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No Violence Done to First Amendment in Video Game Case

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Adhering closely to the ideals of the First Amendment, the Supreme Court in *Brown v. Entertainment Merchants Association, Inc.* struck down a California statute that sought to prohibit the sale or rental of violent video games to minors. In so doing, the Court held that even the at times "astonishing" violence depicted in some video games is nevertheless "speech" protected by the First Amendment. The ruling affirmed the Ninth Circuit's decision below. RTDNA participated in an *amicus* brief in the case.

Writing for the five Justice majority, Justice Scalia seemed to spare no weapon in a sweeping opinion that resolutely dismembered California's statute on a number of grounds. First, Justice Scalia reminded legislatures that the First Amendment exempts only "well-defined" and "narrowly limited" classes of speech, such as obscene speech, from its protections. Legislatures cannot, therefore, add "new" categories of speech (such as violent speech) to the list of unprotected speech "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." Nor will the Court be persuaded by arguments that attempt to "shoehorn speech about violence into obscenity."

Citing *United States v. Stevens* – a case the Court decided last term in which it struck down a law prohibiting certain depictions of animal cruelty – the Court re-affirmed that "the obscenity exception ... does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" Furthermore, because violence is not obscenity, the Court's analysis was unaffected by the fact that California's statute

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was intended to protect minors from violent speech.

Second, Justice Scalia applied the vise of strict scrutiny and found that California failed to identify a compelling state interest to justify its statute. The Court held that, at best, the research presented by California in support of its arguments evidenced mere correlation between violent video games and harm to minors, proof that fell short of the requisite causation. Besides that, the Court held that the law is "wildly underinclusive" as a means of protecting children because it excludes portrayals of violence other than video games and allows parents to "veto" the prohibition simply by purchasing the games for their children. As a final death blow, the Court noted that the law's attempt to assist parents who forbid their children from purchasing violent video games is "vastly overinclusive" because it abridges the First Amendment rights of young people whose parents do not impose such restrictions.

Justice Alito, joined by Chief Justice Roberts, concurred with the majority. Rather than the broader First Amendment grounds upon which the majority rests, however, Justice Alito would strike down California's statute as impermissibly vague. In Justice Alito's view, the law fails to define "violent video games" with the "'narrow specificity' [] the Constitution demands." Having thus found the law unconstitutional on vagueness grounds, Justice Alito expressed no view on whether a "properly drawn" statute would survive First Amendment review.

Justice Thomas and Justice Breyer dissented, each writing separately. In his dissent, Justice Thomas expressed the view that the majority's opinion does not comport with an originalist understanding of the First Amendment. Looking at the "practices and beliefs of the founding generation," Justice Thomas asserts that freedom of speech, as originally understood, does not include a right to speak to minors without first going through their parents or guardians. Although "the original public understanding of a constitutional provision does not always comport with modern sensibilities," Justice Thomas asserts that "the notion that parents have authority over their children and that the law can support that authority persists today." Accordingly, Justice Thomas would not find California's statute unconstitutional on its face but would remand for further proceedings.

Justice Breyer's dissent goes one step further – in his opinion, California's statute should be upheld as constitutional on its face. In so finding, Justice Breyer would apply both the Court's vagueness precedents as well as a "strict form" of First Amendment scrutiny. Perhaps most interestingly, Justice Breyer points out a logical inconsistency in the Court's jurisprudence – after Brown, it is both constitutionally permissible to prohibit a minor from purchasing a magazine that contains an image of a nude woman, while at the same time constitutionally impermissible to prohibit that minor from buying "an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her[.]" Justice Breyer thus concludes, "[w]hat kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?"

The *Brown* decision signals the Court's strong support of the principles enshrined in the First Amendment's

free speech guarantee. It suggests that – at least for the time being – the Court will be loath to extend the few exceptions it has recognized to the First Amendment's protections to other categories of speech. The significance of *Brown*, however, could be felt as early as the Supreme Court's next term, which begins in October. It is then that the Court will hear arguments in an appeal of *Fox Television Stations, Inc. v. FCC*, the long-litigated "fleeting explicative" case involving Fox's 2002 and 2003 broadcasts of the Billboard Music Awards in which Cher and Nicole Richie respectively uttered the "f- word." At the same time, the Court will consider issues raised in *ABC, Inc. v. FCC*, a case involving seven seconds of partial nudity contained in an episode of "NYPD Blue." At issue in both Fox and ABC is the Federal Communications Commission's broadcast indecency rules. While *Brown* appears to resolve – at least in passing – the constitutionality of regulating obscene speech, these cases will test whether the First Amendment's protections extend to another category of speech – indecent speech.