 7, at 7942–43.

242. See *Schwarzenegger*, 556 F.3d at 965. Consider also Woodhouse's example of air pollution, where environmental law would not be satisfied with a response that placed the responsibility of children's exposure to toxic air pollution on a parent's decision to keep the child indoors. See Woodhouse, *Reframing*, *supra* note 1, at 126. Similarly, it follows that ameliorating the harms of media cannot be left to parents alone.

243. See, e.g., Video Software Dealers Ass'n v. *Schwarzenegger*, 401 F. Supp. 2d 1034, 1045 (N.D. Cal. 2005), *aff'd*, 556 F.3d 950 (9th Cir. 2009), *cert. granted sub nom. Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (Apr. 26, 2010) ("Nor, on the other hand, have the plaintiffs shown that . . . the Supreme Court . . . has ever held that sexual obscenity represents a unique category of expression that is the only category to which a state may permissibly restrict minors' access without running afoul of the First Amendment.").

244. *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2010).

245. See Petition for Writ of Certiorari at 6, *id.* (No. 08-1448), 2009 WL 1430036 at *6.

246. The paradigm shift must occur on two levels. First, in the area of child law, ecogenerism demands that the influence of mass media and marketing be recognized within the parent-child-state triangle (perhaps with the model remaining a triangle but placing the child at the center and the three influences at the points or, as Woodhouse describes, all parties "linked together, awash in a sea of culture)." Woodhouse, *Reframing*, *supra* note 1, at 129. Second, in the area of constitutional law, ecogenerism demands that traditional First Amendment liberties yield to children's interests in certain limited circumstances.

247. See, e.g., Editorial, *Video Games and Free Speech*, N.Y. TIMES, May 5, 2010, at A32; Linda Greenhouse, *The Court as Mr. Fix-it?*, N.Y. TIMES, April 30, 2010, at A19.

tive would contend that the Court cannot afford to perpetuate the lower courts' continued rejection of laws like the regulation at issue in *Schwarzenegger*.

As the Eighth Circuit acknowledged in *Swanson*, applying strict scrutiny to extreme violence “reflect[s] a refined estrangement from reality.”²⁴⁸ The need for the Supreme Court to finally address the treatment of violent material under the First Amendment is made all the more obvious when considering the line of violent video game cases from an ecogenerist perspective. The emergence of environmental law and its influence in reframing traditional property rights and land use law can offer inspiration, though not direct precedent, for the paradigm shift that would be required in First Amendment violent video game jurisprudence.²⁴⁹ The Supreme Court appears poised to act upon this opportunity, which is timely and important regardless of the outcome given that states continue to adopt laws regulating the access of minors to violent video games even in the face of uniform precedent against such legislation.²⁵⁰

IV. RECOMMENDATIONS FOR FUTURE RESEARCH AND REGULATION

After reviewing the existing legal framework and after considering the reality of a paradigm shift, this article concludes with recommendations for future research and regulatory efforts related to children and harmful media. Examining the violent video game precedent from an ecogenerist perspective reveals how critical it is for the Supreme Court to take up *Schwarzenegger*. Even if the Court declines to reverse the Ninth Circuit's invalidation of the statute, social science researchers and legal advocates have much to gain by applying principles of ecogenerism to their future studies and legislative proposals. Courts, legal commentators, and social scientists all have offered suggestions for future research and regulation under the existing legal framework. These recommendations, filtered through an ecogenerist viewpoint, are summarized below.

Proposals for future research and regulation from law scholars and judges primarily focus on a narrowed approach, whether in the language used or in the underlying research.²⁵¹ For example, in *Kendrick*, Judge Posner advised that future research should be tied directly to the particular video game or media subject and involve children of the age subject to

248. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008).

249. Woodhouse, *Ecogenerism*, *supra* note 113, at 447. As Woodhouse recognizes, traditional family law provides another example of paradigm shift, moving from treatment of children as property of parents to the “very different overarching ethical principle [of looking to] the best interest of the child.” *Id.* (internal quotations omitted).

250. *See, e.g.*, N.Y. State Assembly, No. A01474 (2009) (proposed bill prohibits “the sale to minors of certain rated video games containing a rating that reflects content of various degrees of profanity, racist stereotypes or derogatory language, and/or actions toward a specific group of persons”).

251. *See, e.g.*, *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578–79, 580 (7th Cir. 2001).

the regulation with a sufficient demonstration of causation.²⁵² He also stated that “a more narrowly drawn ordinance might survive a constitutional challenge.”²⁵³ Judge Lasnik in *Maleng* listed three key considerations for future regulation: (1) the law should apply only to “depraved or extreme acts of violence that violate community norms and prompted the legislature to act”; (2) the law should ban “depictions of extreme violence against all innocent victims, regardless of their viewpoint or status”; and (3) “social scientific studies [must] support the legislative findings.”²⁵⁴ Similarly, Professor Saunders has indicated “that a statute limited to violent, or perhaps only to first-person shooter, video games” might withstand scrutiny.²⁵⁵ As Professor Ross also has observed, “[t]o provide legally convincing evidence . . . studies would need to distinguish more carefully among factors such as the level of exposure to violent entertainment, and violence and poverty in the community.”²⁵⁶ She also expresses concern about the definitional problem associated with the term “media violence” in that research studies define it inconsistently (if at all), and she suggests that future studies “must be carefully crafted to identify the precise harm caused by the speech, and to show that restrictions on speech would directly and materially alleviate the harm.”²⁵⁷ Others look to advances in neuroscience and the use of MRI as possible future sources for producing the evidence that courts seek.²⁵⁸ Significantly, all of these recommendations focus on shortcomings of the legislative language or the research studies, whereas an ecogenerist perspective would also focus on the standards courts use to review the legislation and to evaluate the social science. This is not to say that recommendations from legal academics and judges should be ignored, but they should not be considered alone.

Interestingly, and possibly reflecting frustration with the courts’ repeated rejections of violent video game regulations, researchers Gentile, Saleem, and Anderson recently proposed a moratorium of five to ten years on any legislation.²⁵⁹ During that time, they recommend several actions. First, train lawyers and judges in collaboration with scientists on “the meaning of causality in science, and how to interpret the empirical data [. . . , since] [l]awyers and judges often are asked to make compli-

252. *See id.* at 578–79.

253. *Id.* at 580.

254. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1190 (W.D. Wash. 2004).

255. Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI-KENT L. REV. 257, 264 (2004).

256. Ross, *Constitutional*, *supra* note 12, at 301.

257. *Id.* at 302.

258. *See generally* Jonathan Chananie, *Violent Video Games, Crime, and the Law: Looking for Proof of a Causal Connection*, 26 DEV. MENTAL HEALTH L. 27 (2007). *See also* Saunders, *Disconnect*, *supra* note 233, at 265–68.

259. Gentile, *Public*, *supra* note 2, at 47. *See also* Gentile, *Violent*, *supra* note 2, at 238–40 (listing future public policy options including education, voluntary ratings, mandatory ratings with industry or third-party enforcement, advisory governmental ratings, legal access restrictions, and government production restrictions).

cated judgments about scientific issues, but they do this without the benefit of having training in those sciences.”²⁶⁰ Second, establish uniform guidelines for expert qualifications. For example, in the context of video game regulation, it is “relatively easy for the entertainment industries to hire ‘experts’ to refute the scientific findings . . . [but] *none* of the video game industry ‘experts’ in the cases to date would be considered by the scientific community as real experts on media violence.”²⁶¹ Third, help researchers understand “that the judicial courts use different standards of causality than most social scientists, and that these standards change depending on the type of legal issue. In particular, if the issue is about regulating access to speech, the U.S. courts are very conservative because speech is at the core of democracy.”²⁶² Finally, design research that focuses on (1) immediate harm rather than cumulative long-term effects; (2) harm to the viewing child as well as harm to others; (3) real-world contexts and distinguishing the effect of media violence after taking into account other factors; and (4) results courts will rely upon for regulating speech rather than the most cutting-edge research.²⁶³

A number of these actions reflect ecogenerist values²⁶⁴ though the moratorium does not. As the early environmentalists and others at the forefront of major social movements know, continued legal challenges can serve as a catalyst for change even in the face of defeat. Furthermore, in addition to narrowing studies to fit existing legal requirements as proposed by the researchers, ecogenerism would encourage expanded research focused on developing an entirely new regulatory framework supported by established scientific benchmarks to evaluate media harm.²⁶⁵

Finally, ecogenerism would incorporate media literacy education, “no child left inside” programs, and similar efforts as central to the legislative agenda and future research directives, at least to the extent these efforts were maintained with children’s interests as paramount.²⁶⁶ For example, Heins and Cho maintain that as an alternative to regulation on children’s access to media, legislation should encourage and facilitate youth media

260. Gentile, *Public*, *supra* note 2, at 45.

261. *Id.* at 46.

262. *Id.*

263. *See id.* at 46–47.

264. That proposals from social scientists are similar to ecogenerism is not surprising given that psychologists and sociologists have long considered the “ecology of child development.” Woodhouse, *Reframing*, *supra* note 1, at 92 (citations omitted).

265. Perhaps ecogenerist arguments also will convince Congress to finally pass the Children and Media Research Act, a \$95 million proposal to fund expanded research on media and children that has been introduced several times, most recently in 2007. *See* Children and Media Research Advancement Act, S. 948, 110th Cong. § 301 (2007); *see also* Woodhouse, *Ecogenerism*, *supra* note 113, at 435 (“Research into what is happening to children in the mesosystems, microsystems, and exosystems studied by child development theorists is a necessity, and review and evaluation must be an essential part of new programs, not an afterthought to be included if funding permits.”).

266. *See, e.g.*, Woodhouse, *Reframing*, *supra* note 1, at 142; Press Release, Conn. Gov. M. Jodi Rell, No Child Left in Ride to Get Youngsters Outside, Showcase State Parks, U.S. State News (March 22, 2006), *available at* 2006 WLNR 4886180 [hereinafter Press Release, Gov. Rell].

education programs.²⁶⁷ In particular, they argue that the “federal government should create guidelines for media literacy education which recognize that critical thinking is the goal, and that media literacy is more than simply an ‘inoculation’ against violent, sexual, or other controversial content in art and entertainment.”²⁶⁸ Reviewing what they call “a patchwork quilt of nonprofit advocacy groups, for-profit providers of curricular materials, and assorted state and local initiatives” that currently attempt to address media literacy efforts, they propose that much could be gained from a federally-driven national initiative (and cite other countries’ successful efforts in this regard, such as those of Canada, England, and Australia).²⁶⁹ As for “no child left inside” programs, these initiatives also try to address media influence without direct regulation of children’s access.²⁷⁰ Instead, children are encouraged to participate in outdoor education activities as an alternative (or in addition) to media-related activities like television and video games.²⁷¹ Lastly, in an effort to help educate parents and other video game purchasers, some states have enacted laws requiring video game retailers to display information about the industry ratings systems.²⁷² Media literacy, outdoor education, and ratings systems awareness may not be the entire solution, but programs like these do offer immediate steps that address ecogenerist concerns about media harm to children.

V. CONCLUSION

The law’s continued refusal to recognize mass media and marketing harm to children has left researchers and regulators in a strange position, waiting until science might sufficiently advance to satisfy a court’s causality requirements and in the meantime engaging in a seemingly fruitless exercise of tweaking statutory language in an effort to survive First Amendment strict scrutiny. Like the early environmentalists, mass media reform advocates have harnessed the social science but have lacked the regulatory framework necessary to convert the research results into real change. As this article has shown in revisiting the line of cases striking down legislative efforts to protect children from the harms of violent video game play, ecogenerism offers compelling arguments for a para-

267. See generally Marjorie Heins & Christina Cho, *Media Literacy: An Alternative to Censorship*, Free Expression Policy Project (2003), available at <http://www.fepproject.org/policyreports/medialiteracy.pdf>.

268. *Id.* at 1.

269. *Id.* at 20, 20–37.

270. See, e.g., Press Release, Gov. Rell, *supra* note 266.

271. See, e.g., *id.* (quoting Connecticut Governor Rell on the launching of a statewide initiative, “No Child Left Inside will provide the incentive youngsters need to turn off their computers, cell phones and video games and get back outside”). In a related effort, the U.S. Congress currently is considering a federal environmental literacy program as part of the No Child Left Inside Act of 2009, H.R. 2054, 111th Cong. (2009).

272. See, e.g., WASH. REV. CODE § 19.188.040 (2008) (requiring video game retailers to “post signs providing information to consumers about the existence of a nationally recognized video game system or notifying consumers that a rating system is available to aid in the selection if such a rating system is in existence”).

digm shift. This article demonstrates that the ecogenerist perspective demands reversal of the Ninth Circuit's decision to invalidate the violent video game sales statute at issue in the *Schwarzenegger* case. Should the Supreme Court decline to do so, future research initiatives and legislative action, nonetheless, can benefit from incorporating the ecogenerist perspective.