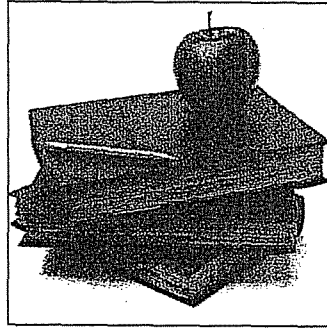


# Opinion The Record



Teachers don't deserve vilification. Commentary, 2



The annual circus comes to a close. By Brigid Harrison, 2

## The High Court's contradiction

By RICHARD L. RAVIN

**L**AST WEEK, the U.S. Supreme Court invalidated a California statute that made it illegal to sell or rent violent video games to minors. The five-justice majority opinion, written by Antonin Scalia, holds that the law violates the First Amendment.

While the court may have been correct in this case to strike down the statute (based on lack of proof of a causal link between the violent video games and harm to minors) it unnecessarily placed a First Amendment roadblock to future regula-

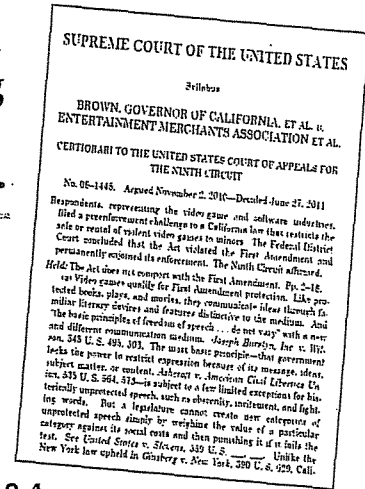
**The Supreme Court has declared that government has no right to restrict the sale of videos containing violence, sexual assault, gore or racism to minors. Pictures of naked people? Well, that's another story.**

tion of new technologies incorporating violent forms of expression where such a link is proven.

Moreover, as Justice Stephen Breyer emphasizes in his dissent, the court's rationale is inconsistent with a prior First Amendment case.

Justice Scalia explained that for purposes analyzing the First Amendment, video games should be treated no differently than books, plays and movies. Games, he said, "communicate ideas – and even social messages – through many familiar literary devices (such as charac-

Richard L. Ravin practices technology and First Amendment law with Hartman & Winnicki in Paramus, where he heads the firm's internet and intellectual property law practice.



# First Amendment

From Page 0-1

ters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)."

Central to the freedom-of-speech analysis is the principle that the government cannot make laws that prohibit speech based on the content or subject matter of the speech, except for limited exceptions, such as obscenity, incitement and fighting words.

The court held that the California Legislature was not empowered to create a wholly new category of content-based speech directed at children. Legislation that attempts to regulate speech based on content will be invalidated unless it passes the strict scrutiny test – that it is justified by a compelling government interest and it is narrowly drawn to serve that interest.

The court recognized that preventing harm to minors could be a compelling state interest. However, it held that there was no compelling evidence of a causal link between violent video games and harm to minors.

Scalia went further, criticizing Alito's concurrence as being ironic, because it "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."

According to the five justices, the research presented to the court did not show that violent video games cause minors to act aggressively. Instead, the court held, almost all the evidence was based on correlation and studies and most of the research was based on flawed methodology.

## State's limited authority

While a state has the authority to protect children from harm, such authority does not include "a free-floating power to restrict the ideas to which children may be exposed," Scalia said.

Scalia noted that as a society, our children read books containing plenty of gore: "Grimm's Fairy

Tales, for example, are grim indeed," he notes. "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.' Cinderella's evil stepsisters have their eyes pecked out by doves, and Hansel and Gretel (children!) kill their captor by baking her in an oven."

Although Samuel Alito joined the majority in declaring the law unconstitutional, he cautioned 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."

His reasoning is simply that the law does not define violent video games with the narrow specificity that the Constitution due process clause demands.

Alito would hold that the law was insufficiently precise to put a person of ordinary intelligence on notice as to which video games would be outlawed for minors. He concludes that the court was wrong to go further and hold that the law violated the First Amendment.

## Parental roles

Justice Clarence Thomas filed a dissenting opinion. When the First Amendment was adopted, he said, it was not intended to protect minors' free speech without going through the minors' parents or guardians. Thus, Thomas would hold that the statute is constitutional.

Justice Breyer, in a separate dissent, differentiated video games from other traditional media, such as movies. Breyer emphasized that video games combine physical action with expression, requiring the video gamer to push buttons to achieve an interactive form of target practice using images of human beings as targets.

Acknowledging that the First Amendment strict-scrutiny test applies, Breyer writes that California has set forth a compelling state interest in the basic rights of parents to direct the rearing of their children and furthering the ability of parents to discharge their parental responsibility.

This interest has become more important over the years, as 5.3 million grade-school age children today

are routinely home alone while their parents work.

Breyer argues that the majority has created a serious anomaly in the First Amendment. Referring to a 1968 ruling (*Ginsberg vs. New York*) in which the court upheld the conviction of a luncheonette store owner who sold pornography to a minor, Breyer explained:

"[The] *Ginsberg* [case] makes clear that a state can prohibit the sale to minors of depictions of nudity; today the court makes clear that a state cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?"

"What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman – bound, gagged, tortured and killed – is also topless?"

He concluded, "This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and without literary, artistic or similar justification, can prove at least as, if not more, harmful to children as photographs of nudity."

In Breyer's view, the First Amendment does not prevent the government from protecting children from speech that reasonably poses a risk of harm to those children, and is without literary, artistic or similar value.

## Government excluded

In the end, the court leaves it to parents and guardians, not the government, to protect children from seeing, hearing and experiencing violent and hateful speech in the form of video games and other media.

While it is reassuring to know that the First Amendment right to freedom of speech is alive and well, as Breyer points out, the court has created an unnecessary contradiction in First Amendment analysis.

The court permits state regulation of one kind of

speech harmful to minors in the form of obscenity, but not another kind in the form of interactive virtual violence.

The majority dismissed as flawed and insufficient the state's evidence that interactive virtual violence is harmful to minors, resulting in the state failing to prove a compelling state interest. Accordingly, the content-based ban on speech failed the strict scrutiny test and was declared unconstitutional.

As our society becomes more mobile and increasingly connected to hand-held devices, the Internet and other technologies, it is virtually impossible for parents to know, much less guard against, all of the harmful electronic speech to which their teens are exposed.

Last week, the high court made it clear that, as to violent video games and perhaps future technologies, parents are on their own, and cannot look to state laws for help.