Video Game Victory: Supreme Court Strikes Down California Law Restricting Sale of "Violent" Video Games to Minors

06.29.2011

In an update to a post that we wrote on November 12, 2010, on Monday, June 27, 2011, the United States Supreme Court released its much-anticipated opinion in *Brown v. Entertainment Merchants Association*. In *Brown*, the Court affirmed by a 7-2 vote the ruling of the Ninth Circuit, striking down a California law restricting the sale or rental of "violent" video games to minors.

Justice Scalia, writing for the majority, found that the California law, which was transparently modeled after a law upheld in a 1968 Supreme Court case, *Ginsburg v. New York*, "impose[d] a restriction on the content of protected speech," and failed to pass the test of strict scrutiny applied to such content-based restrictions. The law at issue in *Brown* attempted to regulate video game violence which, as Scalia noted, "is not part of the obscenity that the Constitution permits to be regulated." The law was therefore invalid, Scalia wrote, unless "justified by a compelling government interest" and "narrowly drawn to that interest."

Applying strict scrutiny, the majority found the California law to be both underinclusive and overinclusive, and therefore not narrowly tailored. Specifically, the law failed to address any "serious social problem" because it sought to restrict *only* violence as depicted in video games, and even then permitted relatives of minors to purchase or rent violent games on the minors' behalf. At the same time, the law failed to truly "aid….parental authority" because, in imposing content-based restrictions, it simply assumed that parents of all affected children desire such restrictions. In addition, the majority discounted evidence presented by the State in support of the view that violent video games beget violence in minors, noting that the studies offered in support of the law had "been rejected by every court to consider them" and that, at best, they demonstrated correlation, not causation.

Justice Alito, concurring only in the decision, wrote separately in an opinion joined by the Chief Justice and found the California law to be unconstitutional on the narrow ground that its definition of "violent video games" lacked requisite specificity. Further, Alito disagreed with what he characterized as the majority's "too quick" dismissal of "the possibility that the experience of playing video games" may differ substantially from other experiences in its "effects on minors," and appeared reluctant to foreclose the prospect of future regulation.

Justices Thomas and Breyer each penned a dissent. Justice Thomas argued that the California law abridged only speech "that bypasses a minor's parent or guardian," which he claimed "does not fall within the 'freedom of speech' as originally understood." Justice Breyer found that the law "imposes no more than a modest restriction on expression," and that, in any event, the law furthers a compelling interest of the State, given the scientific evidence presented.

The ruling has been hailed as a victory by the video game industry. Despite the two-vote concurrence in *Brown* on narrower grounds, the strength of the five Justice majority appears to have erected a significant barrier to any future attempts to restrict violence in video games.

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