

## Strengthening the First Amendment, *Brown v. Entertainment Merchants Association*

In *Brown v. Entertainment Merchants Association* the Supreme Court struck down a California law restricting the sale or rental of violent video games based upon a facial challenge by video-game and software manufacturers.<sup>1</sup> This case, which the majority found to be controlled by another recent decision, *United States v. Stevens*,<sup>2</sup> may evince a mounting concern at the Supreme Court with ensuring the vitality of the Constitution's promise of free speech by stalling erosion of the First Amendment in Supreme Court precedents. To be sure, *Stevens* and *Brown* set sharp limits as to what the text of the amendment *does not* encompass—namely, everything other than categories of speech that the Court has already determined to be unprotected.<sup>3</sup> In so doing, the Court appears focused on twin aims: (1) ensuring that the First Amendment reaches as far as possible, within the confines of its prior opinions, and (2) creating a climate that is highly unfavorable for the recognition of any further categorical exceptions to the reach of the First Amendment.

A second issue of note, although far less at the forefront, is the interplay between parental rights and First Amendment protection. Specifically, the California law acted as negative option for parents—while minors could not buy violent video games, parents were still allowed to buy them for their children. This negative option, California argued, was necessary to aid parents in determining the content of video games that their children played. The majority rejected this argument, finding the negative option addressed a largely non-existent problem (due to the voluntary ratings system already in place for video games) and was not narrowly tailored. Justice Thomas's dissent takes special issue with this conclusion, arguing that the history of the American Puritan family demonstrates that there is no right to reach children with speech unless that speech is vetted through their parents, the system California has established here.

The opinion was fractured. Five justices found that the law violated the First Amendment's protection of free speech; two justices found that the law was too vague to withstand scrutiny under the due process clause; and two justices dissented, each for separate reasons. A more fulsome discussion of each opinion is provided below.

### I. *Majority Opinion*

The five justice majority<sup>4</sup> invalidated the California law as an impermissible restraint on speech.<sup>5</sup> The opinion begins by setting out a rigid, bright-line rule limiting the categories of

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<sup>1</sup> *Brown v. Entertainment Merchants Association*, No. 08-1448 (June 27, 2011) (slip opinion).

<sup>2</sup> *United States v. Stevens*, 130 S.Ct. 1577 (2010).

<sup>3</sup> See *Brown*, No. 08-1448 at \*3 (“Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”); *Stevens*, 130 S. Ct. at 1584, 1586 (exceptions to the reach of the first amendment are limited to speech regarding obscenity, defamation, fraud, incitement, and speech integral to criminal conduct; but with the caveat that “[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”).

<sup>4</sup> The majority opinion was authored by Justice Scalia, and was joined in by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

unprotected speech to those already determined to be beyond the historical reach of the First Amendment.<sup>6</sup> A naturally corollary to this holding emerges as well: legislatures cannot create new categories of unprotected speech for any reason.<sup>7</sup>

Speech depicting violence, of course, is protected under the First Amendment. But because the law at issue here pertained only to minors, a second constitutional question arose—for those categories of speech protected under the First Amendment, are the rights of adults and children coextensive? The Court answered yes, distinguishing prior cases that allowed minor-speech to be regulated differently from their parents. As the Court explained, unlike the laws in its prior decisions, the California law “does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children.”<sup>8</sup> Instead, the California law attempted to deny minors access to speech to which their parents could not be denied access. At its broadest, then, the rule set forth in *Brown* suggests that legislature cannot regulate any form of protected speech whether for minors or adults (unless, of course, it could meet the strict scrutiny test).

In the opinion of several concurring and dissenting Justices, this reading of the First Amendment cramped parental control over children. Perhaps sharing in this discomfort, the majority left itself an escape valve, ostensibly based in history: According to the Court, “if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence” then California’s argument might have fared better.<sup>9</sup> Looking to history, the Court then explained that American children have been exposed to speech depicting violence both today and yesterday, citing works such as Grimm’s *Fairy Tales* and Homer’s *Odyssey*.<sup>10</sup> This analysis is unsatisfying because, as the Breyer dissent notes, it blinks its eye at the reality of past and present—an all too common aspect of historical adjudication.<sup>11</sup> Indeed, as Justice Breyer explains, “[f]or every Homer, there is a Titian. For every Dante, there is an Ovid. And for all the teenagers who have read the original versions of Grimm’s *Fairy Tales*, I suspect there

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<sup>5</sup> Because California conceded that video-games qualify as speech protected under the First Amendment, there was no need to analyze whether video-games are speech. *Brown*, No. 08-1448 at \*2. The Court did explain, however, that video-games qualify as speech. *Brown*, No. 08-1448 at \*2-3.

<sup>6</sup> *Id.* at \*3.

<sup>7</sup> *Id.* at \*3.

<sup>8</sup> *Id.* at \*6.

<sup>9</sup> *Id.* at \*8.

<sup>10</sup> *Id.* at \*8-11.

<sup>11</sup> It has long been recognized that history in the hands of the Supreme Court can prove dangerous. As one commentator observed: “[O]nly within recent years ... have the justices who discovered and embraced the solacing simplicities of historical adjudication endeavored to persuade us that a careful reading of history confirms their confidence. And if the Justices ‘have not always succeeded in this effort ... they have at least taught us that a selective interpretation of history can provide much satisfaction to the interpreter.’” Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 119 (1965) (quoting Mark Howe, *Split Decisions*, N.Y. REV. OF BOOKS, 17 (July 1, 1965)). Many of the criticisms have been echoed by more modern authors. As one author noted: “Looking at the relevance of the Kelly thesis to the Supreme Court after three decades, the most surprising fact is how many of Kelly’s criticisms are still valid. For example, the Court continues to resort to history to decide constitutional cases, it continues to write law office history, and it continues to ask questions of the past that the past cannot answer.” Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J.L. & POL. 809, 883-84 (1997).

are those who know the story of Lady Godiva.”<sup>12</sup> Just as classical literature exposes children to accounts of violence, so too it exposes them to accounts of sexual activity; and so the Supreme Court’s distinction appears to be built on little more than sand.

Relying on its conclusion that exposing minors to speech depicting violence is protected under the First Amendment, the Court applied its strict scrutiny test, which requires the law to be narrowly drawn to serve a compelling governmental interest.<sup>13</sup> California asserted two interests under this test. First, it contended that the law addressed a compelling social problem—video-game violence causing real-life violence. Second, according to California, the law helped concerned parents control the content to which their children were exposed. The Court rejected both justifications. With respect to the former, the Court brushed aside the legislative findings of the California Legislature—explaining that when applying strict scrutiny the Court may second-guess legislative findings—and determined that because there was no conclusive proof linking video-game violence and real-life violence, California failed to identify an “actual problem” in need of solving.<sup>14</sup> Going further, the Court assumed the problem but still rejected California’s solution as insufficiently narrow—even if speech depicting violence begets real-life violence, banning only one form of speech depicting violence would be horribly under inclusive.<sup>15</sup>

California’s argument that its law aided parental authority was given short-shrift by the Court, which explained that aiding parental authority is different from dictating parental choices and then allowing the parents a negative veto.<sup>16</sup> The Court went on to note that the class of parents in need of California’s aid was exceedingly small; for concerned parents there was already a voluntary ratings system in place that allows parents to restrict their children’s access to violent video games, so the law only helps parents who would restrict access but are physically unable to do so.<sup>17</sup> Because the act could not pass strict scrutiny, the Court struck it down as unconstitutional.

## II. *Alito Concurrence*

Justices Alito and Roberts concurred in the judgment, but did not agree with the First Amendment holding. Instead, they would have invalidated the law on vagueness grounds under the due process clause.<sup>18</sup> Specifically, the concurrence found that the statute’s definition of “violent video games” was not defined with the requisite “narrow specificity,” because the application of the California law depended heavily on the “identification of generally accepted

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<sup>12</sup> *Brown*, No. 08-1448 at \*8 (Breyer, J. dissent). Indeed, Justice Breyer need not even look to other authors. As sure as the *Odyssey* recounts tales of violence, it also has sexual depictions such as Demodocus’s song regarding an illicit affair between Venus and Mars. See VIII HOMER, THE ODYSSEY, available at <http://classics.mit.edu/Homer/odyssey.mb.txt>.

<sup>13</sup> *Brown*, No. 08-1448 at \*11 (Scalia, J.).

<sup>14</sup> *Id.* at \*11-13.

<sup>15</sup> *Id.* at \*13-14.

<sup>16</sup> *Id.* at \*15 (“At the outset, we note our doubts that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to minors.”).

<sup>17</sup> *Id.* at \*15-16.

<sup>18</sup> *Brown*, No. 08-1448 at \*1-2 (Alito, J. concurring).

standards regarding the suitability of violent entertainment for minors.”<sup>19</sup> The reliance on community standards was a problem because of the lack of history regarding shielding minors from expressions of violence, which rendered any determination of community standards impossible.<sup>20</sup> Accordingly, the Court concluded that because of the lack of generally understood historical social mores in this area, video-game producers could not be on notice as to which violent depictions would violate this statute.<sup>21</sup>

After explaining the infirmities of the statute under the Due Process clause, the concurrence detailed the flaws it saw in the majority opinion. Specifically, the concurrence expressed concern that the majority painted with too broad a brush, “suggesting that no regulation of minors’ access to violent video games is allowed—at least without supporting evidence that may not be realistically obtainable given the nature of the phenomenon in question.”<sup>22</sup> The opinion then goes on to describe, in arguably unnecessary detail, the “antisocial theme[s]” that the video-game industry has exploited.<sup>23</sup> And, it draws a distinction between video-games, where the player acts out the conduct in first person, and a book, where the reader experiences the book from the third person perspective.<sup>24</sup> Relying on this potential distinction between video-games and classic literature (and other speech), the concurrence concludes by leaving the First Amendment question for another day, criticizing the majority for “prematurely ... dismissing th[e] possibility [that video games are the same as literature] out of hand.”<sup>25</sup>

### III. *Thomas Dissent*

Justice Thomas dissented on the grounds that the majority decision “does not comport with the original public understanding of the first amendment.”<sup>26</sup> Specifically, this dissent argues that the First Amendment does not reach “speech to minor children bypassing their

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<sup>19</sup> *Id.* at 3, 7.

<sup>20</sup> *Id.* at 8. For a discussion on the misuse of history by the Supreme Court, noted here by Justice Breyer and echoed by many commentators *see supra* n. 11.

<sup>21</sup> *Id.* at 8-9.

<sup>22</sup> *Id.* at \*10. This raises an interesting question about whether this case will be reversed if sufficient progress in science is made. In at least one other instance, science has undercut overly broad holdings by the Supreme Court. *See In re Troy Anthony Davis*, 2010 WL 3385081, at \*39 n.18 (S.D. Ga. 2010) (slip op.) (“One of the *Herrera* concerns, that the passage of time only diminishes the reliability of criminal adjudications has been significantly eroded since *Herrera* was decided. While it remains true that the reliability of witness testimony will decrease with time as memory fades, the vastly increased importance of forensic science has created an opposite force. Unlike memory, scientific ability improves with time.”).

<sup>23</sup> *Brown*, No. 08-1448 at \*14 (Alito, J. concurring). Justice Scalia questions the purpose of this argument by Justice Alito: “To what end does he relate this? Does it somehow increase the aggressiveness that California wishes to suppress? Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, JUSTICE ALITO’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.” *Brown*, No. 08-1448 at \*11 (Scalia, J.).

<sup>24</sup> *Brown*, No. 08-1448 at \*16 (Alito, J. Concurring).

<sup>25</sup> *Id.* at \*17.

<sup>26</sup> *Brown*, No. 08-1448 at \*1 (Thomas, J. dissenting).

parents.”<sup>27</sup> Relying, on the history of Puritan families specific to Massachusetts, the works of Locke and Rousseau, and stray quotes from members of the founding generation regarding the authority of parents in a family, Thomas concludes that the founders would not have understood the First Amendment to protect speech to minor children that does not occur through their parents.<sup>28</sup> This history appears to have been rejected as either irrelevant<sup>29</sup> or incorrect by the other eight justices.

#### IV. *Breyer Dissent*

Justice Breyer dissented for reasons different from Justice Thomas. Agreeing with the majority and the concurrence on the appropriate tests, Justice Breyer simply explains that he would have held both tests fulfilled.<sup>30</sup> With respect to the vagueness/due process question, Justice Breyer explains that he believes that this statute, modeled after the statute upheld in *Ginsberg v. New York*, is no vaguer than statutes previously upheld by the Court and therefore is valid.<sup>31</sup> With respect to the First Amendment issues, Justice Breyer accepts the California Legislature’s conclusion regarding the specific dangers that violent video games bring and the associated compelling state interests in protecting the well-being of youth and preserving parental authority; finds that law is narrowly tailored to impose only minimal restrictions on expression; and notes that there is no less restrictive alternative to the California law to achieve its valid ends.<sup>32</sup>

#### V. *Conclusion*

The significance of these opinions, divided along lines of parental rights and robust First Amendment protection, is yet to be determined. However, the opinion, especially when coupled with *Stevens*, may be a harbinger of a more robust First Amendment regime. Or, the opinion could be nothing more than a spike in First Amendment protection, later to be cabined to its facts. While time will tell its significance, the opinion certainly creates an ominous landscape for future government lawyers in position of defending laws against First Amendment challenges.

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<sup>27</sup> *Id.* at \*2.

<sup>28</sup> *Id.* at \*3-15.

<sup>29</sup> Indeed, it is not clear why the founding generation’s view on how parents should rear their children would be relevant to their views on the relationship of the Government to its minor subjects.

<sup>30</sup> *Brown*, No. 08-1448 at \*1 (Breyer, J. dissenting).

<sup>31</sup> *Id.* at \*4-8.

<sup>32</sup> *Id.* at 8-19.