**Constitutional Law I**

**Professor Mike Ramsey**

**Spring 2022**

**Supplemental Reading #10: *Brown v. Entertainment Merchants***

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Supreme Court of the United States**

**Edmund G. BROWN, Jr., Governor of California, et al., Petitioners,**

**v.**

**ENTERTAINMENT MERCHANTS ASSOCIATION et al.**

No. 08–1448.

Argued Nov. 2, 2010. Decided June 27, 2011.

564 U.S. 786, 131 S.Ct. 2729

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C.J., joined. THOMAS, J., and BREYER, J., filed dissenting opinions.

Justice SCALIA delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.

**I**

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§ 1746–1746.5, prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The Act covers games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”  Violation of the Act is punishable by a civil fine of up to $1,000.

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Court of Appeals affirmed, and we granted certiorari…

**II**

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, “esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.” United States v. Playboy *Entertainment* Group, Inc., 529 U.S. 803, 818 (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears.

The most basic of those principles is this: “[A]s a general matter, ... government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002). There are of course exceptions. “‘From 1791 to the present,’ ... the First Amendment has ‘permitted restrictions upon the content of speech in a few limited areas,’ and has never ‘include[d] a freedom to disregard these traditional limitations.’” United States v. Stevens, 130 S.Ct. 1577, 1584 (2010) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382–383 (1992)). These limited areas—such as obscenity, Roth v. United States, 354 U.S. 476, 483 (1957), incitement, Brandenburg v. Ohio, 395 U.S. 444, 447–449 (1969), and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)—represent “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” id., at 571–572.

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 concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. … We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the depiction of animal cruelty—though States have long had laws against committing it.

…

That holding controls this case. As in Stevens, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of “sexual conduct,” Miller, supra, at 24. See also Cohen v. California, 403 U.S. 15, 20 (1971); Roth, supra, at 487, and n. 20.

…

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers “till she fell dead on the floor, a sad example of envy and jealousy.” The Complete Brothers Grimm Fairy Tales 198 (2006 ed.). Cinderella's evil stepsisters have their eyes pecked out by doves. Id., at 95. And Hansel and Gretel (children!) kill their captor by baking her in an oven. Id., at 54.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. The Odyssey of Homer, Book IX, p. 125 (S. Butcher & A. Lang transls. 1909) (“Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame”). In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. Canto XXI, pp. 187–189 (A. Mandelbaum transl. Bantam Classic ed.1982). And Golding's Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered by other children while marooned on an island. W. Golding, Lord of the Flies 208–209 (1997 ed.) ….

California claims that video games present special problems because they are “interactive,” in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. “[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.” American Amusement Machine Assn. v. Kendrick, 244 F.3d 572, 577 (C.A.7 2001) (striking down a similar restriction on violent video games).

Justice ALITO [in his concurrence] has done considerable independent research to identify video games in which “the violence is astounding.” “Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces.... Blood gushes, splatters, and pools.” Justice ALITO recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice ALITO's description of those video games he has discovered that have a racial or ethnic motive for their violence—“ ‘ethnic cleansing’ [of] ... African Americans, Latinos, or Jews.” 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.

**III**

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. R.A.V., 505 U.S., at 395. The State must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. It is rare that a regulation restricting speech because of its content will ever be permissible.

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. … [T]he State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies…

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning). Instead, nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology. They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

Even taking for granted Dr. Anderson's conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the “effect sizes” of children's exposure to violent video games are “about the same” as that produced by their exposure to violence on television. And he admits that the same effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated “E” (appropriate for all ages) or even when they view a picture of a gun.

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child's or putative parent's, aunt's, or uncle's say-so suffices. That is not how one addresses a serious social problem.

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. 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. …

But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell “M” rated games to minors only with parental consent.

 …

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want. This is not the narrow tailoring to “assisting parents” that restriction of First Amendment rights requires.

**\* \* \***

… We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a “well-defined and narrowly limited class of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” Chaplinsky, 315 U.S., at 571–572 (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. …

We affirm the judgment below.

It is so ordered.

Justice Alito, joined by Chief Justice Roberts, concurred in the judgment. Alito argued that the statute did not did give fair notice of what level of violence was prohibited and thought it was unconstitutional on that ground without the need for the additional discussion in the majority opinion. He went on to say that “the Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. Any assessment of the experience of playing video games must take into account certain characteristics of the video games that are now on the market and those that are likely to be available in the near future.” He continued:

In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game which players engage in “ethnic cleansing” and can choose to gun down African–Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.

He concluded:

When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.

Justice Thomas dissented. After extensive historical analysis, he concluded that “The freedom of speech,” as originally understood, does not include a right to speak to minors without going through the minors' parents or guardians. Therefore, I cannot agree that the statute at issue is facially unconstitutional under the First Amendment.”

Justice Breyer also dissented. Relying principally on *Ginsburg v. New York*, 390 U.S. 629 (1968) (allowing restriction on sales of non-obscene pornography to minors), he found that California’s interest in protecting children from the harmful effects of violent video games satisfied strict scrutiny. He included a 12-page appendix listing scientific studies finding harm to children from video games.