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'No Shortage of Gore'

The Constitution, Free Speech, and Technology

On June 27, 2011, the United States Supreme Court struck down a 2005 California law prohibiting the sale of violent video games to minors. The case, Brown v. Entertainment Merchants Association, *was decided 7-2, with Justices Thomas and Breyer dissenting. Among the majority, however, there was disagreement over whether video games are so distinct from books, movies, and other forms of protected expression as to represent a difference in kind, not just degree. We have excerpted below the opinion Justice Antonin Scalia wrote for the Court and the concurring opinion written by Justice Samuel Alito and joined by Chief Justice John Roberts.*

Justice Scalia: 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....

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."...

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 instance, are grim indeed....

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 Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive."...Even where the protection of children is the object, the constitutional limits on governmental action apply.

Justice Alito: The California statute that is before us in this case represents a pioneering effort to address what the state legislature and others regard as a potentially serious social problem: the effect of exceptionally violent video games on impressionable minors, who often spend countless hours immersed in the alternative worlds that these games create....

In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with

caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution....

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.