Judicial Line-Drawing and the Broader Culture: The Case of Politics and Entertainment

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I. INTRODUCTION

Some of the most important work of appellate courts consists of drawing, or refusing to draw, categorical distinctions. Consider any two legal categories. We may be able to distinguish them if they are both merely present together in a case, or even if they interweave with one another but retain their separate identities, the way fudge might be swirled through vanilla ice cream while remaining distinguishable. Despite the swirling, the fudge and the vanilla would still be recognizable. The harder cases, though, involve the complete and inseparable blending of two legal categories.

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In the free speech area, the Supreme Court has confronted these difficulties in seeking, where possible, to disentangle commercial speech from noncommercial speech.[1] The Court has also expressed greater[2] or lesser[3] reluctance to distinguish between one person's vulgarity and another's lyric.[4] A distinction between "amusement" speech and

1. *See, e.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–75 (1989) (finding the commercial and noncommercial elements of a student dorm solicitation speech to not be inseparably intertwined and distinguishing the charitable donation solicitation speech case of *Riley v. National Federation of the Blind*, 487 U.S. 781, 796 (1988)); *see also* Nike v. Kasky, 539 U.S. 654, 663–65 (2003) (Stevens, J., concurring) (stating that the dismissal of certiorari was improvidently granted, for the case "present[ed] novel First Amendment questions because the speech at issue represent[ed] a blending of commercial speech, noncommercial speech and debate on an issue of public importance").

2. *See* Cohen v. California, 403 U.S. 15, 25 (1971) ("How is one to distinguish this from any other offensive word? . . . [W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."). For an example of a more assertive judicial mood, however, see the remarkably contrasting case of *FCC v. Pacifica Foundation*, 438 U.S. 726, 746–48 (1978) (plurality opinion). "In this case it is undisputed that the content of Pacifica's broadcast was 'vulgar,' 'offensive,' and 'shocking.'" *Id.*

3. *See Pacifica*, 438 U.S. at 742–51 (discussing a radio broadcast of the George Carlin "Filthy Words" monologue). For a challenge to some aspects of *Pacifica*, see *FCC v. Fox Television Stations, Inc.*, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011) (mem.).

4. *See Pacifica*, 438 U.S. at 747; *Cohen*, 403 U.S. at 25; *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730 (2010) (holding that a federal statute banning particular forms of support to foreign terrorist organizations does not violate free speech rights). *Compare Cohen*, 403 U.S. at 25 (observing that "one man's vulgarity is another's lyric," and stating that "governmental officials cannot make principled decisions in this area"), *with Holder*, 130 S. Ct. at 2728 (stating that "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not").

"doctrinal" or "propaganda" speech[5] has also been recognized as problematic.[6]

The question of whether to try to judicially draw a categorical distinction again recently arose, importantly and conspicuously, in *Brown v. Entertainment Merchants Ass'n*.[7] In *Brown*, Justice Scalia, for the majority, applied a stringent free speech test of strict scrutiny.[8] *Brown* held unconstitutional a California statute restricting the sale or rental to minors of particular violent video games meeting specified characteristics.[9]

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5. Winters v. New York, 333 U.S. 507, 508, 510 (1948) (discussing allegedly obscene magazines "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust, or crime"). The *Winters* Court concluded that "[t]hough we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510. The problem of drawing reasonable and appropriate categorical distinctions in free speech cases may indeed focus on the perceived value, or lack thereof, of the speech, as in the alleged obscenity case of *Pope v. Illinois*, 481 U.S. 497 (1987), but will more often turn on factors other than the perceived value of the speech. *See* Joseph J. Anclien, *Crush Videos and the Case for Criminalizing Criminal Depictions*, 40 U. MEM. L. REV. 1, 12 (2009); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1138 (2005). For further discussion of the *Winters* language above, see, for example, the alleged obscenity case of *Smith v. United States*, 431 U.S. 291, 319–20 & n.21 (1977) (Stevens, J., dissenting), as well as the opinion by Justice Scalia for the Court in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011).

6. *See Brown*, 131 S. Ct. at 2733.

7. *Id.*

8. *See id.* at 2738–42 (requiring "proof" of causation as well as "compelling" evidence of a compelling governmental interest narrowly pursued without under- or over-inclusiveness).

9. *Id.* at 2742. A portion of the statute limited its coverage in a way loosely parallel to key elements of the standard *Miller* obscenity test, adjusted for minors and focusing on violence rather than sex. *See id.* at 2732–33 (quoting CAL. CIV. CODE § 1746(d)(1)(A) (West 2009)). Among the limitations of the scope of the statute was the element of the game's resulting lack, "as a whole, [of] serious literary, artistic, political, or scientific value for minors." *Id.* The loosely analogous *Miller* obscenity test language may be found in *Miller v. California*, 413 U.S. 15, 24–25 (1973).

As is widely appreciated, much game playing does not involve traditional forms of game sale or rental. Games may be played online or via nonhome console devices, and at least the basic game might, on some business models, be given away. *See generally, e.g.*, Natalie Jarvey, *Video Games Go Live on Internet: Will Industry Pull Plugs on Consoles?*, L.A. BUS. J., Aug. 9, 2010, at 1, *available at* 2010 WLNR 16827202 (discussing the fast evolution from games on consoles to games on the Internet); Matthew Lynley, *Games Are the Most Popular Smartphone Apps*, VENTUREBEAT (July 7, 2011, 10:40 AM), http://venturebeat.com/2011/07/07/nielsen-smartphone-games-popular/ (stating that in the second quarter of 2011, smartphone owners were downloading five to six times as many—usually short—game apps as educational or

The analysis in *Brown* raises a number of secondary issues, including whether any additional kind of speech could ever join the few speech categories, such as fighting words, already deemed unprotected under the Free Speech Clause.[10] For our purposes, though, the crucial focus of the opinion and this Article is on the relationship between political speech and entertainment speech.

The crucial passage from Justice Scalia's opinion runs as follows:

> [V]ideo games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that *it is difficult to distinguish politics from entertainment, and dangerous to try*. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[11]

Justice Scalia thus sees the problem as more severe than carefully detangling, where possible, the two intertwined strands of political speech and entertainment speech. The detangling task is instead generally not to be attempted. At the very best, Justice Scalia seems to be saying that distinctions between entertainment and political speech will typically be subjective or riskily unclear and, in that sense, arbitrary and not reasonably justified. On this basis, the violent video game statute in *Brown* was then subjected to a highly demanding strict scrutiny test.[12]

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learning apps); *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSEN (Aug. 6, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/ ("Despite the almost unlimited nature of what you can do on the web, 40 percent of U.S. online time is spent on just three activities—social networking, playing games and emailing leaving a whole lot of other sectors fighting for a declining share of the online pie." (internal quotation marks omitted)). For a broader, if perhaps discouraging, perspective, see VICTORIA J. RIDEOUT ET AL., THE HENRY J. KAISER FAMILY FOUND., GENERATION M^2: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS (2010), *available at* http://www.kff.org/entmedia/upload/8010.pdf (finding that "[e]ight- to eighteen-year-olds spend . . . an average of more than 7½ hours a day, seven days a week" with various media, not even including some popular media uses).

To the extent that the unamended statute excluded violent video game play online, on smartphones, et cetera, that would presumably both reduce any possible positive effects of the statute and perhaps also reduce the overall free speech burden of the statute.

10. *See Brown*, 131 S. Ct. at 2733–34. There is much to be said about any historical closing of the door, forever, on any new categories of unprotected speech. How the Court can divine at this point that no possible future combination of culture and technology could ever generate a form of speech not meriting free speech protection, or too riskily granted such protection, has thus far been left unclear by the Court.

11. *Id.* at 2733 (emphasis added) (quoting Winters v. New York, 333 U.S. 507, 510 (1948)); *see also* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 823 (8th Cir. 2007) (quoting Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 969 (10th Cir. 2006)). For an intriguing judicial change of heart on the wisdom and viability of drawing a somewhat similar distinction between speech that addresses matters of public or merely private concern, see *infra* notes 155–56 and accompanying text.

12. *See Brown*, 131 S. Ct. at 2738–42.

This Article puts in a broader legal and cultural context and critically evaluates Justice Scalia's reluctance to distinguish politics from entertainment or, more precisely, political speech from entertainment speech.[13] Some may think of Justice Scalia's reluctance as the embodiment of judicial modesty or realistic practical wisdom. Others may think of it as an unnecessary expression of relativism or subjectivism that is ominous in its implications. Either way, whether we can appropriately distinguish between entertainment speech and political speech, and then apply appropriately different free speech standards in each case, says much about our status and priorities as a culture. Placing pure nonpolitical entertainment or amusement at the very core of the Free Speech Clause should certainly be controversial. As it turns out, if we decide that most or all entertainment speech is indistinguishable from political speech, we must then realistically expect other categories of speech to be treated as practically indistinguishable from political speech as well. And all of this may well be inconsistent with our scheme of broadly liberal democratic values.

We initially assume below merely that Justice Scalia's approach and the resulting rigorous application of strict scrutiny are at least debatable on the merits. After all, the California statute appeared to focus on a narrow class of exceptionally violent video games,[14] vaguely akin in some respects to constitutionally obscene materials.[15] Traditional obscene materials, we might note, must lack judicially determined serious value when taken as a whole.[16] But such obscene materials need not be shown, through unequivocal empirical social science evidence, to distinctively cause some serious identifiable social harm or demonstrably undermine some compelling government interest.[17] And the California statute, again, did not attempt to deny the video games in question even to minors where a parent was involved[18] or where sale or rental could be bypassed.[19]

Certainly, the general moral quality of traditional forms of obscenity is controversial. But so is the moral quality of the particular narrow class of exceptionally violent and judicially nonvalued video games regulated

13. *See id.* at 2733.
14. *See id.* at 2732.
15. *See, e.g.*, *id.* at 2732–33 (quoting analogous language).
16. See, for example, the language of the obscenity cases cited *infra* note 51.
17. See the actual free speech test language of the cases cited *infra* note 51.
18. See the statutory language quoted in *Brown*, 131 S. Ct. at 2732.
19. *See id.*

in *Brown*. It is possible to object to either or both of these kinds of speech as immoral or even as unworthy of the most stringent free speech protection even in the absence of a rigorous demonstration of serious social harm.

In fact, one can quote Justice Scalia himself from a prior case to suggest the ability to debate his approach in *Brown*. Consider the approach taken by Justice Scalia in the context of public nude dancing as erotically expressive speech:

> The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.[20]

This is not to suggest inconsistency on the part of Justice Scalia. Perhaps one could say that nude dancing before consenting adults in a club setting is contrary to enforceable public morals but that the transactions with minors regulated in *Brown* are not.

Our initial aim is, again, not to immediately endorse or take issue with Justice Scalia's approach in *Brown*. We instead initially assume merely that his approach was either generally well-chosen or not. That much seems uncontroversial enough. The question we first consider focuses instead on how a society could gain enough perspective on itself—enough critical self-awareness—to evaluate the overall merits of Justice Scalia's approach. On the basis of a broader cultural perspective, the substantial risks and costs of Justice Scalia's approach eventually become clearer.

The discussion below assumes that a legal culture and its surrounding broader culture do not always make their constitutional mistakes entirely at random. Consider, by loose analogy, that a cowardly or rash individual person tends, more than others, to act cowardly or rashly.[21] A rash person's mistakes are in that sense not random. Without pressing the

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20. City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring). For a loosely related sentiment concerning the enforcement, in a non-First Amendment Commerce Clause context, of a sense of public morality apart from any identifiable harmful consequences, see the opinion of Judge Richard Posner for the court in *Cavel International v. Madigan*:

> But even if no horses live longer as a result of the new law, a state is permitted, within reason, to express disgust at what people do with the dead, whether dead human beings or dead animals. . . . A follower of John Stuart Mill would disapprove of a law that restricted the activities of other people . . . on the basis merely of distaste, but American governments are not constrained by Mill's doctrine.

500 F.3d 551, 557 (7th Cir. 2007).

21. *See* ARISTOTLE, NICOMACHEAN ETHICS, *reprinted in* 9 GREAT BOOKS OF THE WESTERN WORLD: ARISTOTLE: II 334, bks. II & IV, at 348, 387 (Robert Maynard Hutchins ed., W.D. Ross trans., 1952) (c. 350 B.C.E.).

analogy between individuals and cultures,[22] we can easily imagine that cultures with particular characteristic defects or excesses tend over time to exhibit those defects or excesses disproportionately, even in judicial decisionmaking.

The point, stated in the broadest fashion, is this: to the extent that we are aware of our culture's systematic defects and excesses, that critical self-awareness may promote better constitutional decisions or at least allow us to recognize the especially likely nature of our systematic or characteristic constitutional mistakes.

As it turns out, the categories most widely discussed by historians, philosophers, and cultural critics that most assist us in this regard are three in number. As the first very general category, used herein merely as a baseline, a legal and surrounding culture might be referred to simply as "civilized."[23] Second, a culture that seems in some important particular respect to be in overall decline can, to that extent, be thought of as "late" or "decadent."[24] Third, and finally, a culture might, in some respects, depart from both pure civilization and "lateness" in ways that can reasonably be thought of as crudely uncivilized or even "barbaric."[25]

Once these categories are fleshed out to anyone's satisfaction, that person may then decide on the extent to which the above categories, or some mixture thereof, describe our own contemporary legal or broader culture. On that basis, we may gain some important additional perspective on the correspondingly likely nature of our culture's systematic constitutional mistakes.

Our basic assumption in this regard was articulated by the great novelist Thomas Mann in this way: "A human being lives out not only his personal life as an individual, but also, consciously or subconsciously,

22. *See* PLATO, THE REPUBLIC pt. II, bks. II–IV, at 41–139 (Francis MacDonald Cornford trans., 1941) (c. 360 B.C.E.).

23. We are here using the idea of civilization as an ideal type, not as a description of any real culture. *See* 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY 654–57 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1968). Even an ideal legal civilization in this sense, untainted by any elements of lateness, decline, or decadence, or by any trace of barbarism, could still make constitutional mistakes, perhaps even systematically, but not of a distinctly late or a barbaric pattern.

24. For a broad range of perspectives, see, for example, the sources cited *infra* notes 107–20, 131.

25. For illustrative references, see, for example, the sources cited *infra* notes 125–30.

the lives of his epoch and contemporaries . . . ."[26] Presumably, this applies even to judges.

The hope, in particular, is that each reader's judgments in this regard will further inform that reader's response to Justice Scalia's approach in *Brown*, in which it is deemed generally too difficult and too dangerous to attempt to distinguish political speech from entertainment speech, with even the latter thus receiving equally rigorous strict scrutiny protection.[27] The costs of this approach in general are explored in the conclusion.

Below, the Article first briefly reviews some of the related entertainment speech case law.[28] Once this judicial background is in place, the idea of a culture that is thought to be "late stage," in decline, or decadent is then taken up as usefully as possible.[29] An account of the idea of the uncivilized or barbaric, as set off against the idea of civilization, is then briefly referred to, drawing upon the work of historians, philosophers, and cultural critics.[30] The conclusion recognizes that even clear cultural tendencies, trends, biases, or patterns cannot reliably explain individual cases such as *Brown*.[31] The conclusion instead seeks to bring all of the above strands together and provide a broad vantage point and perspective for critiquing the merits of Justice Scalia's crucial logic in *Brown*.[32] The conclusion offers implications, however, that extend far beyond the context of merely the *Brown* decision itself.

II. THE FREE SPEECH LAW CONTEXT OF JUSTICE SCALIA'S APPROACH IN *BROWN*

Justice Scalia's reluctance to seek to judicially distinguish entertainment speech from political speech, even in the case of the narrow class of video games regulated in *Brown*, is not without support in various related areas of free speech law. It seems well-established, at a more general level, that under the Free Speech Clause, "[e]ntertainment . . . is protected; . . . live entertainment, such as musical and dramatic works, fall[s] within the First Amendment guarantee."[33] Music in general,

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26. THOMAS MANN, THE MAGIC MOUNTAIN 31 (John E. Woods trans., 1995) (1925).
27. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–42 (2011).
28. *See infra* Part II.
29. *See infra* Part III.
30. *See infra* Part III.
31. *See infra* Part IV.
32. *See Brown*, 131 S. Ct. at 2733; *infra* Part IV.
33. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981), *quoted in* Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 211 (5th Cir. 2009). See the explicitly political message entertainment case *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989),

whether live[34] or purely instrumental and thus with no lyrical or other verbal content,[35] is constitutionally protected.[36] Performance art falls within the Free Speech Clause.[37] Tattooing, whether as tattooer or tattooee, is similarly protected.[38]

Especially prominent among the related free speech cases are the commercial nude dancing and adult entertainment cases. As Judge Guido Calabresi has observed, "Over the past few decades, adult entertainment establishments have played a disproportionately prominent role in First Amendment doctrine."[39] Precisely how to constitutionally categorize

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involving a concert in Central Park. For broad dictum, see *Kaplan v. California*, 413 U.S. 115, 119–20 (1973), which states that "pictures, films, paintings, drawings, and engravings . . . have First Amendment protection."

34. *See Ward*, 491 U.S. at 790; Collins v. Ainsworth, 382 F.3d 529, 539 (5th Cir. 2004); McClure v. Ashcroft, 335 F.3d 404, 409 (5th Cir. 2003).

35. *See* Nurre v. Whitehead, 580 F.3d 1087, 1093 (9th Cir. 2009).

36. *See* DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1265–66 (11th Cir. 2007).

37. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–89 (1998) (involving refusals of federal subsidies for the undoubtedly political message-bearing performance art of Karen Finley); Berger v. City of Seattle, 569 F.3d 1029, 1036 & n.4 (9th Cir. 2009) (en banc) (involving a street or park performer permit and donation solicitations).

38. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1062–63 (9th Cir. 2010).

39. TJS of N.Y., Inc. v. Town of Smithtown, 598 F.3d 17, 20 (2d Cir. 2010). The sheer number and conspicuousness of adult entertainment free speech cases at the appellate level might be taken by some as one very modest indicator of civilization edging into lateness or decline. We shall not explore that possibility herein, given the possible alternative explanations.

For the merest sampling of the commercial nude dancing cases, as distinct from the adult bookstore, video, movie, and magazine cases, see, for example, *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008); *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); *Lleh, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002); *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001); *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001); and *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001).

Separable as well are the adult entertainment free speech cases focusing on liquor licenses and alcohol sale or consumption. *See, e.g.*, Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011); Imaginary Images, Inc. v. Evans, 612 F.3d 736 (4th Cir. 2010); Flanigan's Enters., Inc. v. Fulton Cnty., 596 F.3d 1265 (11th Cir. 2010); East Brook Books, Inc. v. Shelby Cnty., 588 F.3d 360 (6th Cir. 2009); Richland Bookmart, Inc. v. Knox Cnty., 555 F.3d 512 (6th Cir. 2009); Joelner v. Vill. of Wash. Park, 508 F.3d 427 (7th Cir. 2007); Illusions—Dallas Private Club, Inc. v. Steen, 482 F.3d 299 (5th Cir. 2007); 181 South, Inc. v. Fischer, 454 F.3d 228 (3d Cir. 2006); Odle v. Decatur Cnty., 421 F.3d 386 (6th Cir. 2005); Ben's Bar v. Vill. of Somerset, 316 F.3d 702 (7th Cir. 2003).

commercial nude dancing[40] and adult entertainment zoning regulations[41] has posed a number of apparently difficult challenges for the Supreme Court.[42]

Speech in the form of the expressive or symbolic conduct involved in commercial nude dancing is apparently protected by the First Amendment in rather standard ways. Regulation of such speech on the basis of its content or assumed viewpoint would apparently evoke the rigorous standard of strict scrutiny,[43] requiring, at least, the clear advancement of a compelling governmental interest by narrowly tailored means.[44] Regulating such speech on something like a content-neutral basis, however, evokes only some form of mid-level scrutiny.[45]

The Supreme Court has explicitly declared that the standard sorts of commercial expressive nude dancing do not lie at the heart of the First Amendment as central free speech cases. Thus, the plurality opinion in the *Barnes* case determined that "nude dancing of the kind sought to be performed here is expressive conduct *within the outer perimeters of the First Amendment, though we view it as only marginally so*."[46] Similarly, the opinion for the Court in *Pap's A.M.* refers to such expressive conduct as falling "only within the outer ambit of the First Amendment's protection."[47]

Nevertheless, a content-based regulation of such speech would presumably still draw strict scrutiny.[48] When the Court refers to expressive nude dancing as just barely within the outer bounds of the First Amendment, the implication is thus not that such speech is generally

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40. See, for example, the Court's divisions in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

41. See, for example, the Court's fracturing and recourse to dubiously explained legal fictions in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). See also the less controversial, timely judicial review case of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

42. *See* authorities cited *supra* notes 40–41.

43. *See, e.g.*, *Pap's A.M.*, 529 U.S. at 289 (citing the strict scrutiny flag burning case of *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

44. *See Johnson*, 491 U.S. at 403, 406–07.

45. *See Pap's A.M.*, 529 U.S. at 289 (citing the draft-card burning case of *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). See also the somewhat similar content-neutral regulation tests adopted in *Renton*, 475 U.S. at 47, and *Alameda Books*, 535 U.S. at 440, and at the court of appeals level in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1354 (11th Cir. 2011); *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 503 (6th Cir. 2008); and *181 South, Inc. v. Fischer*, 454 F.3d 228, 233 (3d Cir. 2006).

46. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (emphasis added).

47. *Pap's A.M.*, 529 U.S. at 289.

48. *See supra* note 43 and accompanying text.

subject to some lesser standard of constitutional protection.[49] Such speech is not to be thought of as generally second-class speech on the constitutional scale. Rather, the idea is apparently that expressive commercial nude dancing somehow barely makes it over the boundary line into generally fully protected status.

Finally, a sampling of the relatively few violent video game free speech cases prior to *Brown* rounds out the constitutional context of Justice Scalia's opinion in *Brown*. The speech regulations in these cases vary, but the typical legislative focus has been on somehow limiting juvenile access to the most graphically violent video games, where the game in question was deemed to lack serious literary, artistic, scientific, or, importantly, political value for minors.[50] The typical such regulation, then, did not seek to regulate any video game judicially determined to have serious political value for minors.[51] This constitutionally based judicial determination clearly bears on Justice Scalia's doubts as to the reasonable distinguishability of entertainment speech from political speech.

It is also worth noting the literalist but telling point that a number, though certainly not all, of the violent video game cases involve regulated corporate parties whose very names, voluntarily chosen, include terms such as *entertainment* or *amusement*.[52] This of course does not establish that violent video games in general aim at entertainment or amusement to the exclusion of politics or that entertainment speech can always be separated from political speech. But it suggests something of the typical, basic self-understanding, intentions, and priorities of the regulated corporate parties.

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49. *See supra* notes 43–45 and accompanying text. But compare Judge Calabresi's declaration, in the zoning context, that "the Court has upheld adult entertainment zoning restrictions that would almost certainly be unconstitutional if applied to pure political speech." TJS of N.Y., Inc. v. Town of Smithtown, 598 F.3d 17, 21 (2d Cir. 2010). This may depend on how far courts are willing to go in finding a regulation of speech to be sufficiently content neutral in adult entertainment and political speech cases respectively. Compare the zoning cases cited *supra* notes 39–45 with the case of apparently political speech violating a broad, if vague, street noise ordinance in *Kovacs v. Cooper*, 336 U.S. 77 (1949).

50. Our attention below, in chronological order, will be on *Entertainment Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software Ass'n v. St. Louis County* (*IDS*), 329 F.3d 954 (8th Cir. 2003); and *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

51. For this terminology in the obscenity law context, see, for example, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 58 n.6 (1989); *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987); and *Miller v. California*, 413 U.S. 15, 24 (1973).

52. *See* cases cited *supra* note 50.

The first of the major pre-*Brown* violent video game case opinions to consider is *American Amusement Machine Ass'n v. Kendrick*,[53] authored by Judge Richard Posner. As it happens, the regulation in *Kendrick* appeared to be limited to a particular class of "amusement machines."[54] If it had been the case that the regulated parties intended to convey, or could reasonably be interpreted to have conveyed, any sort of political message, it is not clear that those machines would even be considered mere amusement machines within the literal scope of the regulation.

It might even have been arguable that a machine intended both to convey a political message, however vaguely,[55] and to amuse the player should not be legally reduced to the category of amusement machines.[56] The regulated parties in *Kendrick*, however, could have understandably thought of themselves as engaged in amusement or entertainment speech, as separate and distinct, in their case, from political speech. The basic distinction between entertainment speech and political speech seems, in *Kendrick*'s context, to be reasonably manageable. In any event, the ordinance at issue in *Kendrick* regulated access by minors to public video game machines and was further limited to not just amusement machines but rather those machines appealing to a minor's "morbid interest in violence" and featuring "graphic violence" as further specified by the ordinance.[57]

Perhaps most importantly for our purposes, the ordinance by its terms excluded from its coverage any video game found to be of "serious literary, artistic, *political* or scientific value as a whole" for minors.[58] This language by itself can hardly prove the reasonable distinguishability, in typical cases, of entertainment or amusement speech and political speech. But the obvious inference from the regulatory language and the typical obscenity case opinions is that some entertainment speech will also involve significant political content, some entertainment speech will not,

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53. 244 F.3d 572.

54. *Id.* at 573.

55. Under the current judicial understanding, protected speech need not involve, even from the speaker's perspective, any particularized message or idea. *See* Hurley v. Irish-Am. Gay, Lesbian & Bi-Sexual Grp., 515 U.S. 557, 569 (1995). For the more restrictive understanding prior to *Hurley*, see the opinions in *Texas v. Johnson*, 491 U.S. 397 (1989).

56. By analogy, would we think of the relevant works of Dickens, Hardy, Dostoevsky, Hugo, and Zola as fairly and entirely reducible to the category of amusement? Realistically, some such video game sellers might not have consciously conceived of themselves as speakers seeking on a daily basis to convey even a vague or general message as opposed to merely filling a profitable market niche. But for constitutional purposes, they are, in any event, deemed speakers. *See IDS*, 329 F.3d 954, 956–57 (8th Cir. 2003).

57. *Kendrick*, 244 F.3d at 573.

58. *Id.* (emphasis added).

and the courts will commonly be able to reasonably draw this distinction as a matter of law. This is certainly not to deny that there will unavoidably be borderline cases[59] or that entertainment speech and political speech may indeed delicately interlace. But even in such cases, the entertainment and the politics may still be separable, or at least distinguishable, in principle.

The crucial question, following Justice Scalia, is ultimately whether any influence, including culturally late subjectivism, relativism, prudence, judicial humility, a sense of fallibility, or even nihilism, should lead us to largely abandon all attempts to distinguish entertainment from politics, in this context and far more generally, and then to abandon as well other familiar distinctions between political speech and other forms of speech. The practical implications of our realistically abandoning such distinctions among speech categories would, as we shall conclude, be substantial and generally unappealing.

Moreover, Judge Posner in *Kendrick* does draw a distinction between the possible harms of speech and the possible offensiveness of speech.[60] The video game ordinance was thought to be based largely on purported harms,[61] whereas traditionally, obscenity has been prohibited based largely on its adjudicated offensiveness[62] to community norms.[63] In *Kendrick*, Judge Posner found, at least at the preliminary injunction stage, no "compelling" evidentiary grounds sufficient to justify the regulation.[64]

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59. We can imagine, unfortunately, torture video games to be judged by some as essentially "entertainment" speech, by others as essentially "political" speech, of whatever quality, and by still others as perhaps "hate speech." And it would admittedly be possible to argue both that all forms of torture are always wrong and that only minimal harm results from the repeated play, by minors, of realistic interactive torture video games. This might depend on the minor's familiarity, desensitization, habit, social and other environmental influences, age, duration, general mental health, and idea compartmentalization.

60. *See Kendrick*, 244 F.3d at 574–75.

61. *See id.* at 575.

62. *See id.* at 574; *see also* cases cited *supra* note 51.

63. *See Kendrick*, 244 F.3d at 574. We might well wonder whether regulations of allegedly obscene materials in general on the basis of the content of the speech in question should, following the court's logic, be subject to strict scrutiny. Put somewhat differently, does the *Miller* obscenity test, including its focus on community offense, invariably reflect the meaningful advancement of a genuinely compelling governmental interest? *See id.* at 574–76; cases cited *supra* note 51.

64. *Kendrick*, 244 F.3d at 580. *Compelling* in this context refers not to the importance of the state interest sought to be promoted by the regulation but to the convincingness of the largely social scientific or other empirical evidence linking the targeted speech to any cited harms. *See id.* at 576–80. Thus, strict scrutiny is not simply

As to the quality of the violent video games themselves, Judge Posner was disinclined to equate *The House of the Dead* with classic literary texts.[65] More broadly, Judge Posner recognized that with respect to the video games in question, "[w]e are in the world of kids' popular culture."[66] This observation, however, amounts to merely judicial literary criticism rather than an attribution of insufficient political or other constitutional value.[67]

One complication, though, is that Judge Posner characterized the particular game *Ultimate Mortal Kombat 3* as "surprisingly, a feminist violent video game."[68] Judge Posner reported that the game is in this sense political and that it "has a message, even an 'ideology,' just as books and movies do."[69]

We can address this element of the entertainment speech and political speech relationship through considering further the case *Interactive Digital Software Ass'n v. St. Louis County* (*IDS*), regarding sale or rental of violent video games to minors.[70] *IDS* approvingly quotes *Kendrick* on this ideological message point,[71] concluding that "these 'violent'[72] video games contain stories, imagery, 'age-old themes of literature,'" as well as messages or "even an ideology."[73]

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a matter of a typically boilerplate compelling governmental interest and a typically manipulable inquiry into the issue of narrow tailoring; strict scrutiny may also involve onerous, and even practically unmeetable, evidentiary causation burdens on the state. *See infra* note 99; *see also* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–42 (2011).

65. *See Kendrick*, 244 F.3d at 578 ("'The House of the Dead' is not distinguished literature.").

66. *Id.*

67. *See supra* notes 58–59 and accompanying text.

68. *Kendrick*, 244 F.3d at 578.

69. *Id.* Whether a given minor could become a feminist, or learn about feminism, through other means, or even by playing this particular violent video game in some unregulated format, we leave to speculation.

70. 329 F.3d 954 (8th Cir. 2003).

71. *Id.* at 957.

72. It is not clear why the term *violent* in this context was put into quotation marks of an apparently distancing, rather than a word-referencing or a source-indicating, sort. The usual function of distancing quotation marks is to indicate a certain skepticism, subjectivism, or relativism concerning the term in question. Although the court is certainly welcome to adopt such perspectives in general, and although no video game is literally violent, one might question whether the credibility of the court's analysis is really enhanced by a court's suggesting that referring to even the most violent video games as violent at all is somehow problematic or arbitrary. If the most violent video game activities were carried out in real life, would the court still ironize or resist the use of term *violent*?

73. *IDS*, 329 F.3d at 957 (quoting *Kendrick*, 244 F.3d at 577–78). *IDS* notes that because the Supreme Court has accepted the paintings of Jackson Pollock, music of Arnold Schoenberg, and Jabberwocky verse of Lewis Carroll as protected speech, the video games at issue should qualify as protectable speech as well. *Id.* For this point, the

We should, at this point, emphasize that the focus of Justice Scalia's (non)distinction is between political speech in particular and entertainment or amusement speech. Neither Justice Scalia nor this Article addresses the constitutional value of, say, scientific speech[74] or the judicial ability to distinguish scientific speech from either political speech or entertainment speech, assuming that the latter categories can themselves be distinguished. We can thus set aside a number of further complications.

It is in the end certainly possible, for some purposes and on some definitions, to say that every video game, violent or otherwise, involves an ideology,[75] or even a political ideology, however hazy or unintended and nonparticularized.[76] For some purposes, perhaps everything we say has political implications, whether intended, likely grasped, or not.[77]

But if every video game, violent or otherwise, is held for free speech purposes to embody a political message and involve political speech, we have then for most important purposes gone too far, and we will inevitably pay too high a price in terms of our basic constitutional and cultural values. If every regulated video game counts, along with the Lincoln-Douglas debates,[78] as political speech, then realistically every instance of commercial speech[79] would have as good a claim to embody an ideology,

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IDS court relies primarily on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995).

74. Commonsensically, there will be overlaps of one sort or another between scientific and political speech, as in the H-bomb "recipe" or proliferation case of *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), as well as in cases of scientific speech in which political themes are absent or at least separable, and in cases of political speech that are not also scientific speech in the standard senses of the terms. If anything, this suggests a more manageable distinguishability of political speech and entertainment speech than Justice Scalia seems comfortable with.

75. *See IDS*, 329 F.3d at 957 (quoting *Kendrick*, 244 F.3d at 577–78).

76. For the ability to protect nonparticularized ideas, see *Hurley*, 515 U.S. at 569.

77. *See generally* R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010) (discussing the scope of what counts as speech for First Amendment purposes).

78. *See* Abraham Lincoln-Stephen Douglas Debates (1858), *in* THE LINCOLN-DOUGLAS DEBATES (Rodney O. Davis & Douglas L. Wilson eds., 2008).

79. The Supreme Court's crucial "early" commercial speech cases are *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976), and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563–64 (1980). Perhaps the most explicit treatment of "intertwined" commercial and noncommercial speech is *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 473–74 (1989). For one indication, though, of a gradual, halting, inconsistent drift toward treating commercial speech as in some respects more akin to political speech, see *Thompson v. Western States Medical Center*, 535 U.S. 357, 366–67 (2002).

even a political ideology.[80] At least to the extent that amusing video games carry an ideology, commercial speech carries an implicit ideology of commodity, market-based, or commercial solutions.[81] This would render much of the Supreme Court's largely separate and distinct commercial speech jurisprudence completely incoherent.[82]

Or we could ask in addition, if all video game speech is relevantly political, why most, if not all, workplace or school-based verbal sexual harassment speech is not at least equally politically ideological. Why would not strict scrutiny of all content-based regulations of such harassing speech be called for?[83] And again, why would not nearly all pornography and obscenity count as political-ideological speech and thus be protected by strict scrutiny when regulated on the basis of its content or viewpoint?[84] Additional categories, including some forms of criminal or tortious speech, can also be equally political and thus raise further problems under Justice Scalia's analysis.

We could thus, in a burst of enthusiasm, think of nearly all speech as First Amendment political speech. But even if we do so, our basic collective and individual values and priorities would not thereby be changed. Many of us, for example, can imagine making great sacrifices for basic political or religious beliefs, perhaps to protect freedom of scientific inquiry or the collective library of civilization itself. The prospect, on the other hand, of fighting and dying on a foreign shore so as to protect minors' access to especially violent and not otherwise seriously

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80. Commercial speech, taken collectively or not, in a sense inherently promotes market-transactional solutions—the exchange of money for goods and services—rather than alternative approaches to even life's deepest problems. *See* R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE 12–77 (1997).

81. *See id.*

82. As one example, the Court allows for prohibition of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. *See Central Hudson*, 447 U.S. at 563–64. In contrast, any attempt to prohibit political speech deemed to be, say, deceptive or misleading—the various future costs of a proposed spending program perhaps—would typically be a nonstarter, given the potential for bias and abuse. For a somewhat closer case, see, for example, *281 Care Committee v. Arneson*, 638 F.3d 621, 635 (8th Cir. 2011), protecting even knowingly false electoral campaign speech through a strict scrutiny test. See also the Court's willingness to distinguish, in several contexts, between speech that is and is not on a matter of public interest and concern, as referred to *infra* notes 155–56 and accompanying text.

83. For references to such issues, see *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Baty v. Willamette Industries, Inc.*, 172 F.3d 1232 (10th Cir. 1999); and *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991). *See also* Doe v. City of New York, 583 F. Supp. 2d 444, 448–49 (S.D.N.Y. 2008) (discussing limited First Amendment protections of harassing e-mails sent in the workplace).

84. *See supra* note 63 and accompanying text. For an argument for a stronger linkage between much pornographic or obscene material and ideological politics, see generally CATHARINE A. MACKINNON, ONLY WORDS (1996).

valuable video games from some reasonable regulation may well not seem so inspiring.

More generally, few of us would be willing to thus fight and die to protect ourselves from typical regulations of what in reality amounts to a minute and readily replaceable fraction of our entertainment or amusement alternatives.[85] Less dramatically, few of us would be willing to trade away some important egalitarian or other civilizational values, as a rigorous strict scrutiny might require,[86] in order to protect the above video game access rights, particularly given all the increasingly broad and accessible remaining entertainment and amusement options.[87] Distinguishing, insofar as possible, political speech from entertainment speech is thus of broad and serious importance.

We have seen in particular that most of the violent video game and related regulations exempt even the most violent such material if, taken as a whole, the material is of serious literary, artistic, scientific, or political value for juveniles.[88] It is in this light that we must consider the *IDS* court's apparently admirable humility in declaring, finally, that "[w]hether we believe the advent of violent video games adds anything of value to society is irrelevant."[89] On first glance, this attitude may remind us of the healthy sense of fallibility endorsed by free speech champions such as John Stuart Mill[90] and Oliver Wendell Holmes, Jr.[91] But we should, in contrast, bear in mind not only the typical regulatory exclusion for products with any relevant serious value[92] but also the very real social costs of protecting what might be admittedly trivial or vacuous messages by a rigorous strict scrutiny test.[93]

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85. For the increasing range of such options, see the sources cited *supra* note 9.

86. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–42 (2011); *supra* note 64; *infra* note 99.

87. *See supra* note 9. It may not be much of an overstatement to say that virtually any standard form of entertainment or amusement is now available on virtually every platform or every kind of communications device.

88. *See supra* text accompanying notes 50–51, 58.

89. *IDS*, 329 F.3d 954, 958 (8th Cir. 2003).

90. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 77–84 (Gertrude Himmelfarb ed., Pelican Books 1974) (1859) ("All silencing of discussion is an assumption of infallibility.").

91. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]ime has upset many fighting faiths. . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

92. *See supra* text accompanying notes 50–51, 58.

93. *See, e.g.*, *IDS*, 329 F.3d at 958–59.

The third and last of our pre-*Brown* violent video game cases, *Entertainment*[94] *Software Ass'n v. Swanson*, again involved restrictions on the sale or rental to minors of a particular class of violent video games.[95] This case is notable for the combination of its obvious uneasiness regarding the real constitutional value of the video games in question and remarkable stringency in applying strict scrutiny even to such video games.[96] Thus, in *Swanson*, the Eighth Circuit concludes that "[a]lthough some might say that it is risible to compare the violence depicted in the examples [of video games] offered by the State to that described in classical literature, such violence has been deemed by our court worthy of First Amendment protection, and there the matter stands."[97]

It is difficult to believe that the court would feel any need for this apparent defensiveness and distancing if it also sensed much of a political speech element in the video games in question. But on the basis of precedent, at least, the *Swanson* court, again with apparent misgivings, applied a stringent strict scrutiny test with a special emphasis on unequivocal proof of causation. Thus, the court concluded that

> having failed to come forth with incontrovertible proof of a causal relationship between the exposure to such violence and subsequent psychological dysfunction, the State has not satisfied its evidentiary burden. The requirement of such a high level of proof may reflect a refined estrangement from reality,[98] but apply it we must.[99]

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94. Note again the apparent self-understanding of the regulated parties as marketing entertainment without explicit reference to anything like political advocacy. *See supra* text accompanying note 52.

95. 519 F.3d 768, 769–70 (8th Cir. 2008). This case is from the same circuit as and builds upon the *IDS* case discussed above. *See supra* notes 70–73 and accompanying text.

96. *See Swanson*, 519 F.3d at 772.

97. *Id.* Almost without exception, and for perhaps a variety of reasons, virtually every judicial opinion striking down a restriction on minors' access to violent video games explicitly notes that there are passages depicting violence in classic literary works, including Homer, the Bible, Dante, and Shakespeare. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2736–37 (2011); *Swanson*, 519 F.3d at 772.

98. We need not take a position on whether "a refined estrangement from reality" would also be characteristic of the concept of lateness or decadence.

99. *Swanson*, 519 F.3d at 772; *see also IDS*, 329 F.3d 954, 958 (8th Cir. 2003) (applying strict scrutiny to ordinance regulating graphically violent video games based on their conduct); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001) (requiring government to prove a compelling interest to uphold ordinance limiting minors' access to violent video games). If this causal proof standard is taken literally, it might well be realistically incapable of being met in this context or in most other social science contexts of any complexity. For discussion of the particular problem of "causal density," see Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY J., Summer 2010, at 14, *available at* http://www.city-journal.org/2010/20_3_social-science.html. See also the various methodological and other systematic problems raised in John P.A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED.

The above cases, taken together, generally indicate the most directly relevant judicial thinking available to Justice Scalia in *Brown*. On the basis of this relatively narrow legal context of Justice Scalia's opinion in *Brown*, we may now broaden our focus and present some possible perspectives on the wider cultural context of that opinion.

III. THE BROADER CULTURAL CONTEXT OF JUSTICE SCALIA'S APPROACH IN *BROWN*

Despite Justice Scalia's concerns,[100] the courts often assume that despite the various complications of mixture, overlap, intertwining, and borderline cases, it will generally be possible to reasonably distinguish political or ideological speech from speech[101] that qualifies as entertainment or amusement. The cases generally draw a reasonable and meaningful distinction between political speech and entertainment speech.[102] Of course, some instances of speech, such as George Carlin's famously litigated monologue, may count as both.[103] But there is certainly a case to be made for a more confident judicial approach to the distinction than Justice Scalia adopts in *Brown*.

If we seek a broad and deep explanation for Justice Scalia's approach —his reluctance to judicially distinguish between political speech and

696 (2005), http://www.plosmedicine.org/article/fetchArticle?articleURI=info%3Adoi%2F10.1371%2Fjournal.pmed.0020124.

100. *See supra* note 11 and accompanying text.

101. For a discussion of the underlying question of what should count as speech, see generally Wright, *supra* note 77.

102. For a sampling of cases distinguishing political and entertainment speech, at least as abstract categories, see, for example, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), which stated that "[e]ntertainment, as well as political and ideological speech, is protected"; *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007); *Willis v. Town of Marshall*, 426 F.3d 251, 257 (4th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002); and *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002). Even a court that holds, however unwisely, that entertainment speech should receive the same level of free speech protection as political speech thereby impliedly concedes the categorical distinction, in principle, between the two kinds of speech.

103. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978). Of course, the instances of some sort of intertwining of political and entertainment speech are many. For a personal favorite, involving only limited violence by some contemporary standards, see THE ADVENTURES OF ROBIN HOOD (Warner Bros. Pictures 1938), which contains nongraphic deaths by bow and arrow, hangings, officially imposed violence against civilians, quarter staff battle, table throwing, and swordfights to the death, including a climactic duel between Robin and Sir Guy.

entertainment speech—we naturally consider how broader cultural trends and the "spirit of the age"[104] might have influenced the decision. First, though, we must consider some qualifications.

We have already noticed the daunting complexity of most inquiries into social causation.[105] And even if it were possible to fully explain Justice Scalia's approach in causal terms, that would neither confirm nor invalidate his approach on the merits.[106] Further, any attempt to apply broader cultural themes to a judicial decision must inevitably oversimplify the cultural background. Cultural explanations are more reliable in explaining overall patterns of judicial decisions than any single judicial decision in isolation. And as well, no cultural trend is without its own qualifications, limits, and countertrends.

This is all true more specifically of the cultural categories of lateness, decline, and decadence as well as the often conflicting category of barbarism against the background category of civilization. Lateness or decline, for example, will sometimes be accompanied by, linked with, or even intertwined with genuinely progressive and liberating cultural change. Lateness or decadence is to some degree ambiguous and unclear in itself.[107] The idea of lateness may ultimately have no essence—no set of necessary and sufficient conditions. And for every cultural phenomenon we might associate with lateness or decadence, we can find within that culture an apparently contrary trend of one degree or another.

Yet in the end, with all these qualifications, we sometimes find it possible to say, for example, that a sports team, perhaps, or a prominent multigenerational family has entered into a late period of decline. Granting

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104. *See, e.g.*, Henry W. Ehrmann, *The Zeitgeist and the Supreme Court*, 11 ANTIOCH REV. 424, 424 (1951) ("[T]he justices of the Supreme Court must have felt in their chambers the breath of the ['spirit of the age'] upon them.").

105. *See supra* note 99.

106. This could involve what is known as the "genetic fallacy," in which a psychological explanation of why a person has come to a particular belief is supposed to refute the claim that the belief is true. *See, e.g.*, *Genetic Fallacies*, LOGICAL FALLACIES, http://www.logicalfallacies.info/relevance/genetic (last visited May 10, 2012).

107. For a strong version of this view, see RICHARD GILMAN, DECADENCE: THE STRANGE LIFE OF AN EPITHET 15, 180 (1979), which denies that the term *decadence* has any clear, fixed, objective, or descriptive reference over time though does not contest its standard associations and connotations as with *late*—the moribund, exhaustion, inability to make course corrections, or loss of vigor. *But cf.* JACQUES BARZUN, FROM DAWN TO DECADENCE, at xvi (2000) ("All that is meant by Decadence is 'falling off.'"); Neville Morley, *Decadence as a Theory of History*, 35 NEW LITERARY HIST. 573, 573 (2004) ("'Decadence' when applied to the present tells us that we are late . . . .").

Realistically, there may be little or nothing that objectively suggests lateness or decline in a society; if someone views a society as late, that is often due not to the gradual accumulation of evidence but to a more or less sudden, perhaps subconscious, shift in perspective in which the person now sees much of a wide range of the culture's features as suggesting lateness or decline.

the impossibility of uncontroversially pinning down all the particular elements of lateness, we can still survey some of the possible indications thereof. No such listing can be incontestable or complete. No attempt will be made here to defend one list of indicators of lateness over another. Readers are encouraged to add, delete, or reformulate at will and then apply their own formulation. Nor can we here assess the relative importance of any possible indicator of lateness with respect to any other. Instead, the important point is that to the extent that we recognize our broader culture as late—or even in some respects as perhaps bearing marks of barbarism for that matter—the judicial decisionmaking in that culture, at the level of high-profile, open-ended, and controversial judicial decisions, becomes more fully explainable.[108]

What then might be some of the phenomena often associated with cultural lateness, particularly those phenomena that might bear, directly or indirectly, consciously or subconsciously, on the approach taken by Justice Scalia in a case like *Brown*? In no particular order, and again without priority or endorsement, one could list a number of possible lateness indicators: a vague sense that the culture itself has become rather like a tightrope walker with a recently developed excessive self-awareness or a "loss of nerve," resulting in ill-assured steps, lurches, decisional blockage, rigidity, or institutional paralysis followed by indicators such as a loss of genuine collective self-confidence and vitality, despite artificially high levels of cultural narcissism and self-esteem;[109] a fundamentally unserious politics of partisanship, posturing, conscious demagoguery, polarization,[110] animosity, fragmentation, and vehemence at nearly any cost but often based on thin, if

108. *See supra* notes 26, 104 and accompanying text.

109. Or to change the metaphor, to reflect excessively on one's bicycle-riding technique is likely to impair, rather than enhance, one's bicycle riding. As for the narcissism theme, see, for example, JEAN M. TWENGE & W. KEITH CAMPBELL, THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT 260 (2009). Twenge and Campbell say, "[I]ndividual Americans and our shared culture are becoming more narcissistic over time." *Id.* They then say, "[N]arcissism causes . . . aggression, materialism, lack of caring for others, and shallow values," which indicates "vanity . . . entitlement and selfishness" and "a substitution of fantasy for reality." *Id.* at 9, 276, 277. For the narcissistic disdain for history, see CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM 31–32 (1979). There may, of course, be some overlap between traits such as vanity, entitlement-mindedness, or selfishness and other psychopathologies.

110. See the sources cited in R. George Wright, *Self-Censorship and the Constriction of Thought and Discussion Under Modern Communications Technologies*, 25 NOTRE DAME. J.L. ETHICS & PUB. POL'Y 123 (2011).

not ultimately arbitrary, forms of subjectivism, relativism,[111] skepticism, and other similarly modest foundations;[112] a cultural coarsening and disinhibition of antisocial impulses unrelated to any genuinely progressive aim; an increasing willingness to heavily discount the future despite interest in environmentalism; a redistribution from the future to the present; an increasing sense of a cultural incapacity for sufficient self-correction; an increasingly thin understanding of even knowledge-based authority and legitimacy; a widespread indifference to some forms of violence; a culture of the consumption of entertaining experiences, goods, and services of whatever sort; conspicuous self-indulgence as opposed to prudence or reasonable self-restraint;[113] a diminishing interest more broadly in the classic secular virtues historically prized by many cultures;[114] an

111. For some of the most sophisticated contemporary discussions of cultural and metaethical relativism from both adherents and critics, see generally PAUL A. BOGHOSSIAN, FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM (2006); ERNEST GELLNER, RELATIVISM AND THE SOCIAL SCIENCES (1985); GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND MORAL OBJECTIVITY (1996); LARRY LAUDAN, BEYOND POSITIVISM AND RELATIVISM: THEORY, METHOD, AND EVIDENCE (1996); STEVEN LUKES, MORAL RELATIVISM (2008); JOSEPH MARGOLIS, THE TRUTH ABOUT RELATIVISM (1991); MORAL RELATIVISM: A READER (Paul K. Moser & Thomas L. Carson eds., 2001); CHRISTOPHER NORRIS, RECLAIMING TRUTH: CONTRIBUTION TO A CRITIQUE OF CULTURAL RELATIVISM (1996); RELATIVISM: A CONTEMPORARY ANTHOLOGY (Michael Krausz ed., 2010); RELATIVISM: COGNITIVE AND MORAL (Jack W. Meiland & Michael Krausz eds., 1982); DAVID B. WONG, NATURAL MORALITIES: A DEFENSE OF PLURALISTIC RELATIVISM (2006).

112. The twentieth-century philosopher C.E.M. Joad linked his own conception of decadence to "(1) [s]cepticism in belief; (2) Epicureanism and Hedonism in conduct; [and] (3) [s]ubjectivism in thought, art, and morals." C.E.M. JOAD, DECADENCE: A PHILOSOPHICAL INQUIRY 100 (1948). For a brief critique of Joad, see P.F. Strawson, Book Review, 24 J. ROYAL INST. PHIL. 266–67 (1949) (reviewing JOAD, *supra*).

It should be noticed that there is really no logical linkage between relativism or subjectivism, et cetera, and the virtue of tolerance or respect for pluralism and diversity. *See, e.g.*, RUSS SHAFER-LANDAU, WHATEVER HAPPENED TO GOOD AND EVIL? 30–33 (2004). Relativism, et cetera, does not, in this regard, offer any distinctive moral or constitutional payoff not otherwise obtainable. This is even more clearly true in the case of fashionable versions of nihilism. For a brief discussion, see HUBERT DREYFUS & SEAN DORRANCE KELLY, ALL THINGS SHINING: READING THE WESTERN CLASSICS TO FIND MEANING IN A SECULAR AGE 71 (2011) ("The nihilism of our secular age leaves us with the awful sense that nothing matters in the world at all. If nothing matters then there is no basis for doing any one thing over any other . . . .").

113. *See* JOAD, *supra* note 112, at 95, 100, 125; James K. Glassman, *Notes on Europe's Economic Decadence*, COMMENTARY, July/Aug. 2010, at 71, 72 (associating *decadence* with "self-indulgence and decline"). On the problem of individual and collective self-indulgence and self-discipline, see generally DANIEL AKST, WE HAVE MET THE ENEMY: SELF-CONTROL IN AN AGE OF EXCESS (2011), and BENJAMIN R. BARBER, CON$UMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE (2007). For discussion on the unstable combination of acquisitiveness and hedonic consumption with prudence and deferred gratification, see DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 295 (20th anniversary ed. 1996).

114. These would include genuine and reasonable prudence or practical wisdom, courage or fortitude, temperance or reasonable self-restraint, and justice as the sustained

increasing role for collective "denial," distraction, and self-delusion;[115] a cultural shift in the balance between the Freudian "pleasure principle" and the "reality principle"[116] or genuine maturation; an indifference to a wide range of gross inefficiencies; the phenomenon of education as increasingly a matter of credentialing as distinct from meaningful learning,[117] study effort,[118] and basic equity and equality; limited attention spans and unpromising vocabulary and literary trends;[119] and finally and

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disposition to give to any person what is due and proper. *See generally, e.g.*, ARISTOTLE, *supra* note 21; JOSEF PIEPER, THE FOUR CARDINAL VIRTUES (Richard Winston et al. trans., Harcourt, Brace & World 1965) (1954).

115. For the problem of "denial" in the context of business perceptions and decisionmaking, see generally RICHARD S. TEDLOW, DENIAL: WHY BUSINESS LEADERS FAIL TO LOOK FACTS IN THE FACE—AND WHAT TO DO ABOUT IT (2010).

116. *See* SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE (James Strachey ed. & trans., W.W. Norton & Co. 1989) (1920). For Freud on the so-called death instinct, see SIGMUND FREUD, THE EGO AND THE ID 46–62 (James Strachey ed., Joan Riviere trans., W.W. Norton & Co. 1990) (1923). One important question is whether the idea of "thanatos," or the death instinct, is scientifically superfluous or whether it is needed to explain trends that are otherwise not fully explainable. *See* Phillip Longman, *Demography and Economic Destiny*, BIG QUESTIONS ONLINE (Aug. 17, 2010), http://www.bigquestionsonline.com/columns/phillip-longman/demography-and-economic-destiny.

117. *See, e.g.*, RICHARD ARUM & JOSIPA ROKSA, ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES 30, 121–22 (2011) ("American higher education is characterized by limited or no learning [if not declines] for a large proportion of students, and persistent or growing inequalities over time."); *see also id.* at 3 ("Many students come to college not only poorly prepared by prior schooling . . . but . . . they enter school with attitudes, norms, values, and behaviors that are often at odds with academic commitment."); *id.* at 120 ("[T]he college experience is perceived by many students to be, at its core, a social experience. The collegiate culture emphasizes sociability and encourages students to have fun . . . .").

118. For empirical evidence of significantly diminished study time among college students across the board with a number of arguably relevant factors controlled for, see Philip Babcock & Mindy Marks, *Leisure College, USA: The Decline in Student Study Time*, EDUC. OUTLOOK (Am. Enter. Inst. for Pub. Policy Research, Wash., D.C.), Aug. 2010, at 1, *available at* http://www.econ.ucsb.edu/~babcock/LeisureCollege_4.pdf. *See also* Philip Babcock, *Real Costs of Nominal Grade Inflation? New Evidence from Student Course Evaluations*, 48 ECON. INQUIRY 983 (2010); Philip Babcock & Mindy Marks, *The Falling Time Cost of College: Evidence from Half a Century of Time Use Data*, 93 REV. ECON. & STAT. 468 (2011).

119. *See, e.g.*, MARK HELPRIN, DIGITAL BARBARISM: A WRITER'S MANIFESTO 209 (2009) (referring to the "atomization of attention spans" and "the degradation of concentration"). More specifically, see NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS 16, 194, 221 (2010). Carr describes the Internet as "preventing [the] mind[] from thinking either deeply or creatively." *Id.* at 119. "It's not only deep thinking that requires a calm, attentive mind. It's also empathy and compassion." *Id.* at 220. *See also* Patricia Cohen, *Internet Use Affects how We Remember*, N.Y. TIMES, July 15, 2011, at A14, *available at* http://www.nytimes.com/

most generally, a vague sense of impending gravitational collapse[120]—not merely of some particular currently dominant cultural assumptions and standards but of many widely shared basic assumptions and progressive aspirations.[121] There may even be, at worst, a vague sense of resistance among the public or political elites to genuine learning and genuine responsibility, at least where such learning would upset strongly held preferences and preconceptions.

Anyone is of course welcome to judge any or all of these tendencies to not be characteristic of either lateness or our culture, to find them biased or trivial, or to substitute additional trends for those listed. But a reasonable case could be made, along the lines classically suggested by Thomas Mann,[122] that at least some of these cultural trends could be reflected in judicial decisionmaking.

One specific way to link broader cultural trends to judicial decisions, in accordance with Mann, would be to assume that some such trends might be subconsciously "absorbed" into judges' understanding of the popular worldview or their intuitive "common sense." More specifically, the above cultural trends might provide much of the defining "frame,"[123] or what are called the decisional "anchors"[124] for adjudication, including

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2011/07/15/health/15memory.html?_r=1&r=1 (describing studies that suggest using search engines and online databases affect the way people remember information). For discussion on some trends in adult voluntary reading, see HELPRIN, *supra*, at 208. Helprin states that there is a substantial decline in adult voluntary reading over time. *Id.* Again, a case could be made for linking such trends to forms of barbarism as well as to lateness or decline. More optimistically, see the study NAT'L ENDOWMENT FOR THE ARTS, READING ON THE RISE: A NEW CHAPTER IN AMERICAN LITERACY 1–2 (2009), *available at* http://www.nea.gov/research/ReadingonRise.pdf. *But see* Wendy Griswold et al., *Reading and the Reading Class in the Twenty-First Century*, 31 ANN. REV. SOC. 127, 127 (2005) ("[A] reading class is emerging, restricted in size but disproportionate in influence . . . ."). For an expression of concern over shrinking, as opposed to evolving or adapting, vocabularies, see Editorial, *Lost: 15,000 Words—When Language Shrinks, Ideas Are Next To Go, Then Capacity To Uplift Humanity*, OMAHA WORLD-HERALD, Feb. 21, 2005, at 06B, *available at* 2005 WLNR 28109385.

120. *See* EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 619–30 (Dero A. Saunders ed., Penguin Books abr. ed. 1985) (1788) (describing Rome as eventually naturally collapsing of its own weight and accumulated civic vices). Gibbon is responding in part to SAINT AUGUSTINE, CITY OF GOD 62–63 (Image Books 1958) (c. 426 A.D.).

121. The idea of lateness is thus not the trivial observation that cultural institutions are evolving in ways that some currently favored groups may not see as in their interest.

122. *See supra* note 26 and accompanying text; *see also supra* note 104 and accompanying text.

123. *See generally* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981) (discussing frames as psychological principles that govern the perception of decision problems and the evaluation of options).

124. *See* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 120–66 (Thomas Gilovich et al. eds., 2002).

constitutional judgments as to what in our culture is realistic, risky, or unlikely.

Overall, the category of barbarism doubtless has less to plausibly offer our inquiry than does that of lateness or decline. One could, however, argue that some of the considerations mentioned above, including some trends in acceptance of some forms of violence and in literacy, vocabulary, attention spans, et cetera, could be easily classed as indicators not of lateness but of a mild form of barbarism. To the extent that one views our politics, for example, as increasingly fragmented and uncivil by some—but not all—recent standards or as increasingly Hobbesian,[125] one could characterize those trends as more mildly barbaric than decadent.

"Insensitivity" is a quality that may sometimes bridge the mildly barbaric and the late or decadent. Theodor Adorno once declared that "[t]o write poetry after Auschwitz is barbaric."[126] One, if jaded and cynical, could argue for the decadence of insensitivity as well. We might think of the microsociety of William Golding's *Lord of the Flies*[127] as descending from civilization to barbarism as opposed to decadence. But we find remarkable insensitivity and indifference to even one's fellows in the decadent society of the Eloi in H.G. Wells's *The Time Machine*.[128] A number of the phenomena to which the cultural critic Mark Helprin points in his book *Digital Barbarism* might also be thought of as characteristically late.[129] These overlaps may be real, especially if the idea of the mildly barbaric has evolved over time.[130]

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125. *See* THOMAS HOBBES, LEVIATHAN 183–88 (C.B. Macpherson ed., Penguin Books 1985) (1651). For constructive responses, see, for example, DAVID P. GAUTHIER, THE LOGIC OF LEVIATHAN (1969); JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION (1986); and GREGORY S. KAVKA, HOBBESIAN MORAL AND POLITICAL THEORY (1986). Again, conflicts may involve not only current cohorts but one generation's increasing indifference to the well-being of generations to follow.

126. THEODOR W. ADORNO, *Cultural Criticism and Society*, *in* PRISMS 17, 34 (Samuel Weber & Shierry Weber trans., 1997) (1967).

127. WILLIAM GOLDING, LORD OF THE FLIES (Perigee Books 2003) (1954).

128. *See generally* H.G. WELLS, THE TIME MACHINE (1898), *available at* http://www.gutenberg.org/cache/epub/35/pg35.html. Note the rather complex relationship over time between the decadent Eloi and the largely barbaric, if somewhat more technically competent, Morlocks.

129. *See* HELPRIN, *supra* note 119, at 193, 195, 208–09.

130. Edward Gibbon may, in the eighteenth century, have associated the term *barbarism* with not only assumed crudity of mind but also groups that might otherwise be considered civilized, but corrupted. *See* 4 J.G.A. POCOCK, BARBARISM AND RELIGION: BARBARIANS, SAVAGES AND EMPIRES 11, 15 (2008 ed.) (2005). Compare the recent idea of "gentle barbarism" as developed in Jean-Pierre Le Goff, *Modernization and Gentle*

With this unavoidably untidy sense of some of the qualities of a late culture,[131] we can now return to Justice Scalia's approach in *Brown*. We can now consider the latter in light of the former, as Thomas Mann and others have suggested is generally reasonable.[132] Based on our reflections on Justice Scalia's approach to *Brown* from a broader cultural perspective, we emphasize again the price to be paid if we endorse what we might call Justice Scalia's "jurisprudential equivalence" approach to political speech and entertainment speech in *Brown*.[133]

IV. CONCLUSION: POLITICAL SPEECH AND ENTERTAINMENT SPEECH AND THE COSTS OF HOLDING THEM TO BE REALISTICALLY INDISTINGUISHABLE

We can now reconsider the overall credibility of Justice Scalia's approach in *Brown* in its broader legal and cultural context. To reiterate the essence of Justice Scalia's approach in *Brown*:

> [V]ideo games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that *it is difficult to distinguish politics from entertainment, and dangerous to try*. "Everyone is familiar with instances of propaganda

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Barbarism, 49 DIOGENES 41, 41 (2002). For a broader perspective, see S.N. Eisenstadt, *Barbarism and Modernity*, 33 SOCIETY 31, 31 (1996).

131. For some further provocative, if not invariably convincing, approaches to cultural lateness, long-term decline, or sheer decadence, see, for example, CHARLES BERNHEIMER, DECADENT SUBJECTS 21 (T. Jefferson Kline & Naomi Schor eds., 2002). Bernheimer writes, "[O]f one thing Nietzsche remains sure: decadence is a disease that must be resisted for the sake of health and ascending vitality." *Id.*; *see also* THE DEDALUS BOOK OF DECADENCE (MORAL RUINS) 8 (Brian Stableford ed., 1990) (1900) (referring to "a languid hedonism which is contemptuous of arbitrary and tyrannical rules of conduct and scornful of all higher aspirations"); *id.* at 7 (referring to "the aesthetics of cultural free-fall"); *id.* at 65 (referring to "a sense of hopelessness; a haunting suspicion that all that was left for men to do was fiddle while Rome burned"); ANTHONY O'HEAR, AFTER PROGRESS: FINDING THE WAY FORWARD 153 (1999) (noting that in Oswald Spengler's theory, "the unifying vision is lost"); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 63 (1984) ("Special-interest groups . . . slow growth by reducing the rate at which resources are reallocated from one activity or industry to another in response to new technologies or conditions."); F.C. White, *On Properties and Decadence in Society*, 87 ETHICS 352, 357 (1977) (stating that the decadent society "has 'gone to seed' or is 'run down'; . . . it has lost its drive, ambition, self-discipline, and organization"). *But cf. id.* at 361 (noting, militarily, though that "[m]any decadent societies have been only too willing to defend [and conquer] . . . with consummate energy and conviction"); Jane Duran, *On Decadence*, 65 PHILOSOPHY 455 (1990) (focusing mainly on artistic decadence). Note that most accounts of lateness seem compatible with continual policy tinkering and policy initiatives, however predictably ineffectual.

132. *See supra* notes 26, 104 and accompanying text.

133. *See infra* Part IV.

> through fiction. What is one man's amusement, teaches another's doctrine."[134]

In what respects, then, might Justice Scalia's judgment here indirectly and subconsciously reflect the much broader late spirit of the age? We should, for the sake of fairness, continue to bear in mind that to think of any cultural phenomenon as late is not to thereby prove its defectiveness. As Herbert Marcuse observed years ago, what is denounced as "decay" may actually be liberating and genuinely progressive.[135]

Nor should we imagine that all persons, including all federal judges, are equally affected by the lateness of the culture, let alone by all late phenomena. Socrates, for example, held that in a late, decaying democracy, "the old, anxious not to be thought disagreeable tyrants, imitate the young and condescend to enter into their jokes and amusements."[136] As much as a Supreme Court Justice might wish to avoid being unfairly thought a disagreeable tyrant, there may be a narrower limit on the inclination of the Justices to actually enter into the amusements of the young, as distinct from constitutionally validating such amusements.[137] But the decision to strongly constitutionally protect a phenomenon, including violent video games, may in some cases operate to culturally validate the phenomenon in question.

Once the Court leaves the free speech area of classical political argumentation and focuses instead more hazily on vague, nonparticularized "expression," the drawing of First Amendment categorical distinctions may often seem subjective, if not arbitrary. As Daniel Bell once suggested, "[T]he very waywardness of language introduces a larger degree of uncertainty in our . . . theories of knowing. And given this centrality of language as the frame of understanding, for some writers, 'anything goes.'"[138]

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134. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (emphasis added) (quoting Winters v. New York, 333 U.S. 507, 510 (1948)). But again, note the available alternative model suggested *infra* notes 155–56 and accompanying text.

135. *See* HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY 60 (2d ed. 1991) (1964) ("[T]he term 'decadent' far more often denounces the genuinely progressive traits of a dying culture than the real factors of decay."). For discussion of Marcuse on decadence, see Henry Winthrop, *Variety of Meaning in the Concept of Decadence*, 31 PHIL. & PHENOMENOLOGICAL RES. 510, 513 (1971) (stating that Marcuse refers to "the feeling that one is living through the dissolution of a civilization—but does not know what to do about it").

136. PLATO, *supra* note 22, at pt. IV, bks. VIII–IX, at 285–96.

137. *See id.*

138. BELL, *supra* note 113, at 297.

This uncertainty, especially if it has been increasing in our culture, might not inspire judicial confidence even in traditional verbal distinctions, as between political and entertainment speech. But even without this assumed uneasiness regarding the stability of language, consider how just a few of the possible symptoms of cultural lateness might tend to affect the judicial analysis of entertainment speech and political speech, not merely in the context of violent video games but much more broadly.

Consider, for example, any effect, even indirect and subconscious, of the late cultural phenomenon of a "loss of nerve" or an unnatural self-consciousness instead of taken-for-granted self-assurance in the judicial wire-walkers of our day.[139] If a judge begins, even subconsciously, with that sense of the culture's uncertainty and uneasiness, consider how an attempt to distinguish politics from entertainment might well seem unrealistic and daunting. Add in, then, a vague sense of cultural fragmentation[140] and perhaps a sense of the relativism, subjectivism, and similar tendencies at work throughout the culture.[141] To those phenomena, add in as well any unavoidable effects of a broad cultural entertainment coarsening, any reduced public confidence in any official claim to genuinely legitimate and fully justified legal or political authority, and the widespread cultural sense that leisure time is largely about consumption of entertaining experiences of whatever quality and is to be generally indulged.[142] And finally, in vaguely Freudian terms, add in the sense, consciously recognized or not, that the broader culture, particularly in the private sphere, has been gradually resetting the balance between the pleasure principle and the reality principle in favor of the former.[143]

None of these cultural influences need affect one's approach to politics and entertainment and their respective value as speech at a conscious level. The above trends, if they are indeed real, may be at this point rather like the unseen air we breathe. We may see their influence only in the form of what we take to be common sense or what is realistic, mainstream, familiar, practical, or dangerous.[144] But declining to try to reasonably distinguish, where appropriate, between political and entertainment speech—particularly when that reluctance leads to rigorous,

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139. *See supra* note 109 and accompanying text.
140. *See supra* notes 110–11 and accompanying text.
141. *See supra* notes 111–12 and accompanying text.
142. *See supra* note 113 and accompanying text.
143. *See supra* note 116 and accompanying text. As well, any generally diminished interest in the four classic secular virtues, *see supra* note 114 and accompanying text, might also tend to blur any qualitative distinction between speech on justice-related or prudential political matters and speech oriented toward entertainment.
144. *See supra* notes 123–24 and accompanying text.

demanding strict scrutiny protection for entertainment speech[145]—nevertheless eventually involves, as we have suggested, substantial, potentially widespread, and gradually increasing costs.

We need not go so far as to claim, as did the noted cultural critic Neil Postman, that our politics has largely decayed into a form of entertainment.[146] Postman more broadly argued that "[w]hen a population becomes distracted by trivia, when cultural life is redefined as a perpetual round of entertainments, when serious public conversation becomes a form of baby-talk . . . and their public business a vaudeville act, then a nation finds itself at risk; culture-death is a clear possibility."[147] Or alternatively: "Our politics, religion, news, athletics, education and commerce have been transformed into congenial adjuncts of show business, largely without protest or even much popular notice. The result is that we are a people on the verge of amusing ourselves to death."[148]

We certainly need not take the argument anywhere near so far. For one thing, the chronic shrillness, demagoguery, animosity, implacability, and increasing polarization of contemporary politics, despite the large stakes,[149] do not feel reducible, for most persons, to any form of entertainment or amusement, even to that of a soccer rivalry or a professional wrestling event. Anyone who senses that his or her ox may be in line for even minimal goring is unlikely to think of politics as mere entertainment.[150]

As we have suggested above, though, mere amusement or entertainment speech cannot be merged into the category of political speech as the established case law has typically used the term.[151] If there is nevertheless some other sense in which entertainment speech merges indistinguishably into political speech, by a relativist, late cultural logic, it will inevitably be impossible to long retain meaningful distinctions in

145. *See* cases cited *supra* Part II; *see also* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733–42 (2011).

146. *See* NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (20th anniversary ed. 2005) (1985).

147. *Id.* at 155–56.

148. *Id.* at 3–4.

149. *See* Wright, *supra* note 110.

150. More specifically, austerity or budget-battle protests are rarely mere entertainments even to those least directly affected, even if the official rhetoric and public protest tactics involve attention-attracting elements of entertainment.

151. *See supra* notes 74–93 and accompanying text.

constitutional protection between political speech and commercial speech, sexual harassment speech, or even any obscenity that is realistically objected to largely as offensive on the basis of its viewpoint.[152]

In particular, applying a rigorous strict scrutiny test to content-based regulations of not just political speech but also most commercial speech, sexual harassment speech, and various forms of obscene materials[153] would not amount to a clear expansion of liberty or an upgrade of a genuinely progressive society. Broadly expanding the use of strict scrutiny in various speech areas would often tend, as the above examples suggest, to reinforce the interests of already culturally dominant groups. It is far from clear why we should be willing to make greater sacrifices on behalf of enhanced free speech protection for commercial marketing, verbal sexual harassment, or various forms of obscenity if there is really no reason for strict scrutiny, including a rigorous causation requirement, in order to regulate such categories of speech on the basis of content.

And once we tire of overprotecting such categories of speech, at substantial costs in various other substantial values, we would then face an awkward choice. We could choose to water down the protection we give to content-based restrictions on political speech, along with the other forms of supposedly indistinguishable speech noted above. Or else, contrary to Justice Scalia's[154] approach in *Brown*, we could instead decide that after all, reasonably distinguishing between political speech and entertainment speech, in most contexts, is often neither as demanding nor as dangerous as Justice Scalia imagines.

In fact, we do have case precedent for the Supreme Court's quiet reconsideration of an earlier judgment that a similar speech category distinction was too difficult or dangerous to make. The Court, at one point in time, was unwilling to distinguish, in libel cases, between speech on matters of public interest or concern and speech on matters of merely private interest or concern.[155] But some years later, Justice Lewis Powell, the author of the prior opinion, adopted the position that just such a distinction could properly be drawn.[156] In that context, the Court's

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152. *See supra* notes 74–93 and accompanying text.

153. See in particular Judge Posner's discussion in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 574–75 (7th Cir. 2001).

154. Although we have referred herein to the approach in question as that of Justice Scalia, it bears noting that his majority opinion was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011).

155. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). When referring to drawing the speech category distinction in question, Justice Powell, for the Court, stated, "We doubt the wisdom of committing this task to the conscience of judges." *Id.*

156. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757–60 (1985) (endorsing and applying such a distinction between speech on matters of public or

unwillingness to draw an important distinction between speech categories was reversible. Whether Justice Scalia's course in *Brown* is similarly reversible is largely a matter of contemporary, broader cultural trends.

private concern); *see also* Garcetti v. Ceballos 547 U.S. 410, 417–19 (2006) (employing the same distinction in the public employee speech context). For further discussion, see R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1988).