Constitutional Law II  
Spring 2012  
Professor Samuels

First Two Classes Assignments

Kathleen M. Sullivan & Gerald Gunther, Constitutional Law (17th ed.)  
(or Kathleen M. Sullivan & Gerald Gunther, First Amendment Law (4th ed.), pages in parentheses below)

Monday, January 9  
pp. 760-67 (2-9), plus information about the Brown v. Entertainment Merchants decision which is printed below (from the Sullivan & Gunther 2011 Supplement)

Wednesday, January 11  
pp. 772-82 and 804-10 (14-24 and 46-52)

Sales of violent video games to minors. Finding the decision in Stevens to be controlling, a majority of the Court in BROWN v. ENTERTAINMENT MERCHANTS ASS’N, U.S., 131 S.Ct. 2729 (2011), invalidated a California statute prohibiting the sale or rental to minors of violent video games, defined as any games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being” in a depiction that “appeals to a deviant or morbid interest of minors,” is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”

Justice SCALIA wrote for the Court, joined by Justices Kennedy, Ginsburg, Sotomayor and Kagan: “California correctly acknowledges that video games qualify for First Amendment protection. [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.” Noting that content-based laws like California’s are generally invalid subject to exceptions for narrow categories like obscenity, incitement and fighting words, he continued: “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. [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.’ [Because] speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in Ginsberg v. New York, 390 U.S. 629 (1968). That case approved a prohibition on the sale to minors of sexual material that would be obscene from the perspective of a child. [The] California Act is something else entirely. It 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. California does not argue that it is empowered to prohibit selling offensively violent works to adults. [Instead,] it 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. [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.”

The majority opinion thus applied strict scrutiny and found that “California cannot meet that standard. [It] acknowledges that it cannot show a direct causal link between violent video games and harm to minors. [California’s studies] do not prove that violent video games cause minors to act aggressively. [And] 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. [Moreover,] 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. [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. [This] is not the narrow tailoring to ‘assisting parents’ that restriction of First Amendment rights requires.”

Justice ALITO, the lone dissenter in Stevens, concurred only in the judgment, joined by Chief Justice Roberts, suggesting that there might be some regulation of violent video games that would survive First Amendment scrutiny but deeming the California law void for vagueness. He reasoned that, unlike the case of obscenity, there was no well-established “history regarding expression related to violence” and that “the prevalence of violent depictions in children’s literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite ‘deviant’ or ‘morbid’ impulses.” Justice Alito criticized the majority for discounting ways in which playing video games is different in kind from reading violent literature: noting that such “games feature visual imagery and sounds that are strikingly realistic” and that “[p]ersons who play video games also have an unprecedented ability to participate in the events that take place in the virtual worlds that these games create,” he pointed out that, “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.” This portion of the concurrence elicited this response from Justice Scalia in a footnote: “Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not constitutional ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no
less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny.’’

Justice THOMAS filed a dissent arguing that freedom of speech, “as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians’’ and [he] would have added “speech to minor children bypassing their parents” to the Chaplinsky–Ferber list of unprotected categories of speech. He explained: “[T]he founding generation understood parents to have a right and duty to govern their children’s growth. Parents were expected to direct the development and education of their children and ensure that bad habits did not take root. [In] light of this history, the Framers could not possibly have understood ‘the freedom of speech’ to include an unqualified right to speak to minors.’’

Justice BREYER filed a separate dissent reasoning that the California law was subject to strict scrutiny but that such scrutiny ought not be fatal to the law on a facial challenge. In Justice Breyer’s view, the law served a compelling interest in protecting children from the harm of being inured to violent behavior, and “there is considerable evidence that California’s statute significantly furthers this compelling interest,’’ including social science studies finding “causal evidence that playing these games results in harm [because] increased exposure to violent video games causes an increase in aggression.” He reviewed the strengths and weaknesses of various studies, including citations to them in a lengthy appendix, and concluded: “Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases.’’