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Supreme Court Affirms Invalidation of California Restrictions on Violent Video Games

7-2 decision reaffirms several strongly speech-protective precepts, reinforces constitutional protections for children and video games, and underscores recent holding against creation of new categories of "unprotected" speech

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The Supreme Court's June 27, 2011, decision in *Brown v. Entertainment Merchants Association (EMA)* invalidated California's "violent video games" law, which had prohibited sales and rentals to minors and required the games' packaging to bear a large "18" label on the front. Justice Scalia's majority opinion reinforced a number of vital First Amendment principles that bar legislative attempts to create new categories of "unprotected speech," and that establish how relatively little extra leeway the government enjoys even when claiming to regulate in the name of children.

The Court's opinion, which called California's law simply "the latest [ ] in a long series of failed attempts to censor violent entertainment for minors," is significant for a variety of reasons. Perhaps most obviously, it should put to rest state (and local) efforts to regulate "violent" video games. Video game regulation had been introduced in several states and localities, based on a growing (if checkered) body of social science, and were uniformly struck down by federal courts, yet new restrictions continued to be introduced. The decision in *Brown v. EMA* should bring that treadmill to a halt, and should factor significantly as an bulwark against regulating "violent" content in other media.

The decision in *Brown v. EMA* reaffirms and applies the decision last Term in *U.S. v. Stevens* that "without persuasive evidence" that a category of speech "is part of a long (if heretofore unrecognized) tradition of proscription," that was "never [ ] thought to raise any Constitutional problem," legislative efforts to treat it as "unprotected" under the First Amendment cannot stand. It also reaffirms the principle that when the State tries to regulate speech simply because it appears in a new medium, it will face the same stringent First Amendment limits as would efforts to regulate "traditional" media.

California's "violent video game" law restricted sales and required labeling for games that allow players to kill, maim, dismember, or sexually assault an image of a human being, if doing so is depicted in a manner (a) reasonable persons would find appeals to minors' deviant or morbid interests viewing the game as a whole, (b) that is patently offensive to community standards of "what is suitable for minors," and (c) that results in a lack of serious literary, artistic, political, or scientific value for minors."

The Court had little trouble striking down California's law. In doing so, it reaffirmed that "whether government regulation applies to creating, distributing, or consuming speech makes no difference." The fact that the law targeted video games did little to change the analysis. Rather, the Court held, "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles" of free speech "do not vary when a new and different medium for communication appears."

The same First Amendment principles designed "principally to protect discourse on public matters" apply, including that "it is difficult to distinguish politics from entertainment, and dangerous to try." Likening video games to "the protected books, plays, and movies that preceded them," the Court held video games communicate ideas and social messages through both familiar literary devices like character, dialog and plot, as well as through interactivity, all of which receives First Amendment protection. The interactive nature, in fact, is no distinction, the Court observed, as "all literature is interactive" in that "the better it is, the more interactive" it becomes by drawing readers and viewers (or players) into the story.

The Court reiterated that it had “emphatically rejected,” as a “startling and dangerous proposition” the notion that legislatures can create a new category of unprotected speech by applying a simple balancing test weighing its value against its social costs, and punishing it if it fails the test. California’s violent video game law, the majority found, “does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children,” but rather attempted to create a new category, in derogation of last Term’s holding in *United States v. Stevens*.

The Court was emphatic that it did not help to try to make violent-speech regulation look like regulation of obscenity—by including a “saving clause” for serious literary, artistic, political or scientific value—because “violence is not part of the obscenity the Constitution permits to be regulated.” Rather, the Court stressed, “the obscenity exception … does not cover whatever a legislature finds shocking, but only depictions of sexual conduct.” Efforts to underscore the “disgusting” nature of the regulated games also were rebuffed, as were even attempts to note those in which the violence had a racial or ethnic motive. In fact, the Court held, such arguments highlighted the precise danger posed by California’s law, i.e., that “*ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason” for regulating.

Justice Scalia’s majority opinion observed that the state’s legitimate interest in the well-being of youth “does not include a free-floating power to restrict the ideas to which children may be exposed.” In this regard, he wrote that California’s effort to create a new category of content-based regulation for speech directed at children is “unprecedented and mistaken” because minors “enjoy a significant measure of First Amendment protection.” Accordingly “only in relatively narrow and well-defined circumstances” may the government bar public dissemination of protected materials to minors.

The Court applied strict First Amendment scrutiny to strike down the California law. Under this judicial test, the government has the burden to prove that the law is necessary to serve a compelling interest and that there are no available less restrictive alternatives. As the Court put it, the state must identify an actual problem in need of solving and also show that “the curtailment of free speech” is “actually necessary to the solution.” Under this demanding standard, it is rare that regulating speech based on its content will be permissible.

The State could not identify a compelling interest, the Court held, because it offered “ambiguous proof” that any problem exists. Noting the State’s concession that it could not show a direct causal link between violent video games and harm to minors, the Court first rejected its claim that it need do no more than make a predictive judgment that a link exists based on scientific studies. Such leeway is reserved for intermediate scrutiny, applicable only to content-neutral regulation, which plainly is not what was before the court. Under strict scrutiny, “California’s burden is much higher,” and it “bears the risk of uncertainty.”

This became particularly problematic given the Court’s view of the studies cited to support video game regulation as having been rejected by every court to consider them “with good reason.” The Court observed that the studies failed to prove violent video games cause minors to act aggressively. This is not to say the games present no problem, the Court allowed. “But there are all sorts of problems—some of them surely more serious than this one,” such as encouraging anti-Semitism or disrespect for the flag, or spreading political philosophy hostile to the Constitution—but they “cannot be addressed by governmental restriction of free expression.”

Not only was Justice Scalia skeptical that California had proven the existence of a serious problem, he was also unconvinced that speech restrictions were necessary. He pointed to the video game industry’s voluntary ratings for games and concluded that the system “does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home.” He wrote that filling the “modest gap” between voluntary ratings in enabling parents to control their children’s game purchases and that provided by the California law “can hardly be a compelling state interest.”

The Court found the California law to be deficient because it was both over- and underinclusive. It is underinclusive because it failed to regulate other media or even all games that purportedly could have the same adverse effects on children. The Act's purported aid to parental authority is also vastly overinclusive, in that not all children whom the law forbids to purchase violent video games have parents who care whether they purchase them. Consequently, the Court held, "while some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want." Such poorly-tailored legislation failed the Court's First Amendment review.

Justice Alito, joined by Chief Justice Roberts, wrote a concurring opinion. He was less convinced than Justice Scalia that California had failed to demonstrate a problem, and expressed concern about the possible adverse effects of violent interactive games. Rather, he concluded that the California law was unconstitutionally vague, and expressed no view on whether a "properly drawn" statute would survive First Amendment review.

Justices Breyer and Thomas both dissented from the Court's decision. Justice Thomas wrote broadly to suggest that the Framers of the Constitution did not recognize a First Amendment right to communicate to minors "without going through the minors' parents or guardians." Justice Breyer appended a long bibliography of social science research to his opinion, and wrote that California had satisfied its burden of proof to support what he described as modest restrictions on the First Amendment.

Davis Wright Tremaine LLP filed an amicus brief supporting the respondents on behalf of the Comic Book Legal Defense Fund.

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