

Law of the Level

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[Sex, Violence, Videogames and the Supreme Court](#)

In February 2009, the 9th Circuit Court of Appeals struck down California's Violent Video Games Act banning the sale or rental of "violent video games" to minors. While the holding is squarely in line with substantial U.S. Supreme Court precedent requiring parents — not government censors — to decide what is appropriate content for children, the U.S. Supreme Court just granted review. Mixed in with the legal issues are some of the most troublesome themes for free speech protection — minors, sex and violence. The grant of review is therefore unsettling.

The underlying lawsuit was filed by video software associations against Governor Schwarzenegger, who signed the Act into law on Oct. 7, 2005. The Act prohibited the selling or renting of "violent video games" based on the "fear" that repetitive violence contributes to anti-social conduct among minors. The Act defined "violent video games" as those where the options available to the player include killing, maiming, dismembering or sexually assaulting an image of a human being, if those acts are depicted in one of two ways:

“Either in manner that appeals to deviant or morbid interests of minors, is patently offensive to what is suitable to minors according to community standards, and where the game as a whole lacks serious literary, artistic, political or scientific value for minors; or, in a manner that enables the player to virtually inflict serious injury upon images of human beings or characters with substantial human characteristics in an especially heinous, cruel or depraved manner that involves torture or serious physical abuse to the victim.”

The first method borrowed legal doctrine from obscenity laws. Obscenity is not protected speech under the First Amendment as it is deemed to have no value to society, *i.e.*, to be without serious literary, artistic, political or scientific value. The second method borrowed language from federal death penalty jury instructions to define "cruel," "depraved," "heinous" and "serious physical abuse" to include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

The 9th Circuit struck down the Act, finding that video games are a form of expression protected by the First Amendment and the Act sought to restrict expression based on content, *i.e.*, violence. Applying the "strict scrutiny" standard of review, the court held California failed to prove any compelling interest supported its enactment and that less restrictive alternatives were available to protect minors.

The court noted the video game industry itself has a voluntary rating system to provide parents with knowledge about game content. The Entertainment Software Rating Board rates the content of games with age-specific ratings, ranging from early childhood to adults only. It also assigns content descriptors.

Noting the Supreme Court has held minors are entitled to a significant measure of First Amendment protection, the 9th Circuit also rejected California's argument that the Act was supported by the compelling interest of protecting children from "violent, aggressive and anti-social behavior." While there is "an abstract compelling interest in protecting the physical and psychological well-being of minors," California failed to prove the harm was real or that the Act would alleviate that harm in a direct material way.

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