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Comparing and Contrasting the Constitutional Approaches of Justice Scalia and Justice Breyer Through the Pending Supreme Court Case Schwarzenegger V Entertainment Merchants Association

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CLAREMONT McKENNA COLLEGE

COMPARING AND CONTRASTING THE CONSTITUTIONAL APPROACHES OF JUSTICE
SCALIA AND JUSTICE BREYER THROUGH THE PENDING SUPREME COURT CASE
SCHWARZENEGGER V ENTERTAINMENT MERCHANTS ASSOCIATION

SUBMITTED TO

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Introduction

The aim of this thesis is to explore the differences and similarities between Justice Antonin Scalia's textualist approach to interpreting the Constitution and Justice Stephen Breyer's Living Constitution approach (also called the evolutionist approach) by applying these disparate legal theories to *Schwarzenegger v Entertainment Merchants Association*, a case currently pending before the Supreme Court whose resolution centers on the interpretation of the First Amendment.

The textualist approach relies primarily on interpreting the original meaning of the text of the Constitution, and attempting to decide cases in a way that is faithful to an amendment's words as written (Rossum et al. 4). The Living Constitution, or evolutionist approach to constitutional interpretation, contends that the meaning of the Constitution evolves with the standards of society, and the purpose or intent behind the Constitution or an amendment is as important, if not more so, than the literal language when interpreting a Constitutional amendment as it applies to actual cases as they arise (8). These two approaches are fundamentally oppositional, and Justices Scalia and Breyer are the very embodiment of these approaches on the Supreme Court today; each man avidly defends his respective approach in his opinions and other written works, and each exhibits the logic of these approaches in his decisions.

In the following pages, this author will present the facts and history of *Schwarzenegger v Entertainment Merchants Association*, including the judicial history of the case within the lower

courts, followed by an exploration of the arguments presented by the Petitioners and the Respondents to the Supreme Court through their briefs. Next, the author will discuss and illustrate both Scalia's and Breyer's self-proclaimed defenses of their constitutional approaches, including Scalia's scathing critique of the evolutionist or Living Constitution approach in his essay, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," as well as Justice Breyer's book, *Active Liberty*, which is regarded as a direct response to Scalia's essay. This section is intended to provide not only a working understanding of each Justice's constitutional approach, but an in-depth examination of these approaches in these jurists' own words, which is crucial to understanding the analysis that follows regarding this author's reasoned opinion as to how they will individually decide *Schwarzenegger v Entertainment Merchants Association*.

The purpose of choosing a case that is undecided (at the time of this writing) is to explore and flesh out the actual decision-making process of both Justices and their constitutional theories, rather than merely critiquing their decisions and holdings in a case that has already been adjudicated. This approach is arguably a more useful exercise than the latter, as it allows one to examine and weigh the justices' motives, principles, and goals when deciding cases and provides insight into the active process these judges use to uphold constitutional rights. This exploration also allows one to decipher how these approaches are similar and different in interpreting the Constitution. In addition, the author has carefully chosen to examine *Schwarzenegger v Entertainment Merchants Association* for this purpose, as it is a highly useful example for exploring and applying these two theories of constitutional interpretation.

Chapter I:
Background and History of Schwarzenegger v Entertainment Merchants Association

Schwarzenegger v Entertainment Merchants Association presents the question of whether California's Assembly Bill 1179 violates the First Amendment. The Act prohibits minors from purchasing video games that depict violence. The Bill's proponents assert that there is ample evidence from social scientists and published studies that demonstrate a direct causal link between violence in video games and violent behavior in minors (Brief for Petitioner at 1, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 12, 2010)). Opponents contend that the Bill violates the First Amendment of the Constitution because it is overly vague, and constitutes a content-based restriction on speech that does not meet the criteria of the strict scrutiny test (Brief for Respondent at 16-18, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 22, 2010)).

Assembly Bill No. 1179

Assembly Bill 1179 was signed into law by Governor Schwarzenegger on October 7, 2005 (AB 1179). It states that violent video games must be labeled as such (and more stringently than the current standards of the Entertainment Software Rating Board, or ESRB), and that minors under the age of 18 are prohibited from renting or buying such games. Additionally, the Bill dictates that any person who violates the Act by selling or renting a video game classified as violent by the Act is subject to a \$1,000 fine per violation. (AB 1179). The Act does not prohibit a parent or guardian of a minor from buying or renting the labeled video games for his or her minor child to play.

The Bill defines a video game as violent if “the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being” and these

actions meet a set of criteria (AB 1179). The first set of criteria is that “[a] reasonable person, considering the game as a whole, would find [that it] appeals to a deviant or morbid interest of minors,” the video game “is patently offensive to prevailing standards in the community as to what is suitable for minors,” and that the degree of video game violence “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors” (AB 1179). The second set of criteria under which a video game can be classified as offensively violent is if the game “[e]nables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim” (AB 1179).

In Section 1 of the bill, the California Legislature explains that the purpose of the act is to prevent offensively violent video games from causing harm to minors and to society. The Bill states that the “Legislature finds and declares” that “[e]xposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior” (AB 1179). Additionally, the Legislature states that “[e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games,” and asserts that the “State has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games” (AB 1179).

In the brief submitted by California to the Supreme Court, California asserts that the Legislature passed the Act because it “sought to reinforce the right of parents to restrict children’s ability to purchase offensively violent video games” and that in so doing, it took into

consideration many reputable studies and reports “from social scientists and medical associations that establish a correlation between playing violent video games and an increase in aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in both minors and adults” (Brief for Petitioner at 2, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 12, 2010)). California also cites in its brief the Legislature’s consideration of “the Federal Trade Commission's report that the video game industry specifically markets 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” (Pet. Br. at 2).

First Amendment Challenge to Assembly Bill 1179

Entertainment Merchants Association challenged Assembly Bill 1179 before its enforcement, arguing before the District Court that, “the Act violates the First Amendment and is unconstitutionally vague” (Brief for Respondent at 5, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 22, 2010)).

The First Amendment holds that “Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (U.S. Const. amend. I). While broad, the freedom of speech is not unlimited; there are certain categories of speech that do not fall under the protection of the First Amendment, or have a lower standard of protection when government regulations apply to them (Rossum et al. 187). These categories include obscenity, libel, and fighting words (187). However, the spheres of speech that are considered entitled to First Amendment protection have broadened substantially over the Supreme Court’s history (207).

In earlier cases, this protection derived from the English laws that the colonies inherited, and was applied primarily to the press and to political speech but did not include libel and other unprotected modes of speech (187-188). More recently, the Supreme Court has broadened its protection of libel and obscenity and has even extended it not only to the First Amendment protection of “freedom of speech” but of “freedom of expression,” which can take many forms (197). For example, in the 1989 case of *Texas v Johnson*, the court upheld the expressive right to burn the flag in protest of the government though the Constitution makes no mention of protecting expressive action (246).

The broadening of First Amendment protection may be due to several factors, including the incorporation of the free speech and press guarantees to the states through the Due Process clause of the Fourteenth Amendment (207). The Bill of Rights contained the first ten amendments to the Constitution that were applied to local governments, and the Fourteenth Amendment was ratified in 1868 (52). Also, this broadening may be due to the Court gradually accepting various categories as deserving of protection which were previously unprotected, including “symbolic speech, commercial speech, and freedom of association” (Rossum 207). The expansion of First Amendment protections may also be attributable to the Court’s narrowing of its definitions of the categories of speech--“the lewd, and the obscene, the profane, the libelous, and the insulting or ‘fighting words’”--that are not entitled to First Amendment protection” (207).

In examining whether a federal or state law violates the protections afforded by a fundamental right, such as those guaranteed under the First Amendment, the Supreme Court has applied a stringent level of judicial review known as strict scrutiny (US Legal). Strict scrutiny is

a 3-pronged test first espoused in the 1938 case of *U.S. v Carolene Products (Carolene)*. To pass this test of judicial scrutiny, a law that curtails a fundamental constitutional right must be justified by a compelling governmental interest; must be narrowly tailored to achieve that interest; and must use the least restrictive means to achieve that interest (US Legal). Often times, laws concerning the aforementioned unprotected categories of speech, such as those that attempt to outlaw forms of obscenity, are invalidated for over-breadth or vagueness under the strict scrutiny test (US Legal)(Brief for Respondent at 18, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 22, 2010)).

The increase in technological forms of expression, such as the Internet and video games, have had a significant impact on First Amendment jurisprudence, as these advances have forced the Supreme Court to apply old principles to new contexts (Rossum 206). As a result, the Court has had to face more and more cases similar to *Schwarzenegger v Entertainment Merchants Association* because technological innovations and their increasing popularity in society have raised a host of issues concerning obscenity and the protection of minors under the First Amendment. Examples include *Reno v. American Civil Liberties Union*, in which the Court “struck down provisions of the Communications Decency Act of 1996 designed to regulate ‘indecent’ material on the Internet,” and *United States v. American Library Association* which held that public libraries could not receive federal dollars if they did not take measures to prevent children from “obtaining access to material harmful to them” (Rossum 206).

The crux of *Schwarzenegger v Entertainment Merchants Association* is whether the case falls within the obscenity exception, a category of expression that is not protected by the First Amendment. Over the years, obscenity has been redefined in scope by the Court when

determining whether certain expression requires First Amendment protection. In *Miller v California*, the Court applied a three-pronged test for “identifying obscenity” (205). This test, which is almost identical in syntax and diction to the disputed Assembly Bill 1179 passed by California, states that something is obscene if “(a) ‘the average person, applying contemporary standards’ would find that the work, taken as a whole, appeals to the prurient interest;...(b)...the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c)...the work, taken as a whole, lacks serious literary, artistic, political, or scientific value” (205) (*Miller*).

In *Ashcroft v Free Speech Coalition*, the Supreme Court upheld the use of the Miller Test, asserting that “government could only proscribe material that failed the three-part test for obscenity announced in Miller” (206). In addition, the Court held in *U.S. v Playboy Entertainment Group* that regulations aimed at preventing children from seeing sexual material on cable TV were unconstitutional because the court was unwilling to risk creating restrictions on protected expression for adults when attempting to protect children. This ruling demonstrates how “the court’s position suggests the necessity of exploring non-censorial approaches to protecting children from inappropriate material” (206).

Procedural History of Schwarzenegger v Entertainment Merchants Association

The District Court ruled in favor of Entertainment Merchants, holding that the Bill failed the strict scrutiny test because it did not employ the “least restrictive means of achieving the compelling interest in that the State did not demonstrate that parental controls available on some new versions of gaming consoles would be less effective” (Brief for Petitioner at 3, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 12, 2010)). Failing the scrutiny test

led the Court to permanently enjoin enforcement of the Act because it was unconstitutional on its face. The Court of Appeals for the Ninth Circuit affirmed the District Court's ruling, stating that it rejected California's argument that the Act only applies to minors and to speech that is not protected under the First Amendment when minors are involved. California argued that video game violence should be considered obscene, and the State's regulation of their sale is constitutionally similar to the regulation of sexual material to minors under *Ginsberg v. New York*; however, the court distinguished *Ginsberg* because it only applied to sexually obscene material and not to violence. The Court also employed the strict scrutiny test, and determined that California did not meet its criteria because of the reasons discussed in the District Court's holding. The Court also asserted that California did not demonstrate a causal link between video game violence and psychological harm or increases in violent behavior in minors, but that even if it had, the Act was not the least restrictive means to mitigating the harm of violent video games (Pet. Br. at 3). California appealed that decision. The Supreme Court granted certiorari on April 26, 2010, and heard oral argument on November 2, 2010. The case is expected to be decided in June of 2011.

Chapter II: Brief of Appellant-Petitioner, California

Summary

California argues that it can constitutionally limit minors' access to violent, harmful video games because such games which have "no redeeming value for children any different from sexually explicit material" and are thus unworthy of First Amendment protection (Brief for Petitioner at 3, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 12, 2010)). The Act attempts to protect "to protect minors' physical and psychological welfare, as well as their ethical and moral development" by restricting their ability to access graphically violent and disturbing video games, and California asserts that it has a vital State's interest in helping parents limit the amount of offensively violent material minors can have access to and thus consume. California asserts that allowing parents to have more of a role in controlling minors' exposure to "offensively violent video games" does not obstruct the First Amendment rights of adults since the Act in question clearly does not apply to adults (Pet. Br. at 3). California also maintains that minors and adults should not be treated the same under the First Amendment, because minors have more restricted rights under the First Amendment due to the fact that they are less able than adults to make appropriate judgments on how much violent or sexually explicit material they should consume.

Appellant-Petitioner Brief

California frames the questions presented by the case to be, "[does] the First Amendment bar a state from restricting the sale of violent video games to minors?" and "if the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC*, is the State required to

demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?” (Pet. Br. at 1).

California asserts that its state legislature passed the Act in the hopes of “[reinforcing] the right of parents to restrict children's ability to purchase offensively violent video games” (Pet. Br. at 2). It was also motivated by the numerous reports and articles that indicate a correlation between graphically violent video games and aggression in minors. California cited the FTC report as to how much minors are able to purchase and view graphically violent video games. The Legislature also passed the Act because of particularly disturbing and sadistic scenes that players can engage in, using an example from a game known as *Postal 2*, which

“involves shooting both armed opponents, such as police officers, and unarmed people, 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” (Pet. Br. at 3).

This kind of depiction of not only violence but pleasure in performing violent and depraved acts towards both adults and children, California asserts, is not worthy of First Amendment protection because it has no redeeming artistic value, and the standards of society would reasonably deem this as inappropriate material for minors to be exposed to (Pet. Br. at 3).

California argues that the First Amendment allows states to “restrict minors’ access to offensive and harmful violent video games absent parental supervision... [b]ecause the State has the vital interest in reinforcing parents' authority to direct the upbringing of children in order to protect their physical and psychological welfare, as well as their ethical and moral development, restrictions on minors' access to offensively violent material are constitutionally

permissible.” (Pet. Br. at 3). California asserts that minors do not have the same First Amendment rights that adults have, because “[t]his precious right presupposes the capacity of the individual to make a reasoned choice as to whether to consume specific speech...[and] [m]inors lack such capacity” (Pet. Br. at 6).

California concedes that even though any laws that restrict speech are considered void under the First Amendment, and it is the burden of the State to prove that a law does not violate the Constitution, the context of the Act “is all important” (Pet. Br. at 5). California points out that the Supreme Court case history demonstrates that “the Court...has allowed the government to regulate the content of offensive speech that could harm children, even though the speech would have been fully protected in other contexts” (Pet. Br. at 5). Petitioners reinforce this point by asserting that there has been in the “[Supreme] Court's precedent: (1) a recognition that parents must have substantial freedom to direct the upbringing of their children; and (2) a recognition that minors' rights may be curtailed in ways that the rights of adults cannot” (Pet. Br. at 5). Consistent with these principles, this Court has recognized that the First Amendment rights of minors are not "co-extensive with those of adults" in cases such as *Erznoznik v. City of Jacksonville*, *Tinker v. Des Moines School Dist.*, and *FCC v. Pacifica Foundation*.

California asserts that the State must protect minors' liberty by reinforcing the parents' ability to make beneficial choices about how their children develop despite potentially harmful influences. Combining this intention of the State and minors' special standing under the First Amendment, “laws that prohibit the sale to minors of violent material that is patently offensive, appeals to a minor's deviant or morbid interest, and lacks serious socially redeeming value for minors should properly be reviewed under the standard set forth by this Court in *Ginsberg v. New*

York” (Pet. Br. at 5). If examined through the lens of this *Ginsberg* standard, it “should make no constitutional difference whether the material depicts sex or violence,” and “the Act must be upheld so long as it was not irrational for the California legislature to determine that exposure to the material regulated by the statute is harmful to minors” (Pet. Br. at 9).

Applying the *Ginsberg* standard rather than strict scrutiny would allow the State to pass laws that boost the parents’ ability to protect minors’ wellbeing. Doing so, Petitioners claim, would “balance the rights of minors with the State’s interest in reinforcing parents’ prerogative to direct the upbringing of their children,” respects the parents’ control over which materials their children are exposed to, and aids parents in protecting their children from expression that “is just as harmful, if not more so, as sexual material” (Pet. Br. at 9). California asserts that the *Ginsberg* “case is premised upon society’s traditional interest in protecting children from harm and helping parents direct their children’s moral and social development” (Pet. Br. at 5). Additionally, petitioners assert that “[v]iolent video games, like sexual images, can be harmful to minors and have little or no redeeming social value for them” (Pet. Br. at 4-5).

California further argues that “this Court has consistently recognized that parents must be permitted, with governmental assistance, to help shape that marketplace for minors given their underdeveloped sense of responsibility and vulnerability to negative influences...[and] the *Ginsberg* standard properly accounts for fundamental differences in the inherent vulnerabilities and susceptibilities to negative influences between adults and minors”(Pet. Br. at 9). In consideration of these state purposes, the strict scrutiny standard does not make the proper distinction between adult and adolescent vulnerability to speech, and is contradictory to the Constitution, since the “First Amendment has never been understood as guaranteeing minors

unfettered access to offensively violent material”(Pet. Br. at 5). California points to the fact that “[a]lthough the New York law at issue in *Ginsberg* would not have survived judicial scrutiny had it applied to adults, this Court upheld the law because it targeted purchases only by minors” (Pet. Br. at 5-6). California argues that the First Amendment rights of minors cannot be equal to those of adults because of “undeniable distinctions between adults and minors” (Pet. Br. at 9).

Petitioners claim that since “the parts of the brain involved in behavior control continue to mature through late adolescence, speech may have a deeper and more lasting negative effect on a minor than on an adult” and that examining the Act under strict scrutiny would ignore these developmental differences that are crucial to determining the perniciousness of certain speech directed at minors (Pet. Br. at 5).

Petitioners further argue that the offensively violent material of these games “shares the same characteristics as other forms of unprotected speech, especially sexually explicit material” and that, historically, states have regulated the selling of sexual and violent material to underage citizens (Pet. Br. at 9). California argues that these laws originate in “society's understanding that violent material can be just as harmful to the well-being of minors as sexually explicit material” (Pet. Br. at 9). It is therefore illogical to treat violence and sexuality as so different when determining the harm that such expression may have on minors, so that states can legislate against one but not the other. California asserts that this makes an unnecessary and false distinction, since both could be harmful to adolescent development.

Moreover, Petitioners assert that the Legislature incorporated the Miller Test into the Act so that this new prohibition would only apply to a narrow category of speech. In their reply brief, Petitioners argue that the Act that Respondents criticize as a dangerous expansion of

governmental power to censor expression] has “nothing in common with the statute at issue in this case” (Reply Brief for Petitioner at 1, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (October 8, 2010)). California’s restriction only applies to video games which meet the very specific criteria laid out by the Act in detail, and will not create a chilling effect on speech because the guidelines for rating a game as too offensively violent for children to view are clear and precise.

Chapter III

Brief of Appellee-Respondent, Entertainment Merchants Association

Summary

In their briefs submitted for consideration to the Supreme Court, Entertainment Merchants argue against this new California legislation within the framework of landmark cases that dictated the Supreme Court's First Amendment Doctrine. The main argument put forth is that video games are worthy of First Amendment protection, and that a minors' rights under the First Amendment are equal to an adult's except in very narrowly defined circumstances, none of which apply to the Act at issue. Merchants also assert that content-based restrictions on speech require the court to use strict scrutiny in deciding the case, and that California's Act fails the strict scrutiny test. In applying this test, Merchants argues that California did not use the least restrictive means possible to achieve the Act's goals, especially since statistics show that the current video game rating system has been effective in both informing parents about ratings and preventing minors from buying violent video games without parental consent. Additionally, Merchants conclude that California's assertion that the Court should employ the rational balancing test instead of strict scrutiny, that violence should be considered to be in the same unprotected category as sexual obscenity, and that violent video games should be placed in a new unprotected category under the First Amendment is both dangerous and meritless.

Appellee-Respondent Brief:

In the Appellee-Respondent brief submitted to the Court, the Entertainment Merchants Association ("Merchants") assert that "video games are a modern form of artistic expression" that is creative in nature, and as worthy of protection under the First Amendment as literature, cinema, music, and other protected art forms and expressive media (Brief for Respondent at 2,

Schwarzenegger v. Entm't Merchs. Assoc., No. 08-1448 (July 22, 2010)). Similar to film and literature, video games contain “dialogue, music, visual images, plot, and character development,” as well as “classic themes that have captivated audiences for centuries, such as good-versus-evil, triumph over adversity, struggle against corrupt powers, and quest for adventure” (Resp. Br. at 6).

The interactive element of video games, in which the players control characters’ interactions and the plot, the Respondents argue, does not minimize video games’ entitlement to full protection under the First Amendment; “if anything, the interactive aspect of video games heightens the First Amendment values at stake, because playing a game involves expressive activity not only by the game creators but by the player as well” (Resp. Br. at 7). This ability to control video games is thus tantamount to composing a musical score or reading literature. Merchants quote Judge Posner in *American Amusement Machine Ass’n v Kendrick*, who “explained, “[a]ll literature . . . is interactive[...]. [I]terature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own” (Resp. Br. at 7). Respondents argue that “California fundamentally distorts bedrock First Amendment principles when it suggests that video games are entitled to lesser protection because their interactivity *increases* the impact of their expression on the viewer” (Resp. Br. at 7).

In response to California’s argument that depictions of violence in video games are not protected, Merchants assert that “[d]epictions of violence in video games -- like all other media -- are fully protected by the First Amendment” (Resp. Br. at 7). Respondents reference the case of *U.S. v Stevens*, using it as an example to demonstrate the limits of the Court’s First

Amendment Doctrine. In *Stevens*, the Court held that only a few categories of expression are considered unprotected by the First Amendment: obscenity, incitement, and defamation.

Respondents also assert that in *R.A.V. v City of St. Paul*, the Court held that "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations'" (Resp. Br. at 7). As these Court decisions demonstrate, the Respondents argue, "depictions of violence have never been considered a category of unprotected expression" (Resp. Br. at 7).

Although California argues that it can protect minors from "offensive" expression whether it is violent or not, Respondents maintain that the State has no "free floating power" to censor what minors view (Resp. Br. at 9). Minors' rights under the First Amendment are equal to the rights adults enjoy, except in narrow circumstances that, in the Respondents' view, are not exhibited by the facts of this case. Additionally, the brief states that California's argument that the State can interfere because it desires to aid parents in choosing suitable material for their children is not defensible because "[t]hat justification could justify a ban on virtually anything" and snowball out of control (Resp. Br. at 9). Although parents have the right to decide what their children are exposed to, "that parental prerogative does not give the government the right to decide what is worthy for minors to view," and parents, not politicians, should retain this power (Resp. Br. at 12).

Respondents reject California's attempt to use the landmark case of *Ginsberg v New York* to justify censoring violence when minors are concerned. Respondents point out that *Ginsberg* does not include violence in its holding that minors can be censored from obscenity, since "[t]his court

has unanimously held that obscenity is limited to ‘works which depict or describe sexual conduct’” (Resp. Br. at 7). *Ginsberg* therefore does not allow the State to equate violence with sexual obscenity when restricting minors’ First Amendment rights. Additionally, the Respondents argue, *Ginsberg*’s holding only applies to sexual obscenity because sex, as opposed to graphic violence, does not play the same “celebrated” role in American cultural expression and tradition (since gruesome violence is in everything from Greek myths to the *Harry Potter* books). *Ginsberg* also “expressly disclaimed any holding beyond obscenity,” stating that there was “no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State” (Resp. Br. at 11). Respondents also assert that “California’s attempt to equate portrayals of violence with sexual materials ignores an important reality: violence, unlike explicit descriptions of sex, is a central feature of expression intended for minors,” as is demonstrated in works such as *Lord of the Flies*, the *Harry Potter* books, *Lord of the Rings*, and *Grimm’s Fairy Tales* (Resp. Br. at 11).

Merchants portray as potentially dangerous California’s arguments “that some expression to minors, even if entirely non-sexual in content, is unprotected by the First Amendment” and that the Legislature “can [therefore] ban speech to minors that it deems potentially harmful” (Resp. Br. at 8). Respondents assert that “it is critical to recognize the radical nature of California’s position [since] California asserts the power to decide that certain otherwise-protected, non-sexual content is so offensive that it is ‘simply not worthy of constitutional protection’ as to minors” (Resp. Br. at 8). Respondents deem this logic unacceptable. Quoting *U.S. v Playboy Entertainment Group*, Merchants argue that “content based restrictions are presumptively unconstitutional precisely because ‘opinions and judgments, including esthetic

and moral judgments...are...not for the Government to decree, even with the mandate or approval of a majority” (Resp. Br. at 8).

Additionally, Respondents insist that this is a dangerous Constitutional position for the government that could have far-reaching consequences if validated by the Court, since “this argument has almost no stopping point because so many expressive works contain violent depiction or other content that someone could deem offensive for minors...[and][a]ccepting California’s position would thus justify censorship of a wide range of expressive materials by states and localities around the country, a result anathema to the First Amendment” (Resp. Br. at 8-9). Respondents also warn that California’s assertion that it will only regulate offensive expression “only compounds the First Amendment problem” because it “invites viewpoint discrimination,” which was considered unconstitutional by the Court in *R.A.V. v City of St. Paul* (Resp. Br. at 9). Respondents also conclude that the vagueness of the Act, its overbreadth, and its harsh penalties will have a chilling effect on speech that is constitutionally unacceptable.

Respondents use Supreme Court precedent to demonstrate that minors’ rights under the First Amendment are equal to adult’s, except for a few narrow circumstances which they argue are not present in the facts of this case. *McConnell v. FEC* held that the “general rule is that ‘[m]inors enjoy the protection of the First Amendment,’ and *Tinker v. Des Moines* established that minors “‘are possessed of fundamental rights which the State must respect’ and they ‘may not be regarded as closed-circuit recipients of only that which the State chooses to communicate’” (Resp. Br. at 9). Respondents assert that minors are “participants in the marketplace of ideas” that cannot fully develop, become independent, or be “responsible citizens” if forced to live in an “intellectual bubble” dictated by the State (Resp. Br. at 9). The

Court has repeatedly refuted arguments such as California's that minors need to be protected from certain forms of speech, asserting that "[w]e have held consistently that speech 'cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them'" in cases such as *Erznoznik v. City of Jacksonville* (Resp. Br. at 9).

The Respondents' brief also discusses California's contention that the Court should use rational-basis scrutiny because the Act is only meant "to assist parents" through labeling games that meet the State's new definition of violence (Resp. Br. at 10). Respondents point out that when it comes to other expressive mediums, such as the radio, television, and internet, "the Court has not freely allowed the government to censor speech it deems inappropriate for minors, instead relying on parents to control access in the first instance" (Resp. Br. at 9). Respondents assert that it is "undisputed" that parents have control over what speech or expression their children are exposed to, but that this does not allow the government to decide what kinds of expression are "'worthy' of protection" because the "First Amendment leaves 'these judgments...for the individual to make, not for the Government to decree,'" as the Court stated in *Playboy* (Resp. Br. at 10).

Respondents reject California's assertion that violent video games should be placed in a new category in which the First Amendment applies to minors' exposure to violence in video games differently than to other mediums. Respondents maintain that there is no evidence that the depictions of violence in video games warrant a new First Amendment exception, since parents do not seem to have a problem monitoring their children's video game exposure or intake, and the Act's referenced social science does not sufficiently demonstrate psychological harm or an increase in violence among minors from playing video games.

California's "emphasis on assisting parents, while allowing them to make final choices about the games their children will play, means that the State has no regulatory interest unless parents are in fact experiencing difficulty monitoring their children and making those choices"(Resp. Br. at 12). The statistical evidence provided by the Respondents, however, demonstrates that parents do not need this assistance, and the State is therefore interfering in citizens' choices unnecessarily. There is also little evidence of children disobeying their parents in playing violent video games, since many are financially dependent, and need their parents to buy the game from the store or online in order to play. Additionally, the technological controls parents have over consoles prevents minors from playing video games in their absence of a certain rating. These opportunities for parental supervision and the evidence that parents already sufficiently monitor their children's intake of violent video games are ignored in California's insistence that parents need the State's aid.

Respondents also undermine California's evidence that video games inflict "any real harm" on minors' development or behavior, pointing to the fact that "the research cited by California has been resoundingly rejected by every court to have looked at it" because "it does not show that video games cause actual harm to minors, and it purports to find the same measured effects for a wide array of stimuli, including games designed for small children, television cartoons, or even a picture of a gun" (Resp. Br. at 12). Respondents comment that if these sorts of inconclusive social studies could justify making expression unprotected, "the First Amendment would mean very little" (Resp. Br. at 12).

California also attempts to avoid the "violence-prevention rationale" though the Act asserts that it is attempting to prevent violence, most likely because California is aware that video games

cannot count as incitement (discussed in *Brandenburg* holding). California focuses on a “more amorphous harm -- causing increased ‘aggressive thoughts and behavior’ in minors” (Resp. Br. at 12). However, research by Dr. Craig Anderson, which California primarily relies on in its arguments, has drawbacks discussed by the Ninth Circuit Court of Appeal’s decision. The Ninth Circuit asserted that these studies are fundamentally inconclusive and flawed since most of the studies do not aim to prove that there is a causal relationship between video games and aggression in minors but aim to “establish a correlation between preference for violent games and aggressive personal behavior -- though many other studies have not” (Resp. Br. at 12), Respondents also point out that the studies themselves admit that there is no way to determine ““which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games”” (Resp. Br. at 12). In the experimental studies California cites, the “effect sizes” Dr. Anderson calculates through a series of psychological tests for video games “are essentially the same” as the effect sizes he calculated for television (Resp. Br. at 12). Dr Anderson “also admitted that the increases in ‘aggression’ he purported to measure would result from a ‘very large number’ of stimuli other than video games” (Resp. Br. at 12). Respondents assert that the value of California’s evidence that video games cause aggression and psychological harm to children is largely unpersuasive and minimized even by those who conducted the experiment.

Respondents point to a long history of legislative assaults on new mediums of expression, and say that every new medium faced a similar reaction from the government to restrict it. However, each attempt was unwarranted, and the Court has always upheld the First Amendment. This is especially apparent in initial legislative reactions against true crime novels, movies, and

the Internet, which the court deemed protected under the Free Speech Clause and liable to strict scrutiny, despite “purported social science support” (Resp. Br. at 15). Respondents argue that the Court should similarly refuse to take the “‘starch’ out of strict scrutiny review” in this attack on a new mode of expression as well (Resp. Br. at 15). Respondents conclude that a new exception would be both unwarranted and dangerous, putting too much power in the hands of the Legislature to disregard rights of expression as long as it uses the justification that it is protecting the wellbeing of minors.

Respondents, after disputing the argument that a new exception is necessary by showing that evidence that video games are causing harm or inciting violence in youth is tenuous, demonstrate that not only should strict scrutiny be used, but that California’s Act fails strict scrutiny review for several reasons. Respondents claim that the Act first fails strict scrutiny because it does not advance a compelling interest of the State. Although the State has a compelling interest to protect minors, “California does *not* have a compelling interest in shielding minors from constitutionally protected expression that it deems offensive” (Resp. Br. at 16). Respondents maintain that, “to the extent that California seeks to regulate *conduct* resulting from expression, it must show that the regulation satisfies the *Brandenburg* standard [(incitement limited to expression both intended and likely to cause imminent lawlessness)], which it plainly does not” (Resp. Br. at 16). The assertion that there is a compelling interest to reduce psychological harm to minors is also not credible because it is based on weak social science studies and other evidence. Although California stated that the Ninth Circuit wrongly used a “‘heightened standard of proof requirement,’” the Circuit Court merely used the usual strict

scrutiny standard of review, and California failed to demonstrate that there was an “actual harm” or problem that the Act needed to address as a compelling interest of the State (Resp. Br. at 16).

After failing to provide strong evidence of harm, California attempted to convince the Court to engage in a “deferential approach to ‘legislators’ predictive judgments of harm,” essentially allowing the Legislature to review a diverse array of social science studies and decide which ones to credit” (Resp. Br. at 17). Respondents cite *Playboy*, which held that “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake” (Resp. Br. at 17). Respondents further add that the Act also fails the “material advancement prong” because “violent video games represent only ‘a tiny fraction of the media violence to which modern American children are exposed,’” and there are numerous other forms of media which minors can access that similarly depict graphic scenes of violence. To reinforce this point, respondents observe that California’s “*own evidence*, taken at face value, indicates that the effect of exposure to violent video games is the same as exposure to other media containing violence” (Resp. Br. at 17).

Respondents also attempt to prove that the Act fails strict scrutiny review because “it threatens to censor a wide range of fully protected expression,” and is therefore not narrowly tailored. Respondents assert that the Act is so broad in its language that “it would reach a huge range of expression that has never been thought inappropriate for minors” (Resp. Br. at 17-18). The “overbreadth” of the Act is in itself a demonstration that the Act is not narrowly tailored (Resp. Br. at 18). Respondents elaborate on this last statement by highlighting how California’s system makes no distinction between a 17 year-old and a child in elementary school, though the industry’s rating system is not so all encompassing in its rating of video games. If 17 year-olds

are weeks away from being able to enlist in the military, Respondents assert, it is illogical and overly broad in law to encompass them in the same category as young children when it comes to viewing depictions of violence.

Respondents further demonstrate that California's bill fails strict scrutiny review because the State did not use the least restrictive means possible to achieve its purported goals. California did not demonstrate that the current rating system (under the Entertainment Software Rating Board, or ESRB) is ineffective in preventing minors from purchasing and playing violent video games without parental permission, and fails to acknowledge the power parents have over their children's exposure to violent video games with parental controls in video game systems. Respondents assert that the new rating will cause confusion about an already uniform, voluntary, and broadly used system by parents. Vendors may fear the penalties of the Act so much that they refuse to carry certain games for fear that an employee may accidentally sell it to a minor and thus trigger liability. This could unintentionally thereby limit adults' access to video game expression as well, "further limiting the range of expression for adults" (Resp. Br. at 18). Supplanting the current system or current controls, or engaging in more education outreach to parents would have been examples of least-restrictive attempts to promote preventing minors from viewing video games that contain violence their parents consider unacceptable. According to the Respondents, California, therefore, fails each of the three prongs necessary to pass the strict scrutiny test deemed applicable to legislation that restricts speech based on content by the Supreme Court's First Amendment Doctrine.

Chapter IV: Scalia's Textual Approach to Interpretation

Justice Scalia's decision-making process could be summed up in two words: text and tradition. Scalia is wary of any departure from the original meaning of the Constitution's text, strongly criticizing Supreme Court decisions that he believes demonstrate an activist judiciary rather than a neutral decision-making branch of a democracy. Scalia "argues that primacy must be accorded to the text, structure, and history of the document being interpreted and that the job of the judge is to apply either the clear textual language of the Constitution or statute...[i]f the text is ambiguous, yielding several conflicting interpretations, Scalia turns to the specific legal tradition flowing from that text—to what it meant to the society that adopted it" (Rossum 27).

In the case of *Schwarzenegger v Entertainment Merchants Association*, as discussed below, Justice Scalia will most likely find that California's law to censor "patently offensive" video games for minors is unconstitutional, and reject California's assertion that the court should use a new *Ginsberg* standard rather than the strict scrutiny standard when evaluating the Bill in dispute, because his textualist approach would be highly inhospitable to California's arguments (Brief for Petitioner at 3, *Schwarzenegger v. Entm't Merchs. Assoc.*, No. 08-1448 (July 12, 2010)). The attempt to create new, untraditional standards to evaluate a government's ability to censor speech and to convey the text of the amendment as able to include a new unprotected category that was not conveyed or included in the original meaning, as the authors understood it, is inconsistent with Scalia's textualist ideology.

Justice Scalia famously defends the textualist approach to interpreting the Constitution in his essay, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws." He asserts that textualism is a more traditional

and true way to represent the Constitution in Supreme Court decisions, primarily because the Constitution is not meant to change with the times, but to instill long-standing values in the law. His essay evaluates how the common law tradition should not be applied to the Constitution because the Constitution is supposed to be stable in meaning over time. Allowing judges to dictate the law and the direction of its development is a necessary aspect of common law, he argues, but should not drive the interpretive framework of Justices. He argues that, “attacking the enterprise [of constitutional interpretation] with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation” (Scalia 14). This common-law approach, according to Justice Scalia, is inherent in the Living Constitution approach to interpretation, and makes it inherently flawed as a guide for Supreme Court Justices to decide cases. He believes that “reliance on text and tradition is a means of constraining judicial discretion...[and] faithful adherence to the text of a constitutional... provision...or, if that is ambiguous, to the traditional understanding of those who originally adopted it reduces the danger that judges will substitute their beliefs for society’s” (Rossum 27).

He states that he does not intend to change how the development of the common law is driven by the judge who decides common law cases, primarily because it is a good method of refining the law in many fields, but also because “an argument can be made that development of the bulk of private law by judges (a natural aristocracy, as Madison accurately portrayed them) is a desirable limitation upon popular democracy” (Scalia 12). However, he quantifies this dubious approval of the common law process, proclaiming that “though [he has] no quarrel with the common law and its process, [he does] question whether the *attitude* of the common-law judge--the mind-set that asks, “[w]hat is the most desirable resolution of this case, and how can any

impediments to the achievement of that result be evaded?"--is appropriate for most of the work that [he does], and much of the work that state judges do" (13). He jabs at other interpretive approaches to the Constitution, asserting that the Constitution is not a document that "is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like [because this] frustrates the whole purpose of a written constitution" (13).

Scalia defends his interpretive theory against critics' accusations, asserting that

"in some sophisticated circles, it is considered simpleminded-- 'wooden,' 'unimaginative,' 'pedestrian'. It is none of that. To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws" (23).

He argues that "textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute" (23). However, though he makes sure to assert that no one ought to be a strict constructionist, he asserts that even that less cohesive form of interpretation is better than non-textualism.

Scalia maintains that within his judicial philosophy of textualism, "a text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means" (23). He also purports to refute criticism of textualism, stating that "while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible" (24). He argues that "of all the criticisms leveled against textualism, the most mindless is that it is formalistic...the rule of law is about form," proclaiming, "long live formalism...it is what makes a government a government of laws and not of men" (25).

In his defense of textualism, he discusses the “widely criticized” canons of interpretation (25). He references both the canon *noscitur a sociis*, which translates into “it is known by its companions” and “stands for the principle that a word is given meaning by those around it,” and the canon *ejusdem generis*, which literally means “of the same sort” (26). Scalia argues that attacks on these canons are illogical because “all of this is so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them” (26). He defends the canons as legitimate tools of interpretation despite “being attacked as a sham,” arguing that “every canon is simply one indication of meaning; and if there are more contrary indications (perhaps supported by other canons), [this indication of meaning] must yield” (26). However, even if the process of using canons while interpreting the meaning of a text is not always perfect, “that does not render the entire enterprise a fraud--not at least unless the judge wishes to make it so” (27). He also responds to the preconceived notion of textualism that the founder’s opinions were authoritative, asserting “[w]hat I look for in the Constitution is exactly what I look for in a statute: the original meaning of the text, not what the original draftsmen intended” (38).

Scalia argues that the “the distinctive problem of constitutional interpretation” is not due to the nature of the Constitution as a text, but the way in which the judicial system approaches its interpretation (37). He jabs that “the problem is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text”(37). The common law methods of interpreting law, he asserts, are inappropriate in the constitutional realm.

In demonstrating why he believes other constitutional approaches are incorrect, Scalia states that “in textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation--though not an interpretation that the language will not bear” (37). Scalia uses free speech as one such inappropriate expansion of constitutional text. He asserts that, “the provision of the First Amendment that forbids abridgment of ‘the freedom of speech, or of the press’ ...does not list the full range of communicative expression” (37). He elaborates by stating how a handwritten letter, for example, cannot be censored by extension of this, though not all expression is covered by the umbrella of the First Amendment’s Free Speech Clause. He argues that, “in this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole [and] that is not strict construction, but it is reasonable construction” (38).

Scalia states that he is against examining the intent of the Founders as a guide for decision making and criticizes other justices for evaluating the intent of legislators when examining a statute’s text. He concedes that although he references the writings of some of those “who happened to be delegates to the Constitutional Convention,” he does so to construe the meaning of the text of the Constitution properly rather than to discern the intent of the Constitution’s writers (38). He asserts that their writings are important to examine from the textualist perspective because they “display how the text of the Constitution was originally understood” (38). He attempts to sift out the “original meaning of the text, not what the original draftsmen intended,” because the textualist tradition depends on the meaning of the text at the time it was drafted rather than what the words are perceived to mean in present society (38).

Scalia describes the dilemma of textualism in relation to this search for the text's meaning at the time of its drafting, elaborating that "the great divide with regard to constitutional interpretation is not that between the Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from the framers intent or not) and *current* meaning" (38). This distinction is crucial for comparing the constitutional approaches of Breyer and Scalia in deciding cases that come before the Supreme Court.

Chapter V: Breyer's Active Liberty and Living Constitution Approach

Stephen Breyer promotes a highly specialized Constitutional philosophy known as the living constitution or evolutionist approach. In his book *Active Liberty*, he illustrates this approach to constitutional interpretation, which focuses primarily on making America's experiment in democracy functional by giving a voice to the people through the collective opinions and judgments of the nine unelected Justices of the Supreme Court. The notion of "active liberty" allows not only a democratic boost of power to American citizens by giving their convictions influence over judges' interpretation of the Constitution, but also focuses practically on the consequences that rulings have for the American people and their ability to engage in democratic self-governance.

Breyer defends The Living Constitution approach and adds a new theoretical framework to propel the evolution of Constitutional interpretation. His "thesis is that courts should take greater account of the Constitution's democratic nature when they interpret Constitutional...texts" (Breyer 5). Breyer attempts to "illustrate [how] a democratic theme —'active liberty'...resonates throughout the Constitution" and how a democratically-minded approach when interpreting "a legal text will yield better law--law that helps a community of individuals democratically find practical solutions to important contemporary problems" (5)(6).

He asserts that active liberty is an "important theme" of the Living Constitution approach which should encourage judges to interpret legal and constitutional text in a way that improves the functioning of democracy in American society (7). He additionally suggests that the current Court is "too often underemphasizing or overlooking the contemporary importance of active liberty" (11). Breyer defines the concept of active liberty as an ideological theme that "refers to a

sharing of a nation's sovereign authority among its people" (15). He asserts that "active liberty cannot be understood in a vacuum, for it operates in the real world...and in the real world, institutions and methods of interpretation must be designed in a way such that the form of liberty is both sustainable over time and capable of translating the people's will into sound policies" (16). He defends the notion of active liberty, stating that the people's will is more important than what a judge may believe or know is a more just outcome, for "even if a judge knows 'what the just result should be,' that judge 'is not to substitute even his juster will' for that of 'the people.' In a constitutional democracy 'a deep seated conviction on the part of the people...is entitled to respect.'" (17).

The theme of active liberty is one aspect of a larger interpretive tradition referred to as a belief in The Living Constitution, which focuses less on the actual words that make up the Constitution and more so on the "underlying purpose" of the text because this "tradition sees texts as driven by purposes" (17). He asserts that "certain constitutional language, for example, reflects 'fundamental aspirations and...'moods,' embodied in ...which were designed not to be precise'" (18). This focus on purpose over text ties into Breyer's argument that judges must consider the consequences of their decisions. Breyer argues that, "since law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*" (18).

Since the Constitution's aims are what are at stake, the method of achieving these purposes may change over time, which may correspondingly change what the Constitution's amendments actually mean for the outcome of law or cases. Breyer maintains that "a judge should read constitutional language 'as the revelation of the great purposes which were intended to be achieved by the Constitution' itself, a 'framework for' and a 'continuing instrument of

government” (18). He additionally asserts that the underlying purpose of a text is especially important because of the changing times, and that a judge should “recognize that the Constitution will apply to ‘new subject matter...with which the Framers were not familiar’” (18).

Breyer believes that the Framers had active liberty in mind when structuring the Constitution and the Bill of Rights, and desired that the purpose of active liberty be implemented through the themes of the text. He claims that it is “reasonable from a historical perspective to view the Constitution as centrally focused upon active liberty, upon the right of individuals to participate in democratic self government” (21). He points to the states’ brief experimentation with different forms of self-government before the Constitutional Convention, and how the Bill of Rights explicitly attempted to protect democracy through “protections against government interference with certain fundamental personal liberties” (32).

Breyer interprets later amendments as extending “underlying constitutional goals that, in part, were already there” (34). This discussion of the transformation of the Constitution through certain later amendments may be a jab at Justice Scalia and other textualists who consistently hold that the Bill of Rights was never intended to be incorporated into the states through the Due Process Clause of the Fourteenth Amendment. Here, Breyer implies that such amendments “confirmed and perfected” the Constitution’s existing democratic purposes (34).

He asserts that this “constitutional history has been a quest for workable government,” as well as a “workable democratic government protective of individual personal liberty” (34). Therefore, he believes that the changes to the Constitution and its interpretation, which are inherent in The Living Constitution approach, are driven by the need for the government to respond to changing times and continue to be functional and democratic. He also implies by this

that changes in the interpretation and application of the Constitution are necessary to continue to protect American citizens' rights. Breyer argues that there are "modern government-related problems that call for a democratically based response" and that "increased recognition of the Constitution's democratic objective can help judges deal more effectively with interpretive issues" (37).

Breyer thereby concludes that the people should be the impetus behind the courts, and the whole of democratic government. He asserts that the Constitution "is a document that trusts people to solve...problems themselves...and it creates a framework for a government that will help them do so" (133). Therefore, to achieve the underlying goal to create a democracy that the Constitution attempts to realize, the people must be put in control, and it is the duty of government workers to promote a participatory democracy in every way possible. Breyer believes, and demonstrates this belief throughout his decision-making process, that a Living Constitution approach with a particular focus on active liberty, purpose, and consequences therein, would achieve this ideal democratic environment, while a textualist approach would undermine such a development.

**Chapter VI:
Scalia's and Breyer's Defense and Critique of One Another**

Justice Scalia criticizes the Living Constitution approach to interpreting the Constitution championed by judges such as Justice Breyer. Scalia argues that the belief in a Living Constitution, or “body of law that...grows and changes from age to age, in order to meet the needs of a changing society” is incredibly dangerous for our democratic society because “it is the judges who determine those needs and ‘find’ that changing law”(Scalia 38). He argues that this form of constitutional interpretation “is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures” (38). He states that this Living Constitution and its follies are exhibited in the process by which the Supreme Court examines cases, since one “will rarely find the discussion addressed to the text of the Constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text” (39). He explains that, “the starting point of analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding” (39). He criticizes not only this process of analyzing previous case law without considering the original meaning of the Constitutional text, but also the mindset of justices who are consequence-oriented.

Scalia laments that “worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to

mean” (39). He jabs at The Living Constitution approach, using the catchphrase “if it is good, it is so” to describe how judges decide cases based on approval of the issue rather than evaluation of the Constitution (39). Mimicking the mentality of judges, he asks, “should there be--to take one of the less controversial examples--a constitutional right to die? if so, there is”(39). Rejecting this approach, he sarcastically asserts, “never mind the text that we are supposedly construing; we will smuggle these new rights in” (39). He also criticizes The Living Constitution approach because he believes it makes amendments that should be static in meaning temporal. He communicates this mentality in the expression, “what the Constitution meant yesterday it does not necessarily mean today” because according to evolutionists, “its meaning changes to reflect ‘the evolving standards of decency that mark the progress of a maturing society’” (40). He asserts that “this is preeminently a common-law way of making law, and not the way of construing a democratically adopted text” (40). He concludes “the Constitution...even though a democratically adopted text, we formally treat like the common law...what, it is fair to ask, is the justification for doing so?” (40). He argues that it is inappropriate “to tinker with a Constitution, when their tinkering is virtually irreparable” (40).

His textualist view of the Constitution is fundamentally irreconcilable with The Living Constitution approach. In his opinion, “it certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change--to embed certain rights in such a manner that future generations cannot readily take them away” (40). He concludes that Americans should be resistant to this approach as a democracy because “a society that adopts a Bill of Rights is skeptical that “evolving standards of decency” always “mark progress,” and that societies always “mature,” as opposed to rot” (40). He argues that The Living

Constitution approach robs the legislature of decision-making and gives it to overly active Justices who are unelected by the people, despite the argument that The Living Constitution promotes active liberty through its focus on consequences and its value of the people's current convictions. Scalia refutes this point, arguing that, "neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts" (41).

He further dissects the support for The Living Constitution approach that judges cite in their defense, primarily refuting the argument that the evolutionist approach is pragmatic because, "[s]uch an evolutionary approach is necessary in order to provide the "flexibility" that a changing society requires; the Constitution would have snapped if it had not been permitted to bend and grow" (41). He states that this argument would only be valid and persuasive "if most of the 'growing' that the proponents of this approach have brought upon us in the past, and are determined to bring upon us in the future, were the *elimination* of restrictions upon democratic government" (41). He maintains that "just the opposite is true [because] [h]istorically, and particularly in the past thirty-five years, the 'evolving' Constitution has imposed a vast array of new constraints--new flexibilities--upon administrative, judicial, and legislative action" (41). He laments that the intention of the evolutionists is to institute more constraints on the American people by construing the Constitution's text in one limited way, so that state and federal laws cannot reflect changes in public opinion. He argues that this approach guarantees "the creation of *new* restrictions upon democratic government" and "[l]ess flexibility in government, not *more*" (42). Pointing to assisted suicide and capital punishment legislation, he asserts that if

living constitutionalists had their way, states would have no ability to experiment and vary in their laws on these matters. Scalia believes that states should be able to change their laws “as the changing times and the changing sentiments of society may demand” (42). He concludes that “[a]s things now stand, the state and federal governments may either apply capital punishment or abolish it, permit suicide or forbid it...but when capital punishment is held to violate the Eighth Amendment, and suicide is held to be protected by the Fourteenth Amendment, all flexibility with regard to those matters will be gone” (42).

He concludes that despite how living constitutionalists state that they desire to champion positive social change, this is untrue because, “the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it,” as these moral campaigns and opinions of living constitutionalists demonstrate (42). The defense that there are exceptions, he argues, only reinforces how not every “evolution will always be in the direction of greater personal liberty” and how “it is not true that every alteration of that balance in the direction of greater individual freedom is necessarily good” (42). The history of case decisions also refutes this notion that all decisions driven by a belief in The Living Constitution enlarge individual rights, and argues that “we may *like* the abridgment of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions of rights*” (43).

He attributes this haphazard development of evolutionist jurisprudence to the “lack of a guiding principle for evolution” of the Constitution (44). He states that it is also untrue that evolutionists always “follow the desires of the American people in determining how the Constitution should evolve [since] [t]hey follow nothing so precise; indeed, as a group they

follow nothing at all” because “there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution” (44)(45). The divisive stance of evolutionists as a group demonstrates the weakness of The Living Constitution philosophy in Scalia’s view.

“Evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy” (45).

Conceding that originalists do not always agree on a text’s meaning and how it should factor into an issue before the Court, Scalia contends that “the originalist at least knows what he is looking for: the original meaning of the text”(45). He argues that this search is frequently both fruitful and successful when construing legal passages because the text is “usually...easy to discern and simple to apply” (45). Scalia only references one exception to this usually smooth and predictable process of textualism, which is the occasional “disagreement as to how that original meaning applies to new and unforeseen phenomena” (45). He demonstrates how possible difficulties may arise for a textualist when facing new technological innovations, especially concerning the topic of interest here, the First Amendment. Scalia asks, how “does the First Amendment guarantee of “the freedom of speech” apply to new technologies that did not exist when the guarantee was created--to sound trucks, or to government-licensed over-the-air television?” (45). He answers that when facing new innovations, the Court must exercise careful, but often muddy, judgment because “in such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires --and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment” (45). He argues, however, that despite possible pitfalls, textualism must trump living constitutionalism, since “the originalist, if

he does not have all the answers, has many of them” while “for the evolutionist, on the other hand, every question is an open question, every day a new day” (46). Elaborating on the superiority of the textualist approach, he asserts that “the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable” (45-46).

He uses the example of the death penalty to demonstrate how little evolutionists reference the text of the Constitution; he asserts that he has served with three Supreme Court Justices who hold that the death penalty is unconstitutional, despite the fact that the death penalty is expressly discussed in the constitutional text (46). He observes that the constitution’s language on the subject are of “no matter” because “under The Living Constitution, the death penalty may have *become* unconstitutional” (46). It seems to Scalia that the death penalty can become unconstitutional depending on the sentiment of each living constitutionalist, who is not guided by any discernible principle. He concludes that “it probably does not matter what principle, among the innumerable possibilities, the evolutionist proposes to determine in what direction the living constitution will grow” because the evolving constitution will most likely evolve as the majority wishes under this constitutional approach (46). Scalia asserts that the Living Constitution mentality may wreak havoc on the judicial system as it becomes a tool of the majority to implement their passing sentiments permanently (46).

Envisioning a kind of snowball effect in the future, Scalia predicts that, “if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says

or what it was understood to mean, but what it *should* mean, in light of the “evolving standards of decency that mark the progress of a maturing society,” then people will narrowly select judges not based on impartiality and qualifications, but impinged on their ideological sympathies and political opinions (46). This will lead to the will of the majority dominating the law through the legal system because citizens “will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be” (47). In Scalia’s view, this disturbing political reality is already being realized in the judiciary (47).

The campaign for the women’s right to vote brilliantly exemplifies his point that the Living Constitution has already taken a stronghold in the minds and political ambitions of the American people (47). Scalia explains that despite the Equal Protection Clause in the Constitution, the campaign for women’s suffrage was not orchestrated through the court system because “75 years ago, we believed firmly enough in a rock-solid, unchanging Constitution that we felt it necessary to adopt the Nineteenth Amendment to give women the vote” (47). Scalia contends that if the right to vote was a current issue, the courts would have been “the chosen instrumentality of change” and the Constitution would be formally unamended” (47). Scalia asserts that the mindset of the American people has been warped to believe that a Living Constitution exists, and that this document aimed to instill long-standing principles and rights for the people is actually “a ‘morphing’ document that means, from age to age, what it ought to mean” (47). The trend towards interrogating federal judge appointees about their ideological stances and their goals for the direction of this evolving constitution is a result of this ideological shift in the people, and the majority will be able to hijack the judiciary through this appointment process so that it always bends to its will. Scalia asserts that “if the courts are free to rewrite the

Constitution anew, they will, by god, write it the way the majority wants; the appointment and confirmation process will see to that” (47). Similar to Breyer, Scalia asserts that the constitutional philosophy that contradicts his own is undemocratic, or will lead to consequences which are detrimental for American democracy and lawmaking. Scalia argues that the phenomenon of giving the majority power over the judiciary through the appointment process “is the end of the Bill of Rights” because its “meaning will be committed to the very body it was meant to protect against: the majority” (47).

Breyer’s critique of the textualist tradition is just as damning. Breyer contrasts his constitutional approach and focus on active liberty with textualism, which is championed most prominently and defended most avidly by Justice Scalia in the essay discussed above. Breyer condemns the textualist approach as inappropriate for responding to new factors and innovations that the law currently may not cover, and that the Constitution’s authors did not foresee and address. He proclaims that he is “against adopting an overly rigid method of interpreting the Constitution--placing weight upon eighteenth-century details to the point at which it becomes difficult for a twenty-first-century court to apply the document’s underlying values” (73). He states that nitpicking at the Constitution’s text in response to such new advances is unhelpful, while The Living Constitution approach can respond to contemporary developments.

Breyer asserts that a crucial aspect of democracy is legislating by the people’s will, and that The Living Constitution and active liberty approach “helps translate the popular will into sound policy,” while “an overly literal reading of a text can too often stand in the way” (101). Breyer first argues that to decide a case properly, many different elements must be considered by the judge in control, and that relying only on evaluation of the text is a far too narrow and

therefore illogical way to construe a text's meaning and proper effect in current society. When federal judges similarly face a web of text, history, structure, and precedent, he argues that they can decide the case like he does, "with less discord, more faithfully to the entire enterprise, and with stronger justification for the power I wield in a government that is of, by, and for the people, by paying close attention to the Constitution's democratic active liberty objective" (109).

Breyer elaborates on the advantages of the Living Constitution that a textualist approach lacks in his view. He reiterates a common theme among living constitutionalists that an evolving Constitution is necessary to handle unforeseen innovations in current times, alleging that "increased emphasis on the Constitution's democratic objective will help Americans remain true to the past while better resolving their contemporary problems of government through law" (111). He states that an inherently necessary aspect of dealing with contemporary issues is to examine the purposes beneath the Constitution's text and animate the democratic values that Americans live by. Breyer describes how he "sees individual Constitutional provisions as embodying certain basic purposes, often expressed in highly general terms" and idealizes the Constitution as a document that furthers basic democratic aims as a whole, not just in its various parts (115). He argues that consequences are an important aspect of the judicial decision-making process because they indicate how well the Court is achieving the democratic goals inherent in the Constitution's soul (115). Consistent with his aim to promote democracy through the courts, Breyer states that a "focus on purpose seeks to promote active liberty by insisting on interpretations...that are consistent with the people's will" and a "focus on consequences, in turn, allows us to gauge whether and to what extent we have succeeded in facilitating workable outcomes which reflect that will" (115).

After demonstrating the logic of his philosophy, he fully confronts those who believe that focus on purposes and consequences is inappropriate when construing legal text, and constitutional text in particular. He summarizes his interpretation of their argument that once justices frequently use “real-world consequences” as their guide in the courts, they will act undemocratically because their decisions will be inescapably subjective when oriented towards the outcome of a case (11). Critics also feel that using text, tradition, and precedent will provide an important safeguard against the possibility of a judge confusing his own personal views with constitutional mandates. He also argues that textualists and literalists reject the Living Constitution approach because they believe it will have the consequence of making judges more subjective. Framed in these terms, Breyer says this is hypocritical because the non-consequentialists in ideology are consequentialist in their defense of their legal theory.

Breyer aims to refute this assertion that judges who refuse to be literalists will necessarily become subjective in their rulings. He elaborates that his consequentialist approach does not “consider simply whether the consequences of a proposed decision are good or bad, in a particular judge’s opinion, rather, to emphasize consequences is to emphasize consequences related to the particular textual provision at issue” (120). Breyer argues that since “the judge must examine the consequences through the lens of the relevant constitutional value or purpose...the relevant values limit interpretive possibilities” (120). He also maintains that if the values are democratic, the judge will interpret them to mean judicial restraint as well. Breyer additionally contends that if a judge focuses on consequences, the realization that subjectivity in the Court’s decision-making will harm the legal system and cause negative consequences in society will also deter judges from acting subjectively (120). This focus on consequences

therefore does not encourage judges to act subjectively, because “a focus on consequences will itself constrain subjectivity” (120).

Breyer also attacks the textualist and literalist view that relying on text will not breed subjectivity in the courts, especially when a text is difficult to interpret or apply to a situation. He contends that “subjectivity is a two-edged criticism, which the literalist himself cannot escape [because the] literalist’s tools--language and structure, history and tradition--often fail to provide objective guidance in those truly difficult cases” (124). Breyer argues that the canons Scalia discusses in his essay do not provide subjectivity, because picking which canon to follow is in itself a subjective decision made by the textualist or literalist judge. He claims that whether a judge interprets a canon narrowly or broadly can add to the risk of subjectivity of supposedly objective tools of interpretation (124). He concludes that these “uncertainties” that he points out demonstrate how “the textualist, originalist, and literalist approaches themselves possess inherently subjective elements” (127). The use of canons, or linguistic or historical interpretations, Breyer asserts, can also cause doubts among the people concerning the integrity of the judiciary because the decision-making process is less transparent and clear when it involves such tools (127). Since the people and their participation and views are what is most at stake in Breyer’s view, this is unacceptable because it reduces the democratic value of the Supreme Court and the integrity of the judiciary.

He also does “not believe that textualist or originalist methods of interpretation are more likely to produce clear, workable legal rules” in the real-world, and he asserts that they may create dire consequences for Americans (129). In Breyer’s own words, he concludes that, “textualist and originalist doctrines may themselves produce seriously harmful consequences--

outweighing whatever risks of subjectivity or uncertainty are inherent in other approaches” (129).

Jabbing textualists at their own game, Breyer cites how “the Constitution itself says that the ‘enumeration’ in the Constitution of some rights ‘shall not be construed to deny or disparage other retained by the people’” (117). Breyer believes that the Framers incorporated this statement into the text to “make clear that ‘rights, like the law itself, should never be fixed, frozen, that new dangers and needs will emerge, and that to respond to these dangers and needs, rights must be newly specified to protect the individual’s integrity and inherent dignity’” (117-118). This text, in combination with the fundamentally open nature of content, motivates Breyer to reject the notion that the Constitution only offers eternally fixed values. Breyer also seeks to demonstrate that the basic purposes that the Framers wrote into the Constitution are not always achieved when judges rely on a textualist or literalist approach, and that this fact is primarily demonstrated in the textualist disregard for the people’s will--the driving force behind the democracy the framers sought to create (131). He argues that “literalism has a tendency to undermine the Constitution’s efforts to create a framework for democratic government--a government that, while protecting basic individual liberties, permits citizens to govern themselves, and to govern themselves effectively” (131-132). Breyer asserts that by undermining “this basic objective, [textualism] is inconsistent with the most fundamental original intention of the Framers themselves” (132).

**Chapter VII:
Predicting and Comparing Breyer's and Scalia's Decisions in Schwarzenegger v
Entertainment Merchants Association**

In deciding *Schwarzenegger v Entertainment Merchants*, Justice Scalia will most likely find that California's law to censor "patently offensive video games" for minors is unconstitutional, and reject California's assertion that the Court should use a new *Ginsberg* standard rather than the strict scrutiny standard when evaluating the California bill in dispute (Pet. Br. at 3). Scalia has demonstrated the ideas he presented in his essay through his decisions in past cases, which also involve applying amendments from the Bill of Rights to hotly debated issues. In each decision, Scalia places great importance on the constitutional text or "our society's traditional understanding of the text" (Rossum 32). Therefore, in determining the constitutionality of a law in dispute before the Court, Scalia relies on both constitutional text and tradition to guide his decision-making process.

Each departure from the original meaning of the Constitution's text is considered dangerous in Scalia's eyes because it degrades the integrity of the Constitution. To Scalia, the fact that Supreme Court cases rarely focus on the wording of the amendment at stake demonstrates how little respect the Court has for the Constitution as a document, and how the Supreme Court's decision-making process increasingly reflects that of the common law courts, which attempt to decide a case based on the correct consequences rather than on the actual text of a body of law. He has demonstrated his loyalty to the text over consideration of what Breyer may define as negative societal consequences in *Coy v Iowa* (Rossum 30). In *Coy*, Scalia asserted that despite societal concerns that people may have for the underage victims of rape and molestation, laws that prevent the defendant from directly seeing a witness violate the

defendant's right to be "confronted with the witnesses against him" in the Sixth Amendment (Rossum 30)(U.S. Const. amend VI). Scalia defends this point in his essay, stating that confront "means face-to-face," even if society disapproves of the circumstances (Scalia 43-44).

Tradition is also a crucial factor for Scalia. According to him, the Constitution is meant to be a long-lasting text, whose meaning is static over time (40). Statutory texts can be edited and revamped with the passing sentiments of the people by the Legislature, he believes, but the Constitution is meant to be a bedrock that establishes fundamental rights that should not have one meaning today and another meaning tomorrow (40). When Justice Souter's majority opinion in *McCreary County v. American Civil Liberties Union* held that a courthouse display of the Ten Commandments violated the Establishment Clause of the Eighth Amendment because the government could not publicly espouse religion, Scalia used references to America's historical understanding of the Establishment Clause in his dissent (Rossum et al. 312). He asserted that the authors of the Constitution and the society that adopted it did not originally believe the amendment's words to mean that "[r]eligion is to be strictly excluded from the public forum" (Rossum et al. 314)(*McCreary*). Scalia demonstrates this assertion by pointing out that the presidential oath ends with "so help me God," the currency is inscribed with "In God We Trust," the "First Congress instituted the practice of beginning its legislative sessions with a prayer," and "[t]he day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim 'a day of thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of the Almighty God,'" (Rossum et al. 314)(*McCreary*). Expanding and warping the constitutional amendment to restrict certain religious expression was wrong in Scalia's view because that was not a part of the

Constitution's original meaning, as he demonstrated through the actions of the government at the time. The way that an amendment is historically perceived, therefore, is also crucial to Scalia.

In deciding the case *Schwarzenegger v Entertainment Merchants Association*, Scalia's approach to the Constitution will lead him to be unsympathetic towards government attempts to restrict expression that is otherwise protected under the First Amendment by construing the text, society's traditional understanding of the text, and the Supreme Court's case history differently than is historically supportable. The distinction between sex and violence in the case history will probably be crucial to Scalia's interpretation of the California bill at issue in *Schwarzenegger v Entertainment Merchants Association*. His focus on tradition leads him to approach this constitutional question of whether the State can restrict minors' access to graphically violent expression the same way it can restrict minors' access to sexually explicit material with a special focus on the place of sex and violence in American society and the history of the First Amendment. Scalia would reject California's attempt to create a new *Ginsberg* standard because censorship of sex to minors is not equivalent to censorship of violence to minors when evaluating American traditions, especially literary traditions.

Scalia would most likely agree with Respondents' assertions in their brief that sex has not historically not been celebrated in American society the way that violence has, and would be swayed by such examples as the Grimm's fairy tales. Scalia asked during the oral argument of the case if "there are established norms of violence" because in his view, "some of the *Grimm's Fairy Tales* are pretty grim" (U.S. Supreme Court Media). Scalia would concur, based on his approach's goal to sift out the historically prevailing view of a constitutional issue, that depictions of violence in literary works such as the *Grimm's fairy tales*, *Harry Potter*, *Lord of the*

Flies, *Lord of the Rings* trilogy, and other graphically violent works directly aimed for consumption by minors demonstrate the traditional acceptance of violence in American society, as well as the original meaning of the text of the First Amendment (Resp. Br. at 11).

The text at stake is crucial in Scalia's application of his constitutional approach to the case of *Schwarzenegger v Entertainment Merchants Association*. He asks during oral argument what the Founders who penned the First Amendment would have thought of California's attempt to create a category of violence that could be considered unprotected speech under the First Amendment (U.S. Supreme Court Media). The original meaning of the text was the object of this inquiry, because he believes that this original meaning should guide the Court's decision. Scalia would mostly view the historical examples cited in the Respondent's brief as persuasive evidence that violence has never been considered unprotected under the First Amendment, and that the authors of the First Amendment did not intend to restrict children's exposure to violence (Resp. Br.). Scalia has "insisted that since the nation's founding, depictions of sex could be banned, but not depictions of violence and torture (Savage). The *noscitur a sociis* canon, which means "as understood by companions," could be applied to the First Amendment's words "freedom of speech" to decide the issue with the textualist approach.

Scalia will most likely use the famous literary examples listed above in his opinion of the case similar to the manner in which he used historical examples to demonstrate the original understanding of the Establishment Clause in *McCreary*, and may rely on canons such as *noscitur a sociis*. Scalia will probably research the laws of the era in which the Constitution was written, and decipher whether they censored violence as to adults and minors during the nation's founding. As to the English tradition that American laws inherited after the founding, Scalia will

most likely point out that laws restricting speech were aimed at obscenity as defined in sexual terms, not by violent expression (Savage).

Scalia has asserted that when there are new technological innovations that were not covered in the original meaning of the First Amendment, “the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires” (Scalia 45). Scalia will therefore be concerned with the Court’s traditional approach towards deciding cases that attempt to restrict violence when evaluating *Schwarzenegger v Entertainment Merchants Association*. As thoroughly described in the Entertainment Merchants Association’s brief, the Supreme Court has always been adamant in striking down laws that restrict violence, while being more lenient towards laws that restrict expression of the sexually obscene. Examples include the pulp fiction novel and Internet regulations (Resp. Br. at 15)(Rossum 206).

This case history demonstrates that the Supreme Court has historically treated sex and violence differently under the First Amendment. Traditionally, the Court has refused to restrict violent expression both when new mediums depicting graphic violence have become more popular in society, and when states have attempted to minimize the constitutional protection of violence (Resp. Br. at 15). During the oral argument with the Petitioner’s lawyer Mr. Morazzini, Scalia asserted that California’s argument that video game violence is particularly obscene because of the medium it is portrayed in could be applied to any new medium, such as comic books and movies, which have not been subject to censorship regulations similar to those proposed by California.

The use of strict scrutiny in deciding whether a state has a legitimate interest in restricting speech based on content, and whether the law is narrowly tailored and least restrictive in

achieving this compelling state goal, has also been historically used by the Court. This test represents a crucial aspect of the trajectory of the First Amendment with which Scalia is concerned. Scalia would reject the creation of a whole new test and a whole new prohibition on speech, because this is not in accordance with traditional Supreme Court jurisprudence. In the oral argument of the case, he interrogates California's lawyer Mr. Morazzini about where the government will draw the line when restricting speech (U.S. Supreme Court Media). Scalia would believe that if the government is allowed to restrict access to violent video games, where will this restriction end? He would not find the Miller Test to be a satisfying limit on the government's ability to censor violence, because traditionally the Miller Test was only directed towards evaluating obscenity concerning depictions of sex. Scalia additionally hinted in his questions during the oral argument that the Court's traditional avoidance of allowing a chilling effect on speech may also guide his decision to side with the Respondents; he asks Mr. Morazzini how video game industries will know how to construct video games in compliance with the new Act (U.S. Supreme Court Media).

Justice Scalia's reliance on text and tradition to decide this case highlights what he values in his approach to the Constitution. Scalia focuses on the text primarily because he believes that the Court should preserve the original meaning of the Constitution's words, which in turn results in the preservation of its democratic principles. This act of interpreting the text, Scalia believes, keeps the majority from legislating its beliefs through the appointment of judges who ideologically agree with them, and make decisions based on popular sentiment rather than on neutral analysis of the constitutional text at stake. Scalia holds that living constitutionalists who change the meaning of the Constitution are acting inappropriately by allowing the majority to

dictate the outcome of constitutional interpretations. What people like, or what is popular, Scalia asserts, should not be the guiding principle for the court's decision-making process, as he demonstrated in decisions such as *Coy* (Scalia 43)(44). In his essay, he discusses how people "may like" restrictions the Court upholds, such as restrictions on gun laws despite the Second Amendment, but nevertheless, these are still new restrictions on freedom (43). He argues that the Bill of Rights was meant to protect the people from majority rule, and that changing the Constitution based on "the evolving standards of decency" (which the majority naturally determines) makes the Bill of Rights accomplish "nothing at all" (40)(47).

Breyer's constitutional approach lies at the opposite end of the spectrum when compared to Scalia's textualism, since Scalia would most likely assert that Breyer is a willing participant in the degradation of the Constitution's textual integrity. In response to Breyer's likely decision to side with the Petitioners, Scalia would assert that Breyer's evolutionist ideology impedes the Bill of Rights' purpose to prevent America's democratic government from being subject to the "tyranny of the majority" (Federalist 10). Additionally, Scalia would believe that Breyer's sympathy for the convictions of the people by upholding California's law in *Schwarzenegger v Entertainment Merchants Association* crystalizes his argument that living constitutionalists are necessarily guided by the will of the majority when deciding constitutional questions (Scalia 47).

Rather than focusing on text and tradition, Breyer's decision-making relies on purpose and the people. Breyer's belief that there are underlying purposes communicated through the text of the Constitution, and that the most important purpose of the Constitution as a whole is to promote the people's ability to engage in democracy, demonstrates how his vision of The Living Constitution is closely tied to the convictions held by the majority.

In *Active Liberty*, Breyer argues that at times, the government should be able to regulate speech (Breyer 41). He argues that if the First Amendment is given too much sway, this “would prevent a democratically elected government from creating necessary regulation [and] if applied without distinction to all governmental efforts to control speech,” would “unreasonably limit the public’s substantive economic (or social) regulatory choices” (41). Breyer also raises a concern for the people’s right to participate in democracy and collectively decide which speech they want to regulate. He argues that, “strong pro-speech presumptions risk imposing what is, from the perspective of active liberty, too severe a restriction upon the legislature--a restriction that would dramatically limit the size of the legislative arena that the Constitution opens for public deliberation and action” (42). He concludes that in First Amendment cases, “the presence of this second risk warns against use of special, strong pro-speech judicial presumptions or special regulation-skeptical judicial views” (42). Believing that the Court must not “depriv[e] the people of the democratically necessary room to make decisions, including the leeway to make regulatory mistakes,” Breyer is much more likely to be sympathetic to the Petitioners in *Schwarzenegger v Entertainment Merchants Association* (41).

In Breyer’s view, the objective of allowing the people to have a voice in their government’s regulation of speech and the objective of maintaining a free exchange of expression in the marketplace of ideas need to be balanced. Breyer believes that categorizing and making distinctions between speech as to whether to apply strict or relaxed scrutiny is crucial to balancing these needs in the Court’s decision-making process. One of the main issues in *Schwarzenegger v Entertainment Merchants* is what standard of review should be employed by the Court when deciding whether the law is constitutional in its regulation of speech through

video game laws about ratings. Breyer asserts that “references to the Constitution’s more general objectives helps” when analyzing First Amendment cases (42). He argues that protecting political speech is particularly important because of the Constitution’s democratic aims, but “whenever ordinary commercial or economic regulation is at issue, this special risk [to the Constitution’s purpose to protect liberty] normally is absent” (42).

Breyer thereby claims that deference to the Legislature and to the people in First Amendment cases is crucial to maintaining the democratic objective of the Constitution and promoting active liberty. This point is complex because promoting liberty can at times mean upholding restrictions on certain liberties, such as speech in commercial contexts, as long as the people’s will is behind these restrictions. This assertion also relates to Breyer’s belief that the Supreme Court should allow the people to make regulatory mistakes, and should thereby give deference to legislatures that enact the people’s will, even if this means enacting some restrictions on certain constitutional liberties.

This aspect of Breyer’s constitutional approach is particularly key in *Schwarzenegger v Entertainment Merchants* because Breyer aims to allow the people to enact regulations on speech since, ironically, the people’s ability to restrict certain freedoms inherently boosts their overall freedom. He concludes that “the upshot is that reference to constitutional purposes in general and active liberty in particular helps to justify the category of review that the Court applies to a given type of law” and the Court should “define and apply the categories case by case” (42-43). This argument seems to imply that the type of review used should be chosen based on these considerations of the people’s will and the desire to promote democracy, or active liberty, rather than on the actual facts of the case. Under this logic, one could presumably believe that a stricter

method of review should be employed less so in cases when restrictions on speech are driven by the people's will.

These tenets of Breyer's approach to the Constitution and to the First Amendment will guide his decision in the case of *Schwarzenegger v Entertainment Merchants Association*. Breyer is much less resistant to creating new forms of constitutional review on the Supreme Court than Scalia. Since he is less prone to steadfastly follow tradition, text, and precedent, he may be more willing to allow the *Ginsberg* standard to be applied to the case rather than strict scrutiny. If strict scrutiny impedes the will of the people, then a new approach or test may be crucial in order for the Court to achieve the Constitution's democratic goals of empowering the people through their Legislature. A whole new category of unprotected speech may be considered a necessary risk, especially since the Miller Standard can serve as a safeguard that narrows the category of speech that the *Ginsberg* standard would be applicable to (U.S. Supreme Court Media). In his attempt to empower the people, Breyer would be willing to add this standard to the rating already in place, if societal standards deem it necessary. The fact that there is a case history of state legislatures attempting to enact such laws against video game violence, as demonstrated in an Illinois law which used language almost identical to California's, the rising tide of the people's negative opinion of minors playing graphically violent video games may need to be given sway in accordance with Breyer's aims goals for active liberty and his principles of promoting a Living Constitution (Pet. Br. at 12).

In the oral argument of the case, Breyer also demonstrated his willingness to neglect precedent and details of the text when he brought up the notion of "common sense" (Savage) (U.S. Supreme Court Media). He wonders why it is logical that a state can regulate what sexually

obscene materials minors are exposed to, but cannot regulate what offensively violent materials minors purchase (Savage). Breyer may therefore discuss how common sense should trump precedent and the constitutional text when evaluating the case in his decision. He will also most likely assert that the distinction between sex and violence in the Court's traditional interpretation of the First Amendment is arbitrary when applied to minors once viewed through the lens of common sense and active liberty.

Also, Breyer asserts in his defense of The Living Constitution in *Active Liberty* that new mediums may require new constitutional standards that preserve the Constitution's original intent to promote the people's power. Although violence may have been considered a protected category of speech in the past in literature, video games are a new technological innovation that allow minors to actively participate in inflicting violence and torture on victims. Despite the fact that Entertainment Merchants argue that all expression is interactive, like composing music or using one's imagination while reading, Breyer would most likely consider this a weak argument in light of the possibility that Californian society views this medium as particularly indecent. Breyer's view of violence in video games will probably be deferential to the people's will in his opinion of *Schwarzenegger v Entertainment Merchants Association*, since he believes that "a deep seated conviction on the part of the people...is entitled to respect" (Breyer 17).

If the standards of American society deem this new medium to be particularly dangerous in nature for minors, then this standard of harm should be given weight by the Court. This promotion of active liberty and democracy through his interpretation of the Constitution is also paramount in how this case touches upon federalism. Breyer believes that "[b]y guaranteeing state and local government broad decision-making authority, federalist principles secure

decisions that rest on knowledge of local circumstances, help to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate ‘novel social and economic experiments’” (57). This evaluation of the Act demonstrates Justice Breyer’s willingness to be guided by the people’s values in his approach to interpreting the Constitution.

Additionally, according to Justice Breyer, the ultimate purpose of the Bill of Rights boosts the legitimacy of his constitutional approach’s focus on the people because the Constitution aims to create a flourishing democracy that represents the people’s values in its legislation. In a highly general manner, the Constitution’s amendments and text, viewed together, demonstrate that the purpose of the Bill of Rights was to create a system in which people could actively contribute to their political destiny. If the purpose of the Constitution was to promote active liberty and democracy by giving rights and powers to the American people, then allowing people to pass legislation about constitutional issues is a necessity in achieving the Constitution’s democratic aim. Breyer will probably believe that California’s legislature should be given deference in this case because the type of speech at issue is not contributing to the Constitution’s democratic purpose as much as allowing the people to legislate their values and thus achieve the democratic aim of the Constitution of promoting active liberty. If the speech was political in nature, this balance may have been tipped in protecting the speech at stake because it would aid democratic goals, rather than in protecting the people’s active input in the legislature. At the very base of Breyer’s constitutional approach, and the way it influences his decision-making when evaluating First Amendment cases such as *Schwarzenegger v Entertainment Merchants Association*, Breyer is concerned with how much a governmental act promotes active liberty and democracy. Balancing the different ways to achieve these democratic aims that he perceives

throughout the text of the Constitution is at times crucial to promoting a workable democracy from Breyer's perspective.

Conclusion:
Comparison of these Constitutional Approaches as Applied to *Schwarzenegger v Entertainment Merchants*

These theoretical decisions by Scalia and Breyer in *Schwarzenegger v Entertainment Merchants Association* demonstrate how their disparate constitutional approaches are manifested in their decision-making process as Justices of the Supreme Court, and serve as an illuminating springboard to highlight the similarities in each Justice's stance towards upholding the Constitution and preserving American democracy. Both Scalia and Breyer outlined a discussion and defense of their constitutional approach in published works outside of Supreme Court decisions, as discussed in previous passages of this thesis. Their justifications for their approaches, and their criticisms and analyses of the other's views, demonstrate that each constitutional theory and aim of each Justice is fundamentally similar, despite their condemning critiques of one another. The methods to achieve this same aim are strikingly different, however, which is demonstrated by the conflicting outcomes predicted for each Justice in this case.

Both Breyer and Scalia aim to preserve the integrity of the Constitution and achieve a workable contemporary democracy in America through their decisions as Supreme Court Justices. Breyer attacks Scalia's textualist approach as impeding the democratic aims of the Constitution, because an approach that places too much emphasis on the text can prevent the people from participating in national conversations about laws and from translating their values into "sound policies" (Breyer 16). Scalia asserts that belief in The Living Constitution and deference to the will of the people achieves the opposite effect of the shared aim to promote democracy, because a judge may engage in judicial activism not approved of by the American people through a belief in a Living Constitution, and the convictions of the people may create a

system of majority rule rather than a democracy (Scalia 47). Scalia fervently believes that “reliance on text and tradition is a means of constraining judicial discretion...[because] faithful adherence to the text of a constitutional...provision [or] to the traditional understanding of those who originally adopted it reduces the danger that judges will substitute their beliefs for society’s,” and that “the provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties” (Rossum 27-28). Therefore, both Justices believe that the other’s approach will weaken rather than promote the democratic values that underlie the Bill of Rights, but fundamentally share the same aim to promote democracy in American government.

Additionally, both Justices believe that their constitutional approach is faithful to the aims of the Constitution and its Framers, and will allow the Constitution to endure into the future. Scalia believes that remaining true to the original meaning of the text guarantees that the Constitution will not become meaningless when subjected to the sentiments of the Court and the people over time (Scalia 47). Breyer argues that the Constitution’s aim to promote an active democracy and empower the people sometimes requires interpreting its amendments differently over time, so that new developments in American society can be incorporated into America’s achievement of a workable system of self-governance. Breyer believes that allowing the Constitution’s meaning to change so that it can adapt to new developments in society will ensure that the Constitution will not become moot in future decisions, and that this evolution is crucial to continuing the Constitution’s purpose to promote democracy. Both approaches also subject the case at hand to society’s views of the text or issue. However, Scalia focuses on the “traditional

beliefs of society” and thus its historical view on the subject at hand, while Breyer focuses on the current society’s view (Rossum 28).

The important issue of using the Constitution to deal with new innovations and technological developments is exhibited in *Schwarzenegger v Entertainment Merchants Association* through both interpretive approaches. Scalia argues that he is aware that there are many issues and developments not foreseen by the Founders, but that the original meaning of the text and of the Court’s traditional decision-making process towards a particular subject can still provide guidance when evaluating a case. Even though video games were never conceived of by the Founders (and are therefore not specifically considered in the original meaning of the text), Scalia asserts in the oral argument that the presence of violence in speech was foreseen by the Founders (U.S. Supreme Court Media). To construe the First Amendment differently than its original meaning proscribes would degrade the legitimacy of the Constitution as a document that is meant to instill longstanding values in America’s legal system. To create a whole new category of unprotected speech because of evolving societal standards would weaken the legitimacy of the First Amendment, because its meaning will have changed drastically and the text will have been ignored in creating this new exception.

Breyer likewise believes his response to new innovations is faithful to the Constitution. He deciphers the purpose of the Constitution as promoting a democratic system that respects and empowers the American people, and allows them to make decisions about the regulations that their society is subject to and the manner in which they are governed. This self-governance includes regulations of speech and expression, and new mediums and developments may require new interpretations of the text and the Court’s jurisprudence. If the people decide that certain

forms of violence have no redeeming societal qualities and are therefore inappropriate to show to minors, this strongly held conviction should be influential in the Court's ruling, according to The Living Constitution tradition. To evaluate the text of the First Amendment too closely and value it over the people's democratic methods of engaging in self-governance is to give less credence to the Constitution's aim to create a democracy, and fail to be faithful to the Constitution as a result.

This case thereby vividly illustrates important dynamics in America's court system. Although the Supreme Court aims to achieve the purposes of the Constitution and to promote crucial tenets of democracy, the methods to realize these goals in the context of Supreme Court decision-making are strikingly contradictory. Breyer's approach prizes purpose over text, and Scalia text over the will of the majority. These fundamentally different stances towards the text of the Constitution and such important amendments as the First Amendment highlight the problem of how the Court does not currently have an overarching philosophy that dictates how it should do its work. This however, may make the Court more capable of maintaining and promoting a democracy. There are followers of both constitutional approaches in America, and to have Justices represent both on the Court is crucial to balancing the underlying democratic aims of the Constitution while not straying too far away from the Constitution's specific text.

When there is less dispute among Supreme Court Justices, perhaps if Scalia's prediction that Living Constitutionals will soon dominate the Court comes true, then the judiciary may be less able to respect and implement the widely held views of the Constitution when deciding hotly-debated issues such as those presented by *Schwarzenegger v Entertainment Merchants Association*. Similar to much of democratic government, the ultimate goals are agreed upon, but

the splintering factions about how to achieve these goals are not. This insight into the nature of the widely varying approaches to the Constitution is important because it demonstrates how the Court is one more venue for democratic debate. As the ultimate interpreter of the Constitution, the Supreme Court should continually challenge and question its mode of interpretation in order to effectively juggle the different purposes of the Constitution and the different sentiments of American citizens. As society develops and the Supreme Court's body of law grows, the balance between preserving tradition and promoting change will most likely continue to be at the heart of the debate between Supreme Court Justices in the future.

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