learning from the headlines

IN THE NEWS

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Since 1994, the video game industry has voluntarily placed ratings on game packages to identify those that might be too mature for young children. The California legislature tried to put teeth into that ratings system, by making it a crime to sell kids under 18 games that contain extreme, realistic violence against human figures.

On the last day of its 2011 term, the U.S. Supreme Court declared the California law unconstitutional. By a 7-2 vote, the justices decided that the law violated young people's First Amendment right of free speech, which includes the right to receive information. A law that violates the U.S. Constitution is void.

A majority of the Supreme Court justices found that there was no "tradition" of restricting minors' access to violent material – in fact, many fairy tales and comic books contain violence. The justices were not convinced by studies that suggest kids who watch ultra-violent games are more aggressive than other kids. They noted that any effect of the games is minor, similar to the effect of watching a "Bugs Bunny" cartoon.

think about

The First Amendment's protections include the freedom of "speech." Are video games really "speech?" Whose speech are they?

The California law was unconstitutional partly because it was overly broad. Could you come up with a narrower law that might be constitutional? What if the law applied only to very young kids, such as 12 and under? Why might that be easier for a state to defend?

The Supreme Court regularly takes cases that involve the First Amendment rights of young people, but those cases rarely involve journalism. Still, the same First Amendment that protects video games also protects newspapers, magazines and websites. How would you argue that the *Brown* ruling does – or does not – impact journalistic speech?

terms to know

Obscenity – Speech is unprotected by the First Amendment if it is so sexually graphic, and so lacking in artistic or social value, that it is "obscene." The Supreme Court said in 1968 that there are different obscenity rules for minors, so it can be illegal to sell pornography to children that is legal to sell to adults. The Court has never said that speech can be labeled "obscene" just because it is violent, and the ruling in the Brown case seems to reject that idea. Note that, in legal terms, "obscene" does not just mean a curse word. A word can be an "obscenity" but not legally "obscene."

Certiorari ("cert") – A Latin term meaning "to be informed of." In Supreme Court terminology, "certiorari" (usually just called "cert") is a petition that the losing side in a case files in hopes of getting the Court to accept the case. The Court rejects more than 98 percent of the petitions that are filed, so getting a case heard by the Supreme Court is rare. The Court usually grants "cert" if a case raises an important constitutional issue, or if there is confusion among the lower courts about what a federal law means. The *Brown* case came to the Court because of a "cert" petition filed by the State of California. The State lost the case at U.S. District Court and in its first level of appeal.

background

Americans spend about $10 billion a year on video games. Many of the most popular game series – including Mortal Kombat and Grand Theft Auto – contain gruesome simulated killings. The video game industry has agreed to place ratings on game packages that warn parents about material that might be too mature for young players. Like the ratings on movies, the ratings on these games are voluntary and not enforced by the government. Games rated "mature" or "adults only" are not recommended for kids under 17, but it's not against the law for a kid to buy or play one.

Members of the California legislature thought too many kids were playing violent games and being influenced to act violently themselves. They passed a law in 2005 making it a crime, carrying a $1,000 fine, to sell a child under 18 a game containing gory images of human-like figures being killed, maimed or tortured.

The State of California said the law was justified because: (1) kids who play games with realistic violence are more likely to act violently in real life, and (2) parents want help keeping violent games out of their children's hands. But a majority of the Supreme Court did not find these justifications adequate to overcome the First Amendment.

Justice Antonin Scalia wrote the Court's majority opinion, the official "voice" of the Court. Justice Scalia explained that a law regulating speech is unconstitutional if it is "over-inclusive" (it bans more speech than necessary to solve the problem) or "under-inclusive" (it bans some harmful speech but leaves equally harmful speech alone). The California law, he decided, was flawed for both reasons. It is over-inclusive because it stops kids from buying games even if their parents have no objection. And it is under-inclusive, because it has no impact on violence in other media that may have just as much impact on kids as video games.

Chief Justice John Roberts and Justice Samuel Alito voted with Justice Scalia to strike down the law, but did not want to go as far as the other justices. They said simply that the law was vague, because it did not define "violent video games" specifically enough.

Two justices, Stephen Breyer and Clarence Thomas, dissented from the majority's vote, for very different reasons. Justice Breyer wrote a separate opinion arguing that the violence in video games is more severe than violence in movies and books, so different First Amendment rules should apply. Justice Thomas said children have no First Amendment rights, and no one has a right to communicate with them without parental permission.

why it matters

If the State of California had won the case, it could have seriously set back the First Amendment rights of minors. If the Supreme Court had created a new category of ultra-violent speech that is too "obscene" to be shown to minors, then state legislatures and local school boards would likely have started passing new regulations restricting children's access to violent material. This could have invited censorship of movies, books, websites and other materials accessible to kids.

Justice Scalia's opinion strongly affirms that kids have First Amendment rights. "No doubt a State possesses legitimate power to protect children from harm … but that does not include a free-floating power to restrict the ideas to which children may be exposed," Scalia wrote. It is also important that the Court's opinion implies a First Amendment rights for kids to receive information as well as to speak.

This ruling does not impact the rights of stores to self-regulate the sale of games as they choose. The First Amendment regulates only the actions of government agencies, not private companies.

for further reference

Supreme Court's opinion, June 27, 2011, *Brown v. EMA*:
http://www.splc.org/pdf/brown.pdf
California AB 1179, 2005 bill criminalizing sale of violent games to minors:
http://1.usa.gov/daHLID
Entertainment Software Ratings Board, guide to video game ratings:
http://www.esrb.org/ratings/ratings_guide.jsp
Brief filed by SPLC and other First Amendment groups with the Court:
http://www.splc.org/pdf/schwarzeneggerbrief.pdf