Supreme Court Strikes Down Calif. Video Game Ban

Opinion by CEI
(1 Minute Ago) in Technology / Video Games

By Hans Bader

California's ban on the sale or rental of violent video games to minors has been struck down by the Supreme Court as a violation of the First Amendment in a 7-to-2 vote.

The only dissenters were Justices Breyer and Thomas. The opinion, authored by Justice Scalia, is here. CEI joined in an amicus brief in support of the challengers, and CEI's Ryan Radia wrote an op-ed about the case you can find here. As Radia noted, "a comprehensive survey of the major scientific literature . . . found no established link between exposure to media violence and aggressive feelings in children . . . juvenile violent crime fell 36 percent . . . even as the popularity of video games skyrocketed."

Cato Institute's Ilya Shapiro, who co-authored an influential amicus brief in the case, had the following to say about the decision in *Brown v. Entertainment Merchants Association*:

The Supreme Court scored an epic win for the First Amendment in striking down California's prohibition on selling violent video games to minors. The law was both overly broad—sweeping in a wide variety of games based on no objective standard and no age-based gradations—and underinclusive—with no restrictions on other types of media. With a few strictly drawn exceptions for historically unprotected speech—obscenity, incitement, fighting words—government lacks the power to restrict expression simply because of its content. And a legislature cannot create new types of unprotected speech simply by weighing its purported social costs against its alleged value.

"Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat," Justice Scalia points out in his majority opinion. "But these cultural and intellectual differences are not *constitutional* ones."

Moreover, the Court, citing Cato's *amicus* brief, described how each generation's new media produces consternation from adults who want to avoid the "seduction of the innocent" (to borrow a phrase from the attack on comic books in the 1950s). In the 19th century, dime novels and "penny dreadfuls" were blamed for social ills and juvenile delinquency. Later, Congress held hearings on the cartoon menace, which prompted the comic book industry to voluntarily adopt a ratings system. Backlash against certain kinds of movies and music caused those respective industries also to adopt voluntary ratings systems. And the video game industry too adopted an effective and responsive ratings system after congressional hearings in the early '90s. Not only is all this hand-wringing overwrought, but self-regulation and parental oversight have worked—evidence from the Federal Trade Commission shows that the voluntary ratings system works more effectively with video games than with any other medium—and they avoid First

Amendment thickets. Adding a level of governmental control, even if were constitutional, would be counterproductive.

The only dissenters in the case were the two justices most favorable to the government in this kind of case: Justice Breyer, who votes against free-speech claimants more than any other justice, and Justice Thomas, who takes a broad view of the First Amendment in certain areas (like commercial speech and political campaigns), but takes a very pinched view of the First Amendment as applied to minors.

Earlier, I explained why Justice Thomas was wrong in his concurrence in the *Morse v. Frederick* case to claim that minors lack free-speech rights in the schools, and wrong to suggest that judicial recognition of their rights was somehow judicial activism or a recent judicial invention. I did so in a law review article you can find here at this link. I also discussed how left-wing school officials had sought to suppress a wide array of speech based on real or imaginary educational prerogatives.

Josh Blackman is live-blogging the Court's decision here.

Some supporters of laws against violent video games seemingly equate imaginary violence with real violence. As I noted in the *New York Times*, such false equations can lead to irrational panic. "An 11-year-old boy was taken out of his Oldsmar, Fla., elementary school in handcuffs on May 9 for making drawings of weapons. A 14-year-old girl in Harrisburg, Pa., was strip-searched and suspended for two weeks for saying, during a classroom discussion of the Columbine High School massacre, that she could understand how ostracized students might turn homicidal."

Restrictions on video games restrict both the rights of adults (video game designers) and minors (those video game consumers who are under age 18). The idea that minors have free speech rights is not a recent invention by Supreme Court justices. Take a look at the Supreme Court's decision in 1943 in *West Virginia State Board of Education v. Barnette*, for example (a case decided soon after the Supreme Court first applied the First Amendment to state and local governments rather than just the federal government). Nor is it somehow unique among courts in finding that minors have such rights. For example, the California Supreme Court unanimously rejected the prosecution of a minor over a poem that had violent imagery. *See In re George T.*, 33 Cal.4th 620 (2004) (prosecutors could not prosecute minor for poem with violent imagery disseminated to other minor).