

## Supreme Court Invalidates California Law Restricting Violent Video Games

By a vote of 7-2, the Supreme Court held that a California law restricting the sale or rental of “violent” video games violates the First Amendment. Justice Scalia wrote the majority opinion for the Court, reasoning that the state legislature could not create new categories of speech that are unprotected by the Constitution, and that the California law failed to survive strict First Amendment scrutiny. The Supreme Court decision applies broadly to all media and not just to video games.

The Court drew upon the history of comic book censorship in reaching its conclusion. Citing the amicus brief filed by the Comic Book Legal Defense Fund, it noted the crusade against comics led by Dr. Frederic Wertham and observed that it was inconsistent with our constitutional traditions. The Court traced the history of censorship that targeted various media directed toward the young and held that restricting depictions of violence could not be justified under established principles of First Amendment law.

The California law defined violent video games as those that permit a player to kill, maim, dismember, or sexually assault a human being. The state argued that such violent depictions could be compared to obscenity, and that it could ban games that a reasonable person would find, as a whole, appeal to “a deviant or morbid interest of minors.” The Court rejected this attempt to expand the concept of obscenity, describing it as a “startling and dangerous” proposition.

In doing so, it refused to allow the state to create a wholly new category of content-based regulation, even where it would be applied only at speech directed to children. Although the Court agreed that state government may act to protect the well-being of youth, it made clear that this power “does not include a free-floating power to restrict the ideas to which children may be exposed.”

The Court refused to lower the degree of constitutional protection for games on the theory that they are mere entertainment. Justice Scalia wrote “we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.” He also declined the state’s invitation to allow regulation for what it argued is less valuable speech, noting that games “are as much entitled to the protection of free speech as the best of literature.” The majority also emphasized that these strong constitutional protections applied regardless of whether one was “creating, distributing, or consuming speech.”

The Court also declined to reduce the level of First Amendment scrutiny because games involve new and interactive technology. Justice Scalia wrote that the basic principles governing freedom of speech “do not vary” when “a new and different medium for communication appears” and that interactivity does not distinguish games from other engaging literature. Quoting an earlier decision by Judge Richard Posner, the Court observed that “all literature is interactive” and “the better it is, the more interactive.”

To survive First Amendment review, the Court held that the California law must satisfy strict scrutiny. 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.

In this regard, the majority was particularly unimpressed by social science research that California and other states cited to support restrictions on video games. Noting that these studies have been rejected by every court that has considered them, the Court found that the studies purported to show only correlation – not causation – and that “at best” they purported to show “some correlation between exposure to violent entertainment and miniscule real world effects.”

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 the measure of protection provided by the California law “can hardly be a compelling state interest.”

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.

In reaching its conclusion the Court majority did not seek to disparage concerns that have been expressed about video games. Given such concerns about violence-themed games, Justice Scalia noted that “perhaps none of us would allow our own children to play them.” But he added that there are numerous more serious problems “that cannot be addressed by governmental restriction of free expression.” Examples, previously upheld in past cases, include encouraging

anti-Semitism, advocating political philosophy hostile to the Constitution, or encouraging disrespect for the American flag. However, under our Constitution, Justice Scalia wrote, “esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”