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SPECIAL ISSUE

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Game Over for Video Game Censorship

BY ADAM THIERER

On June 27, the U.S. Supreme Court handed down a historic First Amendment decision in *Brown v. EMA*, striking down a California law governing the sale of “violent video games” to minors. By a 7-2 margin, the Court held that video games have First Amendment protections on par with books, film, music and other forms of entertainment.

The Court made it clear that governments may not regulate the sale of such content simply by blithely referring to traditional “it’s for the children” rationales for content control. “California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors,” noted Justice Antonin Scalia, who wrote the majority decision, but “even where the protection of children is the object, the constitutional limits on governmental action apply.”

The ruling comes on top of a growing string of recent First Amendment decisions from the Court that tightly limit legislative efforts to regulate electronic speech and expression in the information age. Going forward, this ruling will force state and local governments to change their approach to regulating all modern media content. Education and awareness-building efforts will be the more fruitful alternative since censorship has now been largely foreclosed.

Games Now on Par with Older Media

“Like protected books, plays, and movies, [video games] communicate ideas through familiar literary devices and features distinctive to the medium,” Scalia wrote. Moreover, “the basic principles of freedom of speech do not vary with a new and different communication medium.”

The Court also rejected the argument put forth by the State of California and many other regulatory advocates that depictions of violence in video games should be treated as “obscenity” and regulated under a lesser First Amendment standard. The Court held that “speech about violence is not obscene” and noted that “the State of California wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children. That is unprecedented and mistaken,” said Scalia. “This country has no tradition of specially restricting children’s access to depictions of violence.”

Advocates of California’s regulatory approach had also argued that some psychological studies had proven that exposure to violent video games led to aggressive behavior by children. The Court was unconvinced. “Psychological studies purporting to show a connection between exposure to violent video games and harmful effects on children do not prove that such exposure causes minors to act aggressively. Any demonstrated effects are both small and indistinguishable from effects produced by other media.”

Parental Responsibility and User-Empowerment Trumps Regulation

The Court also held that regulation must yield to private empowerment solutions and parental responsibility when less-restrictive means exist for dealing with access to objectionable content. The video game industry offers a robust content rating system and outstanding parental control technologies that make it quite easy for parents to set firm limits on what can be viewed or played on gaming consoles.

Although it is the newest of all industry content rating and labeling schemes, the video game industry’s system—the Entertainment Software Rating Board (ESRB)—is in many ways the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America. Virtually every title produced by major game developers today carries an ESRB rating and content descriptors. The ESRB applies six different rating symbols to the games it rates, as well as 30 different “content descriptors” to give consumers highly detailed information about games. Using these ratings and labels, parents can quickly gauge the appropriateness of the title for their children. If parents wish to do additional research in advance of a purchase, the ESRB’s website allows them to enter the name of any game and retrieve its rating and various content descriptors.

Most parents say they find the ratings and labels very helpful. Surveys by Hart Research Associates reveal that 85 percent of American parents of children who play video games are aware of the ESRB ratings and most consult the ratings regularly when buying games for their families. In 2009, the Federal Trade Commission (FTC) concluded that “the video game industry continues to do an excellent job of clearly and prominently disclosing rating information in television, print, and Internet advertising and on product packaging.”

Importantly, the industry takes additional steps to enforce its rating system at the point of sale. The ESRB works with major game retailers to display information about game ratings and then to limit the purchase of games rated above the age of the buyer. The FTC occasionally conducts “secret shopper” surveys to see how well these voluntary media rating systems are being enforced at the point of sale by the video game industry. The FTC recruits a number of 13 to 16-year-olds who make an attempt to purchase such media without a parent being present. The agency’s latest report from April found that only 13 percent of teens were able to buy an “M” rated game, compared to 20 percent in 2008 and 42 percent in 2006. Industry self-regulation is clearly working and constantly improving.

These facts obviously weighed on the minds of the majority in *Brown*. Commenting on the video game industry’s self-regulatory efforts, Scalia noted, “This 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. Filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.”



Misplaced Criticisms

Predictably, some critics lambasted the Court's decision in *Brown*. California Senator Leland Yee, the author of the law that the Supreme Court struck down, and James Steyer, CEO of the advocacy group Common Sense Media, both accused the Court of putting game industry profits ahead of the interests of parents and children.

By that logic, however, every law and regulation struck down on First Amendment grounds is little more than the Supreme Court looking out for corporate interests. In reality, the Court is upholding the rights of all Americans to enjoy the maximum freedom of speech and expression, free from the fear that government will dictate what we can see, read, hear—or, in this case, play.


Upholding the First Amendment against encroachment isn't some nefarious scheme by judges to defend corporate interests. Nor is it an endorsement of any particular type of content. Rather, it is an assertion that citizens should be at liberty to make these determinations for themselves and their families. That is the proper approach for a society that cherishes free speech, freedom of expression, and personal responsibility.

Education, Not Regulation, is the Path Forward

Following *Brown*, state and local governments will need to adopt a very different approach to dealing with concerns about underage access to media content, at least as it pertains to violently-themed content. It is difficult to envision any restrictions on the sale of such media that will be constitutionally permissible going forward.

To the extent lawmakers feel compelled to take steps to help parents in this regard, those efforts will need to be focused on education and awareness-building. For example, state and local government could run public service announcements and distribute information about the content of video games (and other media) without running afoul of the First Amendment.

However, mandatory government labeling of such content with a state-approved rating system would likely be constitutionally impermissible (not to mention a bad use of taxpayer dollars). Instead, lawmakers will need to focus on educating the public based on industry-based ratings and third-party ratings and information (such as the excellent advice offered by Common Sense Media), while also promoting awareness of existing parental control tools.

Simply put, following the Supreme Court's decision in *Brown*, there'll be no more playing games with the First Amendment. 



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