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Video Games and the First Amendment: *Brown v. Entertainment Merchants Association*

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Video games have come a long way since Pong, Space Invaders, and even Donkey Kong. In contrast to those early, relatively simple games, today's games feature complicated characters, detailed scenes, and sophisticated plot lines. They include sights and sounds that are strikingly realistic, with high-definition and even 3-D images. Many games allow players to create their own characters that look like actual people; some allow players to control characters with their own body movements; and many require players to make a multitude of choices, allowing players themselves to direct the course of the game.

In short, video games today give players an unprecedented opportunity to become part of the game. They literally put players in the game. And with rapid technological improvements and endless creativity, games are only becoming more realistic.

They are also becoming more violent. Today's games allow players to kill, maim, dismember, and torture victims by the dozens in every imaginable way. Many games award points to players for both the number of killings and the method of killing. And if all this were not enough, some games blatantly violate all bounds of decency, respect, and humanity. Some games allow players to reenact the killings at Columbine High School and Virginia Tech. Some allow players to rape women. At least one allows players to engage in ethnic cleansing by targeting African Americans, Latinos, or Jews. And one allows players to shoot President Kennedy as his motorcade passes by the Texas School Book Depository. With the technological enhancements, these games allow players to all but live these experiences.

There is substantial evidence that these games can cause children psychological harm. In particular, there are scores of articles in peer-reviewed academic journals based on studies that suggest that violent video games are harmful to children—that they can increase violent thoughts and behavior, that they can lead to antisocial behavior, and that they can desensitize children to violence. These studies are not without their detractors; and there are many studies that suggest that these games are *not* harmful. But the weight of evidence has led expert associations of health professionals to conclude that violent video games can cause psychological harm to children.

Based on this evidence, the California legislature banned the sale or rental of violent video games to minors and required their packaging to be labeled "18." The Act, signed by Governor Schwarzenegger on October 7, 2005, provides for a civil fine of up to $1,000 for each violation. The Act has two stated goals: "preventing violent, aggressive, and antisocial behavior"; and "preventing psychological or neurological harm to minors who play violent video games." It "finds and declares" that

> [e]xposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior [and that]
>
> [e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

The Act includes an elaborate definition of "violent video game" (that draws on a well-established First Amendment test, discussed below):

> "Violent video game" means a video game 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 the game in a manner that does

Jack Schooner, 16, looks at the Grand Theft Auto video game at GameStop in Palo Alto, Calif., June 27, 2011, the same day the Supreme Court ruled that it is unconstitutional to bar children from buying or renting violent video games. (AP Photo/Paul Sakuma)

either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

Before the Act took effect, however, trade groups for video game producers and distributors sued the State through then-Governor Schwarzenegger and California Attorney General Jerry Brown. The plaintiffs claimed that the Act violated the Speech Clause of the First Amendment, that the Act was unconstitutionally vague, and that the Act violated the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs also claimed that the Act's labeling requirement, which required distributors to label violent video games, amounted to compelled speech in violation of the First Amendment. The Federal District Court for the Northern District of California ruled that the Act violated the First Amendment and permanently enjoined its enforcement. The Ninth Circuit affirmed. The State petitioned for Supreme Court review on May 18, 2009, arguing that the lower courts erred in ruling that the Act violated free speech rights. The Court agreed to hear the case on April 26, 2010, and set oral argument for November 2, 2010.

Before exploring the arguments and the Court's ruling, let's take a look at some basic principles of First Amendment law.

Free Speech Primer

The Speech Clause of the First Amendment is deceptively simple. It says that "Congress shall make no law ... abridging the freedom of speech." (The Supreme Court has ruled that the First Amendment applies to the *states*, as well as to *Congress*, by "incorporation" through the Due Process Clause of the Fourteenth Amendment.) But despite

its apparently simple, and categorical, proscription, the Supreme Court has crafted a series of distinct rules that apply to different kinds of government speech regulations. In effect, these rules reflect the Court's view that under the First Amendment all speech is not the same.

This makes sense. Just consider two different kinds of speech—one in which a candidate for public office makes a political speech; the other in which a person threatens that candidate with actual and imminent harm. We would expect the First Amendment to protect the political speech, and therefore to vigorously guard against government intrusion into, or punishment of, that speech. But we would not expect the First Amendment to protect the threat. After all, the threat does not promote any of the First Amendment's values, like sharing information, debating public issues, or creating a "marketplace of ideas" through free speech. Instead, the threat is a first step to a significant crime.

Thus the Supreme Court has long held that certain categories of speech fall entirely outside the First Amendment. Thus, for example, the Court has ruled that incitement of illegal activity, so-called fighting words, and obscenity all fall outside of the First Amendment. The Court considers these kinds of expression to have such a low value, or great harm, or both, that they do not deserve protection against government regulation. Government can regulate, even ban, these categories of speech without violating the First Amendment, as long as the government follows the Supreme Court's very narrow definitions of the categories.

One category, obscenity, has given the Court particular trouble over the years. The trouble is finding the line between pornography (which is protected speech in most cases) and obscenity (which is not protected speech). This knotty problem led Justice Stewart in 1964 to throw up his arms and give this particularly unhelpful definition of obscenity: "I know it when I see it." The Supreme Court has improved on that definition, but it is still hazy. Today, the Court says that obscenity has three characteristics: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In 1968, in *Ginsberg v. New York*, the Court expanded the obscenity category and stretched it to reach minors (despite the Court's famous reluctance to expand categories or to create new ones). In *Ginsberg* the Court upheld state legislation banning the sale of magazines with nude pictures to anyone under 17 years old. The Court recognized that the magazines were not obscene for adults but that they might be obscene for minors, because the concept of obscenity varied in relation to the age of the viewer. The Court ruled that the state could extend the already-recognized category of obscenity for adults to obscenity for minors if the state could rationally find that the material was harmful to minors.

Obscenity, obscenity for minors, and the other exempted categories of speech are an exception to the more general rule that government cannot regulate speech based on its content. If the government enacts a content-based regulation, and if it does not regulate speech within one of the exempted categories, the regulation must satisfy the most demanding test known to constitutional law, strict scrutiny. Thus, the government must show that the speech regulation is necessary to achieve a compelling interest—an extraordinarily rigorous standard that the government can only rarely satisfy.

Here, California's ban on the sale or rental of violent video games to minors is a content-based restriction on speech (because it bans only the sale or rental based upon a game's violent content). If violent video games fall within an exempted category, an expanded category, or a new category, however, the ban will not violate the First Amendment. If, on the other hand, violent video games do not fall within an exempted category, the ban is subject to strict scrutiny, and the law will almost certainly fail.

The Parties' Arguments

The State of California proffered two principal arguments. First, the State argued that violent video games fit within the exempted category of obscenity for minors, the category that the Court recognized in *Ginsberg v. New York*. Although violent video games are not (necessarily) obscene, the State argued that *Ginsberg* did not turn on the underlying sexual expression in that case; instead, it turned on the state's interests in the well-being of minors and helping parents to protect their children, whatever the underlying

FOR DISCUSSION

1. Do you think the Court's explanation that the inconclusivity of evidence of the effects of violent video games on children is accurate? What do you think about the effects of violent video games on children?

2. The Court, in its decision, suggested that less restrictive measures might accomplish the same results as the original California law. What are some examples of these measures?

3. In his dissent, Justice Thomas writes that the First Amendment was never meant to speak to children, therefore, the California law was not unconstitutional. Do you think there is a difference between First Amendment guarantees for children and adults? Why or why not?

expression. That reasoning, the State argued, extended equally to violent video games as to obscenity for minors. The State argued that its dual interests in the welfare of minors and supporting parents in protecting their children adequately—the same state interests at play in *Ginsberg*—justified the restrictions in the Act.

Next, the State argued that even if its ban on violent video games did not fit within the *Ginsberg* category, the Act, as a content-based regulation, satisfied strict scrutiny. The State argued that its ban on sales of violent video games to minors was necessary to achieve its compelling interests in the well-being of minors and helping parents to protect their children.

The plaintiffs, respondents before the Court, proffered two arguments in response. The plaintiffs argued first that the Court should decline to carve out a new exception, or to expand an existing exception, to the First Amendment for violent video games. The plaintiffs distinguished *Ginsberg* (a case recognizing a category for obscenity for minors) and argued that the court should not apply it to violent video games, a wholly different content of expression, having nothing (necessarily) to do with sexual content. They argued that the State's position would result in the banning of such children's classics as Hansel and Gretel, Grimm's Tales for Young and Old, and Snow White.

The plaintiffs argued next that the Act failed to satisfy strict scrutiny. They acknowledged that the State had a compelling interest in the well being of minors, but they argued that the State's social scientific evidence was insufficient to establish that violent video games threatened the well being of minors. Moreover, they argued that the Act swept too broadly in that it banned the sale of violent video games to both a 17-year-old and a much less mature pre-schooler; it also swept too narrowly in that it banned the sale of violent video games but not movies or books containing similar content.

The Court's Decision

The Court agreed with the plaintiffs and ruled the Act unconstitutional. Justice Scalia wrote the opinion of the Court, which was joined by Justices Kennedy, Ginsberg, Sotomayor, and Kagan. He wrote that states cannot simply create new categories of unprotected speech without showing a long tradition of banning that speech—a tradition that the State could not show here. Moreover, violent material for children did not fit within the *Ginsberg* category, a category defined by *sexual* (not necessarily violent) expression. Finally, the State failed to show that the Act satisfied strict scrutiny: the State's evidence did not sufficiently link violent video games to harm to minors, and the video game industry already had a voluntary rating system in place to help parents protect their children. Justice Scalia noted that the State's justifications for the Act would apply equally to ban Snow White and Cinderella in Grimm's Fairy Tales and other classics—evidence of both the overreaching of the Act and its under-inclusion. Because the Act did not regulate a category of unprotected speech, and because it failed to satisfy strict scrutiny, it violated the Speech Clause of the First Amendment.

Justice Alito wrote a concurrence, joined by Chief Justice Roberts, in which he argued that Justice Scalia's opinion did not sufficiently consider how today's interactive video games might create new threats to minors. He wrote that the majority too quickly dismissed the possibility that video games might be harmful to at least some minors and therefore too quickly dismissed California's attempt to protect minors from them. He agreed that the Act violated the First Amendment, though, but for a different reason: Justice Alito wrote that the Act was not sufficiently clear to give a reasonable person fair warning when it might be violated. In other words, Justice Alito would have

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ruled the Act unconstitutionally vague.

Justice Thomas wrote a dissent focusing on his interpretation of the original understanding of the First Amendment. Justice Thomas, the Court's most rigorous and consistent "originalist," argued that the "founding generation believed that parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children." Based on this original context, he argued that the First Amendment does not protect a "right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians." Therefore, he argued, the Act did not violate the First Amendment.

Finally, Justice Breyer wrote a dissent that argued that the Act satisfied strict scrutiny. Justice Breyer argued that the Act was narrowly tailored to advance the State's compelling interests in both helping parents protect their children and the well being of minors. Justice Breyer included an appendix of his own research into the studies suggesting a link, and those suggesting no link, between violent video games and harm to minors. In the end, he concluded that the evidence of a link was strong enough to uphold the Act. He therefore would have held the Act constitutional.

Analysis

The Court's ruling furthers a trend in the Roberts Court over the last two terms to read the First Amendment to prefer *more* speech over *less* speech when given a choice between the two. This trend holds even when the benefits of the speech do not obviously outweigh their harms. Thus, this case falls squarely in line with a series of decisions in the last two years that overturned a state law that banned the sale of information identifying a prescription drug prescriber for use in marketing by pharmaceutical manufacturers (*Sorrell v. IMS Health, Inc.*); overturned a state jury verdict against a highly offensive protestor at a funeral (*Snyder v. Phelps*); and overturned a federal law criminalizing the creation, sale, or possession of certain depictions of animal cruelty, or so-called "crush videos" (*U.S. v. Stevens*). In each of these decisions, and in *Brown v. EMS*, the Court read the Speech Clause to protect speech that might otherwise have received no protection or less protection under the First Amendment. Given these rulings—especially *Snyder v. Phelps* and *U.S. v. Stevens*, both of which involved highly offensive speech that did not obviously further a First Amendment value—and given the trend in the lower courts to overturn laws like California's, the Court's ruling here was hardly a surprise.

But the ruling leaves states in a difficult spot with regard to violent video games. Unless states can show a long tradition of regulating access to violent material by children (and they cannot, at least yet), or unless they can show with more certainty that violent video games harm children, they are left to regulate within the existing categories and other doctrinal bounds of the First Amendment (including the still-existing category of obscenity for minors from *Ginsberg*). Their only other choice is the one that, according to the majority, seems to be largely working: leave it to the industry's voluntary video game rating system.

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