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First Amendment Fire Power: United States Supreme Court Applies Strict Scrutiny, Rejects Ban on Violent Video Games

Justice Antonin Scalia and his teammates mowed down California's ban on violent video games with fully loaded First Amendment precedents and barbed retorts to opposing arguments. In doing so, the Supreme Court reinforced a fundamental point: that First Amendment protections do not depend on the medium of communication. Thus, video games are protected speech, and restrictions based on their content will be subject to strict scrutiny.

The California law at issue prohibited the sale or rental of violent video games to minors, and imposed a civil penalty of \$1,000 for every violation. At the heart of the law was a definition of the restricted games as those 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." The definition cobbled together tests adopted in two prior Supreme Court decisions, one adopting a restriction on obscene materials specific to minors (*Ginsberg v. New York*, 390 U.S. 629 (1968)), and the other a notoriously vague decision governing obscenity generally and permitting the standard for restrictions on obscene material to be based on "community standards" (*Miller v. California*, 413 U.S. 15, 24 (1973)). However, it sought to

apply them to depictions of violence rather than depictions of nudity or sexually explicit conduct.

The Supreme Court struck down the law in a split decision that created some unusual alignments. Justice Scalia was joined by Justice Kennedy, now considered a centrist, and the Court's three female justices, Justices Ginsburg, Sotomayor, and Kagan, all considered part of the liberal wing. Justices Alito and Roberts concurred in the judgment, but would have avoided the central issue of whether the law's restrictions unduly restricted protected speech by finding it to be impermissibly vague. Justice Thomas dissented, applying an "original intent" analysis that would have held, in essence, that minors have no right to receive any information at all other than what their parents want them to have. Finally, and perhaps most strangely, Justice Breyer dissented, arguing that the statute met strict scrutiny analysis, primarily because interactive video games involve physical activity as well as communication.

The majority acknowledged that the government may adopt limits on materials available to minors that are more restrictive than the limits that may constitutionally be applied to adults. However, it held that in doing so the government is limited to areas that traditionally have been the subject of restrictions on speech, such as obscenity. Relying on its recent decision in *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010), which struck down a statute prohibiting violent "crush" videos, the Court held that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown v. Entertainment Merchants Assn.*, 564 U.S. ___ (2011), Case No. 08-1448, slip opinion at 3.

The majority fired back at the argument, asserted in different ways both by Justice Alito and Justice Breyer, that interactive video games are—or at least might be—different than other forms of entertainment. "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic

principles of freedom of speech and the press, like the First Amendment's command, do not vary, when a new and different medium for communication appears." *Brown*, slip opinion at 2-3.

The decision also shot down Justice Thomas's proposition (notably joined by no other justice) that, in essence, parents have "total parental control over children's lives," and that children are "expected to be dutiful and obedient." Instead, the majority held that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Brown*, slip opinion at 6-7, quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1975).

Thus, the majority held that the California law was subject to "strict scrutiny"—the most demanding test imposed by constitutional law for the validity of restrictions on speech. *Brown*, slip opinion at 11. When faced with that test, the law was even less likely to survive than a pedestrian in Liberty City.

First, the majority found that the California government "acknowledges that it cannot show a direct causal link between violent video games and harm to minors." *Brown*, slip opinion at 12. In particular, it noted that the expert upon whom the government primarily relied had conceded that to the extent that exposure to violent video games had any meaningful effects, "the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner . . . or when they play video games like Sonic the Hedgehog" *Brown*, slip opinion at 13.

Second, it found that the law was substantially under-inclusive, singling out video-game providers and not addressing others, such as "booksellers, cartoonists, and movie producers." *Brown*, slip opinion at 14. This called into question whether the law would effectively further the purported interest of protecting minors from the effects of exposure to violent entertainment.

Finally, the majority concluded that the California law provided only marginal

benefits beyond those provided by existing, voluntary regulations, while at the same time restricting purchases by minors who have their parents consent to acquire restricted games. *Brown*, slip opinion at 15-16.

The concurring and dissenting justices fired off in three different decisions. Justice Alito adopted a limited approach that may have been intended to provide common ground for the warring factions of the Court. They would have tossed out the law on the grounds that it was impermissibly vague, putting off for another day the question of whether there is something unique about video games that might justify restrictions that would otherwise be unconstitutional under the First Amendment. If Alito's intent was to provide a pragmatic solution that would satisfy most or all of his colleagues, he failed. Only Justice Roberts joined his concurring opinion.

Justice Thomas dissented, arguing that the First Amendment has to be construed in light of the cultural values in place at the time it was adopted. Relying principally on "[t]wo parenting books published in the 1830's," but also citing from works by Locke and Rousseau and the letters of Thomas Jefferson, Thomas claimed that it was the cultural norm at the time of the adoption of the First Amendment that "[p]arents had total authority over what their children read," as well as the right to control other aspects of their children's lives, and hence that "the Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors." *Brown*, slip opinion, Thomas, J., dissenting. Thus, Thomas would have rejected *any* First Amendment protection for minors to have access to information of any kind. Responding, the majority pointed out that even if it is true that parents have traditionally had the power to control what their children hear and say, "it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior consent." *Brown*, slip opinion at 7, n. 3.

As a practical matter, the proposition that parents have the power to control what their children hear or say would come as a surprise to most parents.

Regardless, the majority decision points out that even if they do that does not mean that the government has the power to compel them to exercise that authority, or the power to prevent their children from hearing or saying anything they have not approved.

Justice Breyer's dissent asserts that video games are different because they constitute "an interactive, virtual form of target practice," and while the evidence is not conclusive, there is research supporting the proposition that the effects of video games on violent or aggressive tendencies in minors "may be" more significant and severe than other forms of communication or entertainment. *Brown*, slip opinion, Breyer, J., dissenting. Under these circumstances, he argues, the courts should defer to the judgment of legislature. Thus, Breyer concludes, the California law should have been found to survive strict scrutiny.

It remains to be seen how the consequences of the Court's decision will play out. Contrary to the concern expressed by Justice Alito, however, it's highly unlikely that the recognition of First Amendment protection for violent video games will spell an end to industry self-regulation, particularly because the California statute was struck down in part based on the recognition of the efficacy of the self-regulatory scheme. Therefore, expect industry self-regulation to march on while state and federal statutes fall by the wayside. In any event, California has used this law's last life, and at least for now, the game is over.

Authored By:

[James M. Chadwick](#)

650.815.2605

jchadwick@sheppardmullin.com