Supreme Court Rules California Ban on Sale or Rental of Violent Video Games to Minors Unconstitutional Under the First Amendment

On June 27, 2011, in *Brown v. Entertainment Merchants Assn.*,[1] the Supreme Court held that a California law banning the sale or rental of violent video games to minors and requiring their packaging to be labeled "18" was an unconstitutional restriction on the content of speech protected by the First Amendment. The Court held that the interactive nature of video games does not lessen their protection under the First Amendment, and the restrictions based on violent content were subject to strict scrutiny, rather that the more permissive test applied to regulation of obscenity, because the Court would not create a new category of speech exempted from First Amendment protection.

I. Facts and Procedural History

Brown stemmed from a pre-enforcement challenge to California Civil Code Ann. §§1746-1746.5 (the "Act"), [2] brought on behalf of the video-game industry, by Entertainment Merchants Association, in the United States District Court for the Northern District of California.

The Act prohibited the sale or rental of "violent video games" to minors and required their packaging to be labeled "18." The Act applied to games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[3] Violation of the Act was punishable by a civil fine of up to $1,000.[4]

The district court concluded that the Act violated the First Amendment and permanently enjoined its enforcement.[5] The Court of Appeals affirmed.[6]

II. The Supreme Court's Decision

The Court[7] held that video games qualify for First Amendment protection and remarked that entertainment has been traditionally protected as a form of speech in part because "it is difficult to distinguish politics from entertainment, and dangerous to try."[8] Applying a basic principle of First Amendment law that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its

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1 No. 08-1448, slip op. (2011) ("*Brown*"), available at http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf. Citations to the Court's decision are to the slip opinion.

2 The Act stems from Assembly Bill 1179, passed by the California State Legislature in 2005.

3 California Civil Code Ann. § 1746(d)(1)(A).

4 California Civil Code Ann. § 1746.3.

5 *Video Software Dealers Ass'n.* v. *Schwarzenegger*, 401 F.Supp.2d 1034 (N.D. Cal. 2005).

6 *Video Software Dealers Ass'n.* v. *Schwarzenegger*, 556 F. 3d 950 (9th Cir. 2009).

7 Justice Scalia wrote for the majority, joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

8 *Brown* at 2.

content"[9] the Court held that the California law was subject to "strict scrutiny" because restricted access to video games based on the games' content (the depiction of violence). [10]

The Court relied on its opinion from the prior term in *United States v. Stevens*,[11] which addressed a federal statute seeking to criminalize the creation, sale, or possession of certain depictions of animal cruelty.[12] There, the Court rejected the government's argument that it "could create new categories of unprotected speech by applying a 'simple balancing test' that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test."[13] Quoting *Stevens*, the *Brown* Court held that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'"[14]

California drafted its restrictions on the sale of violent video games to mirror a New York statute restricting the sale of "obscenity-for-minors" that was upheld in *Ginsberg v. New York*, 309 U.S. 629 (1968).[15] The Court explained, however, that "the obscenity exception to the First Amendment" only applies to depictions of "sexual conduct."[16] Thus, while *Ginsberg* defined obscenity from the perspective of what was suitable for minors, it was simply "adjus[ting] the definition" of an existing First Amendment exception.[17]

California, on the other hand, recognized that violent content was permissible for adults and thus "wishe[d] to create a wholly new category of content-based regulation that is permissible only for speech directed at children."[18] That, the Court held, would be "unprecedented and mistaken," because "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[19] The Court further justified the distinction between regulation of obscenity and regulation of depictions of violence by noting that there is no longstanding tradition restricting children's consumption of violent entertainment.[20]

Applying strict scrutiny, the Court held that the law was not narrowly tailored to a compelling government interest for several reasons. First, the Court addressed the asserted interests of protecting minors and aiding parental authority. While the Court acknowledged those were important goals, it held that the relevant

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9 *Id.* at 3 (quoting *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

10 *Id.* at 11 (A restriction on speech that is subject to strict scrutiny will be invalid "unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.") (quoting *R.. A. V.* v. *St. Paul*, 505 U. S. 377, 395 (1992)).

11 559 U.S. __, 130 S.Ct. 1577 (2010).

12 *Id*. at 3 (citing 18 U.S.C. § 48 (2007) (amended 2010)).

13 *Id.* at 4.

14 *Id*.

15 *Id.* at 4-5 ("As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulations.").

16 *Id.* at 5 (citing *Miller* v. *California*, 413 U.S. 15, 24 (1973)).

17 *Id.* at 6.

18 *Id*. at 8-9. For examples of violence in children's entertainment, the Court pointed to Grimm's Fairy Tales, Lord of the Flies, and 1800's dime novels known as "penny dreadfuls," among others.

19 *Id*. at 6-7 (quoting *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213-214 (1975)).

20 *Id.* at 11 (quoting *R.. A.. V.*, 505 U. S. at 395).

inquiry was not the broad interest in protecting minors generally, but rather the marginal contribution the law would have toward those goals. In this instance, the Court noted that the video game industry had a self-imposed rating system that already "does much to ensure that minors cannot purchase seriously violent video games on their own, and parents who care about the matter can readily evaluate the games their children bring home." In light of the existing ratings, "[f]illing the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." The Court acknowledged Justice Breyer's criticism that the voluntary measures were not always enforced. But "[e]ven if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced."[21]

Moreover, because the law was subject to strict scrutiny, the state bore the burden of demonstrating a causal link between violent video games and the asserted harm to minors. California had acknowledged that "it cannot show a direct causal link between violent video games and harm to minors," as "[n]early all of the research is based on correlation, not evidence of causation."[22] Instead, the state relied on *Turner Broadcasting System, Inc. v. FCC* [23] to argue "that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies."[24] The Court distinguished *Turner* on the ground that it had applied "*intermediate scrutiny* to a content-neutral regulation," whereas, under strict scrutiny, the government "bears the risk of uncertainty" and "ambiguous proof will not suffice."[25]

Next, the Court found that the law was not narrowly tailored because it was both "wildly underinclusive" and "vastly overinclusive."[26] The law was "wildly underinclusive when judged against its asserted justification" of restricting minors' access to depictions of violence because as it did not attempt to restrict access to other types of depictions of violence.[27] In addition, the law was "seriously underinclusive" because it allowed material depicting violence "in the hands of children so long as one parent (or even an aunt or uncle) says it's OK."[28] Thus, the law was not tailored to the goal of protecting children. At the same time, the law's "purported aid to parental authority [was] vastly overinclusive," because "[n]ot all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games."[29] Rather than directly supporting parental authority, the law's effective purpose is to support "what the State thinks parents *ought* to want. This is not the narrow tailoring . . . that restriction of First Amendment rights requires."[30]

Thus, while the California law sought to further two legitimate state interests, protecting children and aiding parental authority, it was not sufficiently tailored to accomplish either objective. "Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny."[31]

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21 *Id.* at 16 n.9.

22 *Id.* at 12-13.

23 512 U.S. 622 (1994).

24 *Id*. at 12.

25 *Id*. (citing *United States* v. *Playboy Entertainment Group, Inc*., 529 U. S. 803, 818 (2000)).

26 *Id.* at 14, 15.

27 *Id.* at 14.

28 *Id.* at 15.

29 *Id.* at 16.

30 *Id*.

31 *Id.* at 18.

III. The Concurring Opinion

Justice Alito submitted a concurring opinion, joined by Chief Justice Roberts, that agreed with the majority insofar as it held that the "law's definition of 'violent video game' is impermissibly vague," but refused to go further, arguing that there was "no need to reach the broader First Amendment issues addressed by the Court."[32]

In his disagreement with the majority's opinion, Justice Alito contended, "We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of the legislators, who may be in a better position than we are to assess the implications of new technology."[33]

Justice Alito's concurrence did acknowledge an important difference between "violent video games" and "sexually related materials" because there are no "generally accepted standards regarding the suitability of violent entertainment for minors," whereas there were generally accepted standards for obscenity.[34] Because of this distinction, "the California violent video game law fails to provide the fair notice that the Constitution requires. And I would go no further. I would not express any view on whether a properly drawn statute would or would not survive First Amendment scrutiny. We should address that question only if and when it is necessary to do so."[35]

IV. The Dissenting Opinions

Justices Thomas and Breyer independently authored dissenting opinions. Justice Thomas's dissent focused on the notion that the founding fathers "believed parents to have a complete authority over their minor children and expected parents to direct the development of those children."[36] In light of this, the First Amendment simply did not give children any right, on their own, to free speech. "Because such speech [to children] does not fall within the 'freedom of speech' as originally understood, California's law does not ordinarily implicate the First Amendment and is not facially unconstitutional."[37]

Justice Breyer, on the other hand, claimed he "would apply both this Court's 'vagueness' precedents and a strict form of First Amendment scrutiny."[38] However, with respect to vagueness, Justice Breyer found no meaningful distinction from the New York law upheld in *Ginsberg*, and therefore did not find the California law impermissibly vague.[39]

Justice Breyer also contended that the law should pass the strict scrutiny test because the state had a compelling interest "in protecting children from harm sufficient to justify limitations on speech."[40] Justice Breyer

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32 *Id*., Alito, J. concurring, at 1.

33 *Id.* at 2.

34 *Id.* at 7-8.

35 *Id.* at 9.

36 *Id*, Thomas, J. dissenting, at 15.

37 *Id.* at 20.

38 *Id*., Breyer, J. dissenting, at 3.

39 *Id*. at 5.

40 *Id.* at 10.

also concluded that the law was properly tailored as it imposed "no more than a modest restriction on expression" by banning minors, and only minors, from purchasing the games.[41] Justice Breyer also found the studies identifying a link between violent video games and violence sufficiently persuasive for the Court to defer to the legislature.[42]

Justice Breyer argued that the Court's opinion results in an unjustifiable disparity between the regulation of obscenity and the regulation of depictions of violence:

> "*Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman - bound, gagged, tortured, and killed - is also topless?"[43]

V. Significance of the Decision

The *Brown* opinion is significant in several respects. While the Court acknowledges that "a State possesses legitimate power to protect children from harm," it nevertheless applied strict scrutiny to a law expressly directed at regulating speech to minors.[44] The opinion is also noteworthy for refusing to extend the obscenity jurisprudence to depictions of violence on the basis of longstanding tradition and generally accepted standards, and in therefore holding the state to a burden to demonstrate both (i) a causal link between the regulated speech and the asserted harm; and (ii) that the regulation will effect a compelling marginal benefit. The boundaries of this holding are likely to be tested in the next Term, by *Federal Communications Commission v. Fox Television Stations, et al.* No. (10-1293), an indecency case that involves restrictions purporting to protect children from profanity and nudity.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Kayvan Sadeghi at 212.701.3049 or ksadeghi@cahill.com

41 *Id.*

42 *Id.* at 16-17.

43 *Id.* at 19.

44 *Brown* at 7 (quoting *Ginsberg*, 309 U.S. 629, 640-641 (1968)).