



Brown v. Entertainment Merchants Association 131 S. Ct. 2729 (2011)

Ludwig Herard

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

Recommended Citation

Ludwig Herard, *Brown v. Entertainment Merchants Association 131 S. Ct. 2729 (2011)*, 22 DePaul J. Art, Tech. & Intell. Prop. L. 515 (2012)

Available at: <https://via.library.depaul.edu/jatip/vol22/iss2/8>

This Case Summaries is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION

131 S. CT. 2729 (2011)

I. INTRODUCTION

In *Brown v. Entertainment Merchants Ass'n*, the Respondent, an association representing the video game and software industries, challenged the Petitioner, the state of California, seeking a declaratory judgment against enforcement of a state statute.¹ The statute prohibited the sale of violent video games to minors, and it provided for a civil fine up to \$1000 if violated.² In its judgment, the Supreme Court of the United States struck down the statute.³ The Court's decision defeated California's attempt to regulate the sale of violent video games to minors, and in doing so, it dramatically decreased the likelihood that future regulation on violent content targeted at minors will pass constitutional muster.

II. BACKGROUND

A. Factual History

The challenged California statute⁴ prohibited the sale of violent video games to minors and required the games' packaging to be labeled "18."⁵ The Act covered games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being. . . ."⁶ A game fell into the violent category if its depictions of violent acts (1) were rendered in a way that "[a] reasonable person,

1. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011).

2. *Id.* at 2732-33.

3. *Id.* at 2742.

4. CAL. CIV. CODE §§ 1746.1-1746.5 (West 2012).

5. *Id.* Section 1746.1(a) stated that a person "may not sell or rent a video game that has been labeled as a violent video game to a minor." *Id.* § 1746.1. Section 1746.2 required the video games' packaging to indicate that only buyers 18 years and older could buy violent video games. *Id.* § 1746.2.

6. *Id.* § 1746(d)(1).

considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” (2) were “patently offensive to prevailing standards in the community as to what is suitable for minors,” and (3) would cause “the game, on the whole, to lack serious literary, artistic, political, or scientific value for minors.”⁷

B. Procedural History

This case is the Supreme Court’s decision, which follows from the State of California’s appeal, in which the court upheld the Entertainment Merchants Association’s challenge⁸ of the constitutionality of California’s statute on First Amendment grounds.⁹ At the district court level, the United States District Court for the Northern District of California granted the Association’s motion for summary judgment, permanently enjoining enforcement of the statute.¹⁰ The State appealed, and the Ninth Circuit Court of Appeals affirmed the district court’s holding.¹¹ The Supreme Court granted certiorari.¹²

7. *Brown*, 131 S. Ct. at 2732. This standard was based on an obscenity statute described in *Miller v. California*, 413 U.S. 15 (1973). See *infra* note 47 and accompanying text.

8. The Entertainment Merchants Association arose from a merger of two organizations: The Video Software Dealers Association (the party to the district and appellate decisions to *Brown*), and the Interactive Entertainment Merchants Association. About EMA, ENTERTAINMENT MERCHANTS ASSOCIATION, <http://www.entmerch.org/about-ema/index.html> (last visited Feb. 12, 2012).

9. *Brown*, 131 S. Ct. at 2742.

10. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 952 (9th Cir. 2009).

11. *Id.* at 953.

12. *Brown*, 131 S. Ct. at 2733.

III. LEGAL ANALYSIS

*A. Majority Opinion**1. The United States v. Stevens Holding Controls*

Justice Scalia, writing for the majority, asserted that a prior case, *United States v. Stevens*, 130 S. Ct. 1577 (2010), was controlling.¹³ In *Stevens*, the Court held that legislatures may not add new categories of speech to the limited list of classes of speech that are not protected by the First Amendment, without persuasive evidence of a long-standing tradition of restriction.¹⁴ Therefore, the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁵ However, exceptions to First Amendment protection do exist; historically, the First Amendment has not protected speech content in “a few limited areas,” such as obscenity, incitement, and fighting words.¹⁶

California properly asserted that video games qualify for First Amendment protection.¹⁷ However, according to the majority, California tried to “make violent-speech regulation look like obscenity regulation by mimicking a statute regulating obscenity for minors that the Court upheld in *Ginsberg v. New York*.¹⁸ The

13. *Id.* at 2734.

14. *Id.*

15. *Id.* at 2733 (internal quotation marks omitted).

16. *Id.* The majority asserted that the First Amendment allows only limited exceptions to free speech protection. *Id.* at 2733 (citing *United States v. Stevens*, 130 S. Ct. 1577 (2010)). Importantly, these limited areas are well-defined, narrowly limited, and long-established. *Brown*, 131 S. Ct. at 2733. The Supreme Court has never held the prevention or punishment of the aforementioned types of speech unconstitutional. *Id.*

17. *Id.* The majority reasoned that the First Amendment protects video games, like the books, plays, and movies that preceded them, because they communicate ideas and social messages through familiar literary devices (e.g. characters, dialogue, music, and plot). *Id.*

18. *Id.* at 2735. In *Ginsberg*, the Court upheld a statute regulating obscene speech to minors because that law merely adjusted the definition of an already unprotected category of speech, obscenity, with respect to minors. *Id.* at 2735 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)). Specifically, the law in *Ginsberg* prohibited the sale to minors of obscene materials deemed “harmful to

Court held that violent speech is not obscene because obscene speech contains only depictions of sexual conduct, not “whatever a legislature finds shocking.”¹⁹ Following *Stevens*, the majority held that California tried wrongly to add a new category of unprotected content under the First Amendment.²⁰

2. *The Standard of Review is Strict Scrutiny*

Because the respondents attacked the California statute on First Amendment grounds, the Court reviewed the issue under strict scrutiny.²¹ The Court established that to pass strict scrutiny, California must show (1) that the statute was justified by a compelling government interest and (2) that the statute was narrowly drawn to serve that interest.²² The Court held that California’s statute failed both prongs.²³

Regarding the State’s compelling interest, the Court held that the statute legitimately served the government’s interest in helping parents control the content to which their children are exposed.²⁴ However, the Court expressed doubt that the statute’s punishment of third parties for conveying protected speech to minors was a proper exercise of governmental power.²⁵

Regarding the question of whether the statute was narrowly drawn, the Court held that the law was both underinclusive and overinclusive.²⁶ The law was underinclusive because it singled out video game retailers and renters for “disfavored treatment,” but it

minors.” *Brown*, 131 S. Ct. at 2743. It defined what was harmful to minors by adding the words “for minors” to each element of the definition of obscenity established by the leading Supreme Court obscenity decisions of the time. *Id.* However, in this case, the California law attempted to regulate violent speech as an entirely new category of speech not protected by the First Amendment. *Id.* at 2735.

19. *Id.* at 2734.

20. *Id.* at 2734-35.

21. *Id.* at 2738.

22. *Brown*, 131 S. Ct. at 2738.

23. *Id.* at 2742.

24. *Id.* at 2741.

25. *Id.* at 2740.

26. *Id.* at 2740-41.

did not target booksellers, cartoonists, and movie producers regarding violent content.²⁷ On the other hand, the law was overinclusive because it regulated sales to minors whose parents did not necessarily care to prevent their children from buying such games (i.e. the law's scope was too large for its purpose).²⁸

California argued that video games presented a special problem because of their immersive interactivity; with video games, the player participates directly in the violent action on screen.²⁹ However, the majority reasoned that other forms of literature are similarly immersive and interactive, but cannot be regulated.³⁰ Thus, because the law failed strict scrutiny, the Court struck it down as invalid.³¹

B. Justice Alito's Concurrence

Justice Alito concurred in the judgment that the statute did not pass constitutional muster, but he disagreed with the majority's approach in arriving at its conclusion.³² Justice Alito believed that *Ginsberg*, not *Stevens*, controlled the case.³³ He argued three points to support the conclusion that *Ginsberg* controlled.³⁴

First, Justice Alito thought the statute in *Stevens* was different in scope than the California statute because the *Stevens* statute broadly prohibited "any person from creating, selling, or possession depictions of animal cruelty for commercial gain."³⁵ However, in *Ginsberg*, and in the present case, the laws in

27. *Id.* at 2740.

28. *Brown*, 131 S. Ct. at 2741.

29. *Id.* at 2737-38.

30. *See id.* at 2738. The Court referred to graphically descriptive choose-your-own-adventure novels as being similarly immersive as violent video games, and that video games only present violence in a different degree, but not in a way that warrants regulation. *Id.*

31. *Id.* at 2742.

32. *Id.* at 2742.

33. *Brown*, 131 S. Ct. at 2743-47.

34. *Id.* at 2747.

35. *Id.* at 2747.

question merely prevented *minors* from purchasing certain materials.³⁶

Secondly, Justice Alito argued that strict scrutiny, as applied to the statute in *Stevens*, was the wrong standard to apply in this case.³⁷ Instead, the Court should have applied the more lenient standard of intermediate review set forth in *Ginsberg*.³⁸ Justice Alito argued that as a result of the majority's decision, a State could prohibit the sale to minors of what *Ginsberg* called "girlie magazines" under intermediate review, but the State must pass strict scrutiny to prevent minors from buying violent video games.³⁹ Lastly, Alito noted that the outcome of *Stevens* "left open the possibility that a more narrowly drawn statute targeting depictions of animal cruelty" might be constitutional, but the outcome of suggests that no regulation of minors' access to violent video games is allowed.⁴⁰

However, *Ginsberg* suggested that certain regulations will be held valid.⁴¹ To Justice Alito, the California statute in the present case reinforced parental decision making in exactly the same way that the statute in *Ginsberg* did.⁴² Therefore, *Ginsberg* should have controlled.⁴³

Justice Alito forwent any First Amendment analysis; instead, he simply found the statute to be too vague to uphold.⁴⁴ Using *Ginsberg* as precedent, Justice Alito stated that California's law did not define "violent video games" with the narrow specificity that the Constitution demanded.⁴⁵ In an attempt to avoid First Amendment issues, California modeled its statute after the New York law that the Supreme Court upheld in *Ginsberg*.⁴⁶ Then, to bring the law within the protection of *Ginsberg*, California

36. *Id.* at 2743, 2747.

37. *Id.* at 2747.

38. *Id.*

39. *Brown*, 131 S. Ct. at 2747.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2746.

45. *Brown*, 131 S. Ct. at 2744-45.

46. *Id.* at 2743.

modified its definition of violence to mirror the definition of obscenity set forth in *Miller v. California*.⁴⁷ In *Miller*, the Court held that an obscenity statute (generally for adults) must contain a threshold limitation that restricts the statute's scope to specifically described "hard core" materials.⁴⁸ *Ginsberg* adopted the obscenity test set forth in *Miller* specifically for minors; thus, *Ginsberg* became the precedent allowing the regulation of obscene content with respect to minors.⁴⁹

In the present case, California attempted to structure the statute in a manner similar to the statute in *Miller* to regulate violent speech.⁵⁰ But Alito argued that the California law did not perform the "narrowing function" served by the limitation in *Miller*.⁵¹ The obscenity statute upheld in *Miller* defined the type of obscene depictions of "hard core" sexual acts that were prohibited, but in the present case, the statute was not specific enough.⁵² Alito reasoned that when *Miller* was decided, depictions of "hard core" sexual conduct were not part of mainstream culture, so the description given by the statute sufficiently narrowed the requirement in that case.⁵³ However, "for better or worse," present

47. *Id.* at 2744. Under *Miller*, the standard for obscenity is that "(1) an 'average person, applying contemporary community standards [must] find . . . the work, taken as a whole, appeals to the prurient interest'; (2) 'the work [must] depict[t] or describ[e], in a patently offensive way, sexual conduct specifically defined by the applicable state law; and' (3) 'the work, taken as a whole, [must] lac[k] serious literary, artistic, political, or scientific value.'" *Id.* (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

48. *Id.* at 2744.

49. *See id.* at 2743-44.

50. *Brown*, 131 S. Ct. at 2744. Adopting *Miller's* statutory language, the California statute set the standard for regulating violent content to minors: "(i) A reasonable person, considering the game as a whole, would find [the game] 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; and (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *Id.* (quoting CAL. CIV. CODE § 1746(d)(1)(A) (West 2012)).

51. *Id.* at 2745.

52. *Id.* Alito reasoned that the California law would more closely resemble the limitation in *Miller* if it more narrowly targeted particular graphic depictions of violence. *Id.* at 2745.

53. *Id.* at 2745.

society has long regarded many depictions of violence as suitable features of popular entertainment, including that available to minors, so the California statute must narrowly target specific descriptions of graphic violence.⁵⁴ Thus, according to Justice Alito, the California statute did not provide fair notice of what made “violent video games” violent for the purpose of the statute and was unconstitutionally vague.⁵⁵

C. Justice Thomas’s Dissent

Justice Thomas dissented, arguing that the law should be upheld based on the Founders’ original understanding of the First Amendment: First Amendment protection does not stretch to minors.⁵⁶ Justice Thomas recounted customs of parental authority throughout the history of the United States.⁵⁷ By his reasoning, the founding generation would not have included the right to speak to children without going through their parents within the “freedom of speech.”⁵⁸ He noted that the Supreme Court has recognized that there may be “some categories of speech that have been historically unprotected [and] have not yet been specifically identified or discussed as such in our case law,” and that speech to minors is one of those classes.⁵⁹

D. Justice Breyer’s Dissent

Justice Breyer dissented separately, asserting that he would uphold the statute against the vagueness precedent established by the Court, as well as traditional First Amendment analysis under strict scrutiny.⁶⁰ Breyer would employ a two-pronged test to determine constitutionality by applying: (1) the Court’s vagueness precedents and (2) strict scrutiny.⁶¹

54. *Brown*, 131 S. Ct. at 2745.

55. *Id.* at 2746.

56. *Id.* at 2751.

57. *See id.* at 2751-60.

58. *Id.* at 2752.

59. *Id.* at 2759 (quoting *Stevens*, 130 S. Ct. at 1586 (2010)).

60. *Brown*, 131 S. Ct. at 2765, 2771.

61. *Id.* at 2762.

1. *Vagueness*

With respect to vagueness, Justice Breyer compared the language of the California statute to the language of the New York statute in *Ginsberg* and found no substantial difference in specificity that would render the California statute too vague.⁶² In Justice Breyer's view, the words "killing and maiming" in the California statute were no more vague than the "nudity" prohibited by the statute in *Ginsberg*.⁶³ Furthermore, California's reliance on and use of the term "community standards" regarding violence was no less limiting than the use of the same term in *Miller*, which the Supreme Court upheld.⁶⁴ Lastly, Justice Breyer could find no failure in California's reliance on arguably vague "community standards" of unacceptable depictions of violence.⁶⁵

2. *Strict Scrutiny*

Justice Breyer, like Justice Alito, believed that *Ginsberg*, not *Stevens*, should have controlled this case.⁶⁶ His approach to strict scrutiny would require the satisfaction of a three prong test: The statute must (1) be narrowly tailored, (2) further a compelling interest, and (3) be the solution for which there is no less restrictive alternative that would be at least as effective.⁶⁷

Justice Breyer argued that the statute was sufficiently narrow because it was not vague when compared to the statutes in *Ginsberg* and *Miller*, after which it was modeled.⁶⁸ Furthermore, Justice Breyer found California's interests compelling on the ground that the statute represented California's attempt to supplement parents' and guardians' abilities to guide child

62. *Id.* at 2763-64.

63. *Id.* at 2764.

64. *Id.*

65. *Id.* at 2765.

66. *Brown*, 131 S. Ct. at 2771.

67. *Id.* at 2765.

68. *See id.* at 2763-65. After comparing the language of the statutes in depth, Justice Breyer determined that the California statute was similar enough to those in *Ginsberg* and *Miller* that the California statute should have passed muster. *Id.*

development and to protect the well being of California's youth.⁶⁹ Lastly, Justice Breyer pointed to statistics to show that, although the video game industry already had a rating system in place to prevent minors from buying violent video games, that rating system had "serious enforcement gaps."⁷⁰ Therefore, California's statute represented the solution for which no less restrictive, but at least as effective, alternative existed.⁷¹

IV. FUTURE IMPLICATIONS

The holding in *Brown* essentially precludes states from regulating the sale of violent video games to minors, even though the Court arguably lacks the expertise in the area of social and behavioral sciences necessary to render socially beneficial decisions on the matter.

Technology is advancing to the point of realism such that the human brain may not be able to distinguish between a game and reality.⁷² For example, modern display devices, such as high-definition TVs and cell phone screens can display images at the resolution at which images fall upon the human retina.⁷³ Additionally, researchers continue to refine the methods by which they manipulate human perception.⁷⁴

69. *Id.* at 2767.

70. *Id.* at 2770. Justice Breyer highlighted statistics that show that the video game industry's self-rating system was not effective at preventing the sales of violent video games to minors. *Brown*, 131 S. Ct. at 2770. Additionally, he suggested that the California statute may help by preventing a minor from buying violent video games, the kind that "the industry *itself* . . . wants to keep out of the hands of those under the age of 17," without the help of parents. *Id.* at 2766.

71. *Id.* at 2770.

72. JIM BLASCOVICH & JEREMY BAIENSON, *INFINITE REALITY: AVATARS, ETERNAL LIFE, NEW WORLDS, AND THE DAWN OF THE VIRTUAL REVOLUTION* 1-8 (HarperCollins, 2011).

73. See Bryan Jones, *Apple Retina Display*, JONESBLOG (June 24, 2010, 11:00 PM), <http://prometheus.med.utah.edu/~bwjones/2010/06/apple-retina-display/> ("Apple's Retina Display adequately represents the resolution at which images fall upon our retina"). *Id.*

74. See generally Ronald W. Noel & Claudia M. Hunter, *Mapping the Physical World to Psychological Reality: Creating Synthetic Environments*, in

Despite the technological advances and the theoretical risks associated with the increased level of realism they offer, the Court suggests that video games are essentially similar to other First Amendment-protected forms of literature, regardless of the complexity of the technology involved.⁷⁵ Thus, the *Brown* holding stands for the proposition that sales of violent video games to minors cannot be regulated, even though video games differ dramatically from literature, music, graphic novels, and even motion pictures, due to their highly interactive nature.⁷⁶ This position is consistent with decisions rendered in other jurisdictions.⁷⁷ For example, in 2001, the Seventh Circuit Court of Appeals reversed a lower court's denial of a preliminary injunction based on the likelihood that a city ordinance aiming to restrict minors' access to violent video games would be found unconstitutional.⁷⁸ Continuing this trend, in 2005, the United States District Court for the Northern District of Illinois found an Illinois statute aimed at restricting the sale of violent video games unconstitutional because it did not pass strict scrutiny.⁷⁹

PROCEEDINGS OF THE 3RD CONFERENCE ON DESIGNING INTERACTIVE SYSTEMS: PROCESSES, PRACTICES, METHODS, AND TECHNIQUES 203 (Daniel Boyarski & Wendy A. Kellogg eds., 2000), available at http://courses.ischool.utexas.edu/Winget_Megan/MeganCollection2/files/10778/mapping%20the%20physical.pdf (discussing the effects of various manipulations of visual stimuli that influence humans to perceive virtual representations as real representations).

75. *Brown*, 131 S. Ct. at 2738.

76. *See id.* at 2779 n.4.

77. *See, e.g., Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66-68 (2d Cir. 1997) (striking down a local law prohibiting the sale to minors of trading cards depicting graphic violence); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (striking down a state statute prohibiting rental or sale to minors of video cassettes depicting violence).

78. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2001). The court in *Kendrick* compared video games to other forms of literature, such as stories, that contain themes, messages, and ideologies. *See id.* at 577-79.

79. *Entm't Software Ass'n v. Blagojevich (ESA II)*, 404 F. Supp. 2d 1051, 1075 (N.D. Ill. 2005); *see also* Michael J. Aschenbrener, *Gaming the System: The Seventh Circuit Prefers Its Video Games Violent, Not Sexy*, 2 SEVENTH CIRCUIT REV. 737, 738 (2007), available at <http://www.kentlaw.edu/7cr/v2-2/aschenbrener.pdf>.

However, the Court should not decide authoritatively on whether or not such technological considerations should be regulated. Justice Breyer astutely observed that numerous studies conducted by experts in behavioral and social sciences have led to debatable conclusions about the effects of violent video games on minors' behavior.⁸⁰ Importantly, he noted that (1) the Court lacks the expertise to determine which results are correct, and (2) the Court should defer to expert opinions and the elected legislature's conclusions.⁸¹

In spite of all these considerations, the *Brown* holding stands. With Supreme Court precedent firmly in place, violence in video games will likely continue to lie under the protection of the First Amendment for a long time to come. Regulation of the sale of video games containing such violence will continue to be difficult, if not impossible.

V. CONCLUSION

Ultimately, the Court found California's law unconstitutional because it attempted to create a new category of unprotected speech and it failed strict scrutiny.⁸² The immediate effect of this holding is to place violent video games firmly under the protection of the First Amendment, where they will stay for a long time to come.

*Ludwig Herard**

80. *Brown*, 131 S. Ct. at 2769 -70.

81. *Id.* at 2780.

82. *Id.* at 2742.

* J.D. Candidate 2014 (Part-Time), DePaul University College of Law; B.S. in Computer Engineering, Iowa State University. I would like to thank Professor Alan Salzenstein for giving me valuable guidance and feedback.