

Free Speech Strategy Works for Violent Video Games than Minors, Does It?*

- Comment on the U.S. Supreme Court's Unconstitutionality Decision on California's Violent Video Games Law

Choi, Young-Ran

Associate Professor, School of Law, Wonkwang University

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I. Introduction

In the United States several states have attempted to regulate violent video games, by enacting laws to restrict the children's access to such games.¹⁾ However, such efforts had been struck down by the courts holding

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1) In the U.S. some states including Illinois, Indiana, Michigan, Minnesota, and Washington had enacted legislation regulating violent video games from a decade ago, but the courts held such laws unconstitutional. George B. Delta and Jeffrey H.

that such state regulations were unconstitutional in violation of free speech protection under the First Amendment of the U.S. Constitution. Against this backdrop, on June 27, 2011, in *Brown v. Entertainment Merchants Association (EMA)*,²⁾ the U.S. Supreme Court struck down California's video game law which prevents the sale or rental of violent video games to minors and requires labeling for underage purchasers.

Such a decision by the highest court in the U.S. provides some interesting points. Once state or federal laws are regarded as content-based regulations on free speech, they are hard to pass the "strict scrutiny" standards of judicial review which requires the governments' "compelling interest" to enforce such laws. To show the compelling interest, in this case, the Court requires California to present clear scientific evidence showing the "causation" that violent video games cause minors to act aggressively. It also emphasizes that there is a less-restrictive way to regulate violent video games, such as the rating systems managed by the Entertainment Software Ratings Board (ESRB),³⁾ which might render any strict government controls unnecessary.

Therefore, whenever the courts focus on the free speech protection for the video game industry or even for children claiming their unlimited access to violent video games, any new governmental attempts to protect children through legislation to control the dissemination of violent video games to minors will be repeatedly unsuccessful in the U.S., even if such governmental attempts do not target directly at regulating "descriptions or ideas" of violence and sexual conducts portrayed in video games.

In short, this paper reviews the legal principles laid out by the U.S. Supreme Court on free speech protection related to the First and Fourteenth

Matsuura, *Law of the Internet*, § 12.02 (Attempts at legislating Against Obscenity), Aspen Publishers (2011), p. 12-86.

2) 131 S.Ct 2729 (2011).

3) ESRB is a non-profit organization that assigns letter ratings to virtually all video games. The letter rating recommends minimum age to play certain video games depending on their contents. <http://www.esrb.org/index-js.jsp>.

Amendments of the U.S. Constitution. Such constitutional principles will be observed by analyzing the Court's discussion on California's violent video game law. Then, it discusses some implications of the outcome of the Court's decision.

II. Overview of *Brown v. EMA*

1. California Law on Violent Video Games

On October 7, 2005, Governor Schwarzenegger signed "California Assembly Bill 1179 (hereafter "California law"),"⁴⁾ which prohibits the sale or rental of violent video games to minors under eighteen years of age, and requires the labelling on such games to restrict underage purchase. The law states that "a person may not sell or rent a video game that has been labeled as a violent video game to a minor."⁵⁾ If violated, a civil penalty of up to \$1,000 will be imposed.⁶⁾

The California law does not have a specific provision restricting sexually-explicit video games, but sexual content is indirectly mentioned in the definition of violent video games.⁷⁾ The law defines "violent video games" when the video game players engage in "killing, maiming, dismembering, or sexually assaulting an image of a human being" if the descriptions in the game fall on one of the two categories. The first category is whether a reasonable person would find that the game "appeals to a deviant or morbid interest of minors" while the game is "patently

4) This is codified at California Civil Code §§ 1746-1746.5.

5) Cal. Civ. Code § 1746.1(a).

6) Cal. Civ. Code § 1746.3.

7) Russell Morse, "If You Fail, Try, Try Again: The Fate of New Legislation Curbing Minors' Access to Violent and Sexually Explicit Video Games," *Loyola of Los Angeles Entertainment Law Review* (2005-2006) 171, pp. 189-190.

offensive to prevailing standards in the community” and such depictions “lack serious literary, artistic, political, or scientific value for minors.” The second category is when the video game “enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics” done by heinous, cruel manner or by “torture or serious physical abuse to the victim.”⁸⁾

The law also defines the terms “cruel,” “depraved,” “heinous,” and “serious physical abuse” and states that “pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved 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.”⁹⁾

Whether this law is also applied to cases where minors purchase video games by accompanying their parents was disputed in court.¹⁰⁾ The law does not speak to whether there is an exception for sales to minors accompanied by a parent. It states only that it does not apply if the violent video game is sold or rented to a minor by the minor’s parent, grandparent, aunt, uncle, or legal guardian.¹¹⁾

8) Cal. Civ. Code § 1746(d)(1): “Violent video game” means a video game 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 the game in a manner that does either of the following:

- (A) Comes within all of the following descriptions: (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors. (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors. (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.
- (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

9) Cal. Civ. Code § 1746(d)(2)-(3).

10) Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 953, fn. 4.

11) Cal. Civ. Code § 1746.1(c).

2. The Procedural Backgrounds

Before the law enjoined the sale of violent video games, the Video Software Dealers Association¹²⁾ brought a lawsuit against the government of California when Arnold Schwarzenegger was Governor, alleging that the state law violated the First Amendment and that its enforcement should be enjoined. Both federal courts, District Court¹³⁾ and Court of Appeals¹⁴⁾ in California, ruled against the State of California, holding that the state law is unconstitutional. Thus, the enforcement of the law was permanently enjoined. Then, the State of California filed a certiorari petition at the Supreme Court in April, 2010. The Supreme Court affirmed the decisions of lower courts in June, 2011.

In its seven to two decision, the Court found that video games qualify for First Amendment protection. The Court opposed to adding "violent video games" as new categories of unprotected speech like obscenity, incitement and fighting words, where content-based governmental restrictions on expression are limitedly acceptable. In addition, the Court concluded that "California failed to satisfy burden of showing either that the law was justified by compelling government interest, or that law, which was both

12) Video Software Dealers Association and Entertainment Software Association were the original plaintiffs at the district court and the court of appeal. Then, Entertainment Merchants Association as this association represents the video-game and software industries became the respondents at the Supreme Court.

13) Video Software Dealers Association v. Schwarzenegger, 2007 WL 2261546 (N.D.Cal.).

14) Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398, 176 L. Ed. 2d 784 (2010) and aff'd, 2011 WL 2518809 (U.S. 2011). The Court of Appeals held that: "(1) state's concession that alternate definition of "violent video game" found in law imposing restrictions and labeling requirements on the sale or rental of "violent video games" to minors was unconstitutionally broad did not render the entire law wholly invalid; (2) as a matter of first impression, violent video games did not fall within legal definition of "obscenity" under the First Amendment; (3) state did not have a compelling interest in preventing psychological or neurological harm to minors allegedly caused by violent video games; and (4) even if state had a compelling interest in preventing psychological or neurological harm allegedly caused to minors by violent video games, law was not narrowly tailored to further that interest."

over-and underinclusive, was narrowly drawn to serve that interest."¹⁵⁾

III. The Court's Strict Scrutiny Analysis on Violent Video Games

1. Free Speech Protection - Strict Scrutiny Test

The main argument of this case is whether a California law imposing restrictions on violent video games comports with the First Amendment of the U.S. Constitution, which protects free speech.¹⁶⁾ The Fourteenth Amendment has been incorporated into all of the First Amendment freedoms, and thus, individuals can be protected from actions by local and state governments and by the federal government.¹⁷⁾

The issue of the First Amendment protection arises when the government regulates expression based on its content, message, ideas, or subject matter.¹⁸⁾ Except some unprotected speech including fighting words and obscenity,¹⁹⁾ almost all content-based regulations are easily held unconstitutional.

15) *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011).

16) "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.C. Const. Amend. 1.

17) "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C. Const. Amend. 14, Sec. 1.

18) 131 S.Ct. 2729, 2733.

19) *Ibid* ; Some of major categories of unprotected speech are incitements, obscenity, fighting words, defamation, fraud, and speech integral to criminal conduct. Erwin Chemerinsky, *Constitutional Laws: Principles and Policies*, New York: Wolters Kluwer Law & Business, 2011. Expressions related child pornography involving photographs and films of young children can be limitedly unprotected. John E. Nowak and Ronald D. Rotunda, *Principles of Constitutional Law*, Thomson-West, 2010, p. 614.

Such content-based government regulations on expressive activities are subject to the "strict scrutiny" standard of review.²⁰⁾ To meet the strict scrutiny test, the government has to prove that its action is narrowly tailored to the government's "compelling interest."²¹⁾ If the government fails to prove its compelling interest to enforce such content-based regulations, then such regulations are considered unconstitutional as violation of free speech protection.

2. Analysis on "Violent Video Games"

1) Whether video games are speech to be protected?

There was no disputes between the parties that "video games" qualify First Amendment protection.²²⁾ The Court regarded that "video games communicate ideas—and 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)" like book, plays, and movies, and thus, free speech through video games can be protected.²³⁾ The Court acknowledged that the basic principles of freedom of expression can apply to a "new and different medium for communication" like video games as the advanced technology continues to be developed.²⁴⁾

2) Whether "violent" video games can be added as a new unprotected speech

The question presented in this case is not just "video games," but "violent

20) Ibid, p. 613.

21) Ibid, p. 614.

22) 131 S.Ct. 2729, 2733.

23) Ibid.

24) Ibid.

video games," and whether such video games can be regarded as protected or unprotected speech. If "violent video games" do not fall into categories of unprotected speech like inciting lawless action or obscenity,²⁵⁾ violent video games are considered as protected speech, and therefore, not subject to content-based regulations. Any content-based regulations on violent video games will be held unconstitutional.

Although California law restricts the sale or rental of "violent" video games, because it defines "violence," the majority opinion treated the law as a content-based regulation.²⁶⁾ The Court appeared to be reluctant to add new categories of unprotected speech even if "certain speech is too harmful to be tolerated"²⁷⁾ like violent video games.

In addition, the Court looked into whether the California law on violent video games regulates obscenity, and if so, the law can be legitimate since obscenity is unprotected expression. At first, the Court pointed out that the California law tried "to make violent-speech regulation look like obscenity regulation."²⁸⁾ However, the Court made it clear that obscenity is only

25) Categories of unprotected speech are speech that incites imminent lawless action; speech that is integral to the commission of a crime, speech that triggers an automatic violent response (fighting words), true threats, defamatory remarks, and obscenity. Expressions related child pornography involving photographs and films of young children can be limitedly unprotected. Nowak, et al., op. cit., p. 614.

Whether violent video games belongs to one of unprotected speech as "incitement" was discussed in a district court to decide a case against the "Mortal Kombat" video game maker by a mother whose son was killed by his friend who was addicted to and obsessed with such violent video game. The court was reluctant to treat "violent video games" as unprotected speech since "the game's images and messages were not directed to inciting or producing imminent lawless action and were unlikely to incite or produce such action." (Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167 (D. Conn. 2002). Kurtis A. Kemper, "First Amendment Protection Afforded to Commercial and Home Video Games," §7 (Violent video games as unprotected speech: speech inciting lawless action), 106 American Law Reports 5th 337 (2003).

26) The majority opinion of this Court criticized Justice Alito, a dissenting opinion, who saw that the California law punishes the "sale or rental" not the "creations or possessions of violent depictions." 131 S.Ct. 2729, 2734. fn. 1.

27) 131 S.Ct. 2729, 2734.

28) Ibid.

depiction of sexual conducts. As the California law defines "violence" related to "obscenity" as "sexually assaulting an image of a human being," such "violence" is not obscene, although shocking.²⁹⁾ Thus, California law is not regulating obscenity, and therefore it is invalid.

Likewise, while the Court was unwilling to add "violent video games" as unprotected speech, the Court found the California law is a content-based regulation since it dealt with "depiction" of violence. The Court relied on its precedent, *United States v. Stevens* where the Court held that a section of the federal law on animal cruelty was "substantially overbroad, and therefore invalid under the First Amendment."³⁰⁾ In *Stevens*, the federal law criminalizes the creation, sale or possession of certain "depictions" of animal cruelty defined in Section 48 when "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed if that harm to the animal was illegal."³¹⁾ Thus, the Court in *Stevens* concluded that depictions of animal cruelty are "not categorically unprotected" speech, the section explicitly regulates expression based on content, and thus the law is unconstitutional.³²⁾

The majority opinion here commented that there was "no American tradition of forbidding the depiction of animal cruelty though States have long had laws against committing it."³³⁾ It also reminded a saving clause from one of the Supreme Court's early decisions which "exempted depictions with serious religious, political, scientific, educational, journalistic, historical,

29) 131 S.Ct. 2729, 2733-2735.

30) *United States v. Stevens*, 130 S.Ct 1577 (2010).

31) Definitions of "Depiction of Animal Cruelty": "the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1).

32) 130 S.Ct 1577.

33) 131 S.Ct. 2729, 2734.

or artistic value.³⁴⁾

Accordingly, the majority opinion of this Court compared the federal law of Stevens with the California law which is defining "violent video games" when games show "killing, maiming, ..., or sexually assaulting an image of a human being, if those acts are depicted." Subsequently, the Court adjudged that the California law was contented-based, by regulating "depictions" of violence which cannot be categorized unprotected speech, and so the law is unconstitutional.

3) Violent? From whose point of view? - From minors

The Court also distinguished the California law on violent video games from the New York law regulating "obscenity-for-minors" in *Ginsberg v. New York*, where the law intended to prohibit the sale to minors of "sexual materials that would be obscene from the perspective of a child."³⁵⁾ The Court in *Ginsberg* upheld the New York law, since the law "could adjust the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests ... of ... minors."³⁶⁾

However, the majority opinion contended that the California law on violent video games failed to adjust the "boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children." The Court noted that the California law did

34) *Ibid.* (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

35) *Ginsberg v. New York*, 390 U.S. 629, 638 (1968). The New York law restricted the sale of certain depictions of "nudity, sexual conduct, sexual excitement, or sado-masochistic abuse," that were "harmful to minors." A depiction was harmful to minors if it: "(i) predominantly appeals to the prurient, shameful or morbid interests of minors, and "(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and "(iii) is utterly without redeeming social importance for minors." N.Y. Penal Law § 484 - h(1)(f); 390 U.S. 629, 645-646.

36) 131 S.Ct. 2729, 2735.

not prohibit the sale of violent video games to adults while it tries "to create a wholly new category of content-based regulation that is permissible only for speech directed at children."³⁷⁾ Accordingly, the Court concluded that if speech is neither obscene as to youths nor subject to some other legitimate proscription, such speech cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.³⁸⁾

4) What right is protected? – Minors' right of access to "depictions" of violence

The majority opinion confirmed that "minors are entitled to a significant measure of First Amendment protection," and thus "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."³⁹⁾ It noted that there was no tradition in the U.S. of "specially restricting children's access to depictions of violence" like books for children containing "no shortage of gore."⁴⁰⁾ The Court pointed out that minors have been exposed to violence all the time through other learning materials such as fairy tales and books for children and students containing violent activities, images, or descriptions.⁴¹⁾ As "minors' consumption of violent entertainment has never encountered resistance" by

37) 131 S.Ct. 2729, 2735-2736.

38) 131 S.Ct. 2729, 2736.

39) 131 S.Ct. 2729, 2735. Unlike the majority, another dissenting Justice Thomas denied the constitutional rights of persons under 18. He stated that "the practices and beliefs of the founding generation establish that "the 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." 131 S.Ct. 2729, 2751.

40) 131 S.Ct. 2729, 2736.

41) 131 S.Ct. 2729, 2736-2737. The Court listed fairy tales and books containing violent expressions like Grimm's fairy tales, the wicked queen poisoning Snow White, Cinderella's evil stepsisters whose eyes pecked out by doves, Hansel and Gretel killing their captor by baking her in an oven; and books like Homer's *Odysseus*, Dante's *Inferno*, Golding's *Lord of the Flies*.

reading, watching or listening crime novels, comic books, cartoons, movies, television programs, or music lyrics, containing expressions of violence, "violent video games" can be treated as one of these permissible media for children.⁴²⁾

In addition, California alerted that violent video games might cause more harmful impact to minors because of its 'interactive' nature, which is different from violent books or movies, when the players of violent video games "participate in the violent action on screen and determines its outcome."⁴³⁾ However, the Court disregarded such differences, but emphasized similar influence, stating that "all literature is interactive," since children would tend to "identify" themselves with the characters in all other violent entertainment materials whether reading books or watching cartoons, etc.⁴⁴⁾

3. Analysis on the Strict Scrutiny Test

Here, how the Court concluded that the California law failed the strict scrutiny test will be examined, by reviewing major discussions.

The Court found that the California law on violent video games imposes a restriction on the "content" of protected speech. Thus, California has to pass strict scrutiny to enforce its law. To pass the strict scrutiny test, California has to show that it has a "compelling interest" and the law is "narrowly-tailored," which is not "over- and underinclusive," to serve that interest.

1) Does causal connection between violent video games and violence of children exist?

The Court found that California failed to meet the strict scrutiny standard

42) 131 S.Ct. 2729, 2737.

43) 131 S.Ct. 2729, 2738.

44) Ibid.

because the state cannot show "a direct causal link between violent video games and harm to minors."⁴⁵⁾ Although California presented a research showing a "connection" or "correlation" between exposure to violent video games and harmful effects on children, the Court did not accept it as a good evidence since the research failed to prove "causation" that violent video games cause minors to act aggressively.⁴⁶⁾

It further argued that even if such a research showed "some effect on children's feelings of aggression," those effects are "both small and indistinguishable from effects produced by other media" like violence on television.⁴⁷⁾ The Court utilized the same research, showing 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. It articulated that such effects would be same "when children watch cartoons starring Bugs Bunny or the Road Runner" or "when they play video games like Sonic the Hedgehog⁴⁸⁾ appropriate for all ages," or even "when they view a picture of a gun."

2) Is the law under-inclusive or over-inclusive?

Underinclusiveness can be found when the California law on violent video games might be served as "disfavoring a particular speaker or viewpoint" while it failed to pursue the governmental interest which was invoked in the law.⁴⁹⁾ Here the Court regarded that the California law would be underinclusive since the law just singled out the "purveyors of video games for disfavored treatment" and failed to provide the reason of such treatment.

The Court doubted since the law failed to restrict the sale or distribution

45) Ibid.

46) 131 S.Ct. 2729, 2739.

47) Ibid.

48) It is a video game character and the main protagonist of the Sonic video game series released by Sega, Japan. [http://en.wikipedia.org/wiki/Sonic_the_Hedgehog_\(character\)](http://en.wikipedia.org/wiki/Sonic_the_Hedgehog_(character)).

49) 131 S.Ct. 2729, 2740.

of other "violent" expressions like cartoons, pictures of gun, games rated for young children. Instead, the law imposes fine on retailers to sell violent video games, but it does not regulate booksellers, cartoonists, or movie producers who might deal with violent expressions.⁵⁰⁾

In addition, the Court found the law underinclusive since the law would leave the "dangerous, mind-altering material in the hands of children so long as one parent says it's OK" to buy violent video games.⁵¹⁾ The Court criticized the law since the law failed to clearly show how to verify the "parental or avuncular relationship" with the children who would purchase violent video games by accompanying adults.⁵²⁾

In case of the overinclusiveness discussion, the Court doubted about California's claim that the purpose of the law is to help parents who wish to restrict their children's access to violent video games.⁵³⁾ The Court found that California failed to show the "substantial necessity" of its governmental regulation because there is another voluntary, less-restrictive, "age-specific" rating system by the Entertainment Software Rating Board to inform consumers or parents about the content of video games.⁵⁴⁾

The Court cited a report from the Federal Trade Commission (FTC) in 2009 on the result of utilizing the rating systems, "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated products at retail."⁵⁵⁾ Thus, the Court considered that the rating system does "much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home."⁵⁶⁾

50) Ibid.

51) Ibid.

52) Ibid.

53) 131 S.Ct. 2729, 2740-2741.

54) ESRB ratings are: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only-18 and older).

55) 131 S.Ct. 2729, 2741.

Accordingly, the Court did not accept California's argument that its law on violent video games would be "filling the remaining modest gap in concerned-parents' control," and thus, California failed to show its compelling state interest.⁵⁷⁾

Interestingly, the majority opinion acknowledged that, despite such rating systems, children may have access to buy violent video games rated for those older than 17. The FTC's report shows that 20% of those under 17 are still able to buy M-rated video game.⁵⁸⁾ However, the Court saw that such a fact did not support the compelling government interest to enforce the California law since "some gap in compliance is unavoidable."⁵⁹⁾

3) The Court's ruling on strict scrutiny test

In conclusion, even though the Court understood California's legislative goals "addressing a serious social problem and helping concerned parents control their children," such goals must be pursued by the law that is "neither seriously underinclusive nor seriously overinclusive."⁶⁰⁾ The Court found that the California law is "seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto."⁶¹⁾ It also concluded that the law is "seriously overinclusive because it abridges the First Amendment rights of young people whose parents ... think violent video games are a harmless pastime." Thus, the Court held that the law failed to survive strict scrutiny, and it would be unconstitutional.⁶²⁾

56) Ibid.

57) Ibid.

58) 131 S.Ct. 2729, 2741, fn. 9.

59) Ibid.

60) 131 S.Ct. 2729, 2741-2742.

61) 131 S.Ct. 2729, 2742.

62) Ibid.

IV. Implications of the Court's Decision

As the U.S. Supreme Court mentioned, the judiciary body should not disregard the constitutionality of laws to protect free speech, and the constitutional limits on government action should apply even the protection of children is the object.⁶³⁾ Once the Court adds "violent video games" as a new category of unprotected speech because of its "depictions" of shocking, disgusting expressions, the Court might have faced endless requests to create new categories of unprotected speech as technology develops new medium of communication or as the society continues to change in its value, ideas, thought, expressions, etc. Thus, it is understandable that many courts in the U.S. have struck down state or local laws on violent video games as content-based regulations.

However, the majority opinion in this case is rather biased in taking sides with the constitutionality concern while disregarding the necessity of a law restricting violent video games for children. By playing a role of protagonist of free speech for the video game industry as well as minors, the Court intentionally rejected to consider other evidences or social phenomena related to children's access to violent video games including "M-rated (mature adults)" games for minors and its dangerous effects.⁶⁴⁾

For example, the Court leave minors to determine what "violence" is. If descriptions of violence is not regarded as violent "from minors' point of view," such descriptions are not violent, and not be regulated. It is logical fallacy. "Violent" video games are created by adults to show their artistic creativity or other reasons, and disseminated by adults seeking more users

63) Ibid.

64) The Court cited a report from the 2009 Federal Trade Commission, saying that some 20% of those under 17 are still able to buy M-rated games. 131 S.Ct. 2729, 2741, fn. 9. 69% of children age from 13 to 16 can buy M-rated games based on the FTC's study in 2003. Morse, *op. cit.*, p. 203 (Citing from Elizabeth Linton, A.B. 1179 Assembly Bill Analysis (2005), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1151-1200/ab_1179_cfa_20050908_235925_asm_floor.html, last visited on Nov. 10, 2011.

or players for their business profits, including minor, presumptively or unintentionally. Moreover, "violent" video games are rated by adults to choose appropriate ages to play with, based on their "violent content" level. Then, if so, when the rating system turned out to be mal-functioning, laws on banning the sale of violent video games might be enforced even if "violence" is defined from the adult's perspective. If the decision on "violence" and "obscenity" or "sexual matters" leave on minors, especially children at younger ages or lacking cognitive ability on violent or sexual expressions, legal enforcement on violence or obscenity might be useless.

Moreover, the majority opinion opposed to take evidences to show the correlation between violent video games and violence of children while it emphasized that no convincing scientific researches to prove the "causation" of violent video games to minors' violence although there are researches showing such causal links available as the dissenting opinion stated.⁶⁵⁾ This Court's attitude implies that any state or federal government laws against violent video games may not survive the strict scrutiny test of the highest court, and cannot be enforced.

Any scientific researches or evidences on social phenomena cannot be considered perfect, convincing, or finalized since contradicting views to these researches may exist, and empirical proof on new researches might have not been done. When scientific uncertainty is at issue, scientific researches or evidences might be taken or discarded depending on decision-makers' tastes or interests as this Court's discussion. Therefore, it might have been less-biased if this Court would have taken into consideration the views different or conflicting rather than just emphasizing the scientific evidence that the Court wanted to take or which support the Court's conclusion.

In addition, the majority opinion disregard the impact of the "interactive" actions in playing video games. The Court ruled that the effect of

65) 131 S.Ct. 2729, 2767-71 (Justice Breyer's dissenting opinion); Patrick R. Byrd, "It's All Fun & Games Until Someone Gets Hurt: The Effectiveness of Proposed Video-Game Legislation on Reducing Violence in Children," 44 Hous. L. Rev. 410-413.

interactiveness in playing violent video games is same as that of watching violent T.V. programs on TV or reading books with violent descriptions. Is such impact level to minors really same between "actively" participating violent video games by killing or harming others with their keyboards or sticks while their brain "order" doing such actions, and "passively" watching violence or imaging violent descriptions? Even the video game industry confirmed how video games are effectively training soldiers by performing directly military actions through video games.⁶⁶⁾ Could the training effect of "acting" to be violent by playing violent video games by themselves be same when compared with the effect of watching violent military activities or of reading the military manuals how to be violent? Moreover, "active" players of violent video games have to be violent to win the games, by identifying themselves as virtual "violent actors," while "passive" readers of violent materials do not always "identify" themselves as the violent actors of the materials. Some readers of violent books might identify themselves as victims of such violence. Thus, the inference of the majority opinion was not persuasive.

The majority opinion is good for the game industry of violent video games since its artistic originality is protected as free speech, which help their business. However, it is disappointing by leaving the society nowhere without providing legal solutions how to resolve children's access to violent video games in the followings:

- When video game markets failed to protect children from buying or having access to violent video games;
- When the voluntary rating system failed to restrict under-age minors

66) The video game industry puts more emphasis on the 'positive' impact of video games. It is reported that video games have reduced violent crime rates. Chris Morris, "Video games reduce violent crime," BBC news, June 23, 2011. <http://games.yahoo.com/blogs/plugged-in/bbc-video-games-reduce-violent-crime-791.html>, last visited on Oct. 29, 2011 ; See also, Robert H. Wood, "Violent Video Games: More Ink Spilled than. Blood - An Analysis of the 9th Circuit Decision in Video Software Dealers Association v. Schwarzenegger," 10 Tex. Rev. Ent. & Sports L. 103, pp. 119-120.

to get violent video games that are not permitted;

- When almost all legislation on restricting violent video games have been struck down because of its unconstitutionality;

- When there is no convincing scientific evidence on causal links between violent video games and violence of children or even when there are researches available to show the causal link, courts are not willing to take such research as convincing to prove the government's compelling interest

V. Conclusion

As this paper analyzes the reasoning of the majority opinion to strike down the California law to restrict violent video games which might cause harmful effects on children, it is somewhat disappointing that a government cannot simply enforce a law even if the law's primary purpose is to protect children from violent materials and to help parents.

Parents, lawmakers, or government officers might demand more strict laws to regulate violent video game to protect their children whenever we face minors committing heinous crimes or engaged in violent activities in our society. We might say without hesitation, "What is the government doing without making strict laws to prevent such crimes or violence by minors? Nowadays children have unlimited access to violent video games through various sources including the Internet or mobile phones downloading and even purchasing violent video games with adult identifications. We need a law to protect our children from violent video games." In the U.S. incidents like the classmates-massacring Columbine high school student and the police officer-killing 18 year old boy, who had been playing Grand Theft Auto, one of the top violent video games⁶⁷⁾ are enough to provoke the necessity of

67) CBS News, "The Video Game Defense," November 13, 2006.

<http://www.cbsnews.com/video/watch/?id=678389n>, last visited on Oct. 29, 2011. The

legislation to restrict children's access to violent video games, but such attempts have failed because of the constitutionality issue.⁶⁸⁾

Many failed attempts to regulate violent video games in the U.S. are coupled with market failures to prevent children from harmful substances like alcohol, tobacco as well as violent video games since some minors have access to such substances despite governmental or other voluntary regulative schemes.⁶⁹⁾ It implies that such violent video games will be disseminated in the global markets including Korea through importation or on the Internet. Korea will not be free from the 'game globalization' business strategy by the game industry.

In Korea, debates on 'harmful' video games to minors are not just current problems.⁷⁰⁾ Korea also has been placed in the same dilemma between the promotion of video game industry and the protection of children from violent video games, as well as problems of children's addiction to playing video games. Consequently, it is worth reviewing the recent U.S. experiences on violent video games regulations, although they are failed and frustrating, in order to learn the necessity to look for other effective alternatives than meaningless legislation. It must not be easy to find alternatives to eradicate the negative impact of violent video games to minors and to block minors' access to violent video games.

A research paper argued that even the strictest regulation on violent video game laws like Germany's Protection of Young Persons Act enacted in 2002⁷¹⁾ failed to prevent from the horrible incident like the Winnenden school shooting in 2009.⁷²⁾ Such points can be meaningless since it is aware that

video game, Grand Theft Auto, is a series from 1990s, and is killing police officers.

68) Byrd, *op. cit.*, pp. 405-410; Wood, *op. cit.*, pp. 110-115; Morse, *op. cit.*, 179-203.

69) 131 S.Ct 2729, 2741. fn 9.

70) <http://www.nocutnews.co.kr/show.asp?idx=1630062>, last visited on Nov. 1, 2011.

71) Protection of Young Persons Act (Federal Law published on July 23, 2002) [Federal <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/juSchGenglisich,property=pdf,bereich=rwb=true.pdf>, last visited on Nov. 11, 2011.

72) Wood, *op. cit.*, pp. 120-121. The school shooting killing 15 people occurred on

even strictest penalty like death penalty never eradicate crimes like murder. However, the same paper noted, on the one hand, that a stricter gun control law to prevent minors' access to weapons can serve to reduce violence. Likewise, a law on violent video games may protect children from being exposed to violent video games at early ages because of the failure of the voluntary rating system and market failure.⁷³⁾

If there is no law to limit the minors' access to violent video games in the market or on the Internet, the video game industry will not take any cautious action for children. Now, with a simple search on "violent video games" on the Internet, we can check what kind of "violent" video games are available in the market. For example, anybody can easily get an access to an advertisement or introductory video clips showing the "Top Violent Video Games" on the website of Youtube without any age restriction.⁷⁴⁾ Interestingly, while one of the video clips introduces "Naughty Bear" ranking the third in its violent content level, the ESRB rates Naughty Bear as "Teen" (13 or older).⁷⁵⁾ Unlike the case of violent video games at the Youtube site, movie clips rated NC-17 (No one 17 and under admitted) cannot be accessible without age verification asking the user's age to have an access to the restricted materials.⁷⁶⁾ It may prove that the video game industry or the ESRB contribute more children's access to violent video games rather than guide them to choose appropriate games for them. It doubts whether the voluntary restrictions on violent video games will protect

March 11, 2009, by a quiet, ordinary 17 years old boy who spent a lot of time in his room, much of it spent in front of his computer, playing also violent video games.<http://www.spiegel.de/international/germany/0,1518,612940,00.html>, last visited on Nov. 15, 2011.

73) Wood, *op. cit.*, pp. 120-121.

74) Some horrific violent video games with M-rated including Mad World, Dead Space and Mortal Kombat are introduced, showing their content with bloody graphics. <http://www.youtube.com/watch?v=0sTOowJPv8k>. last visited on November 19, 2011.

75) Check the video game ratings at the ESRB web site. http://www.esrb.org/ratings/ratings_guide.jsp.

76) After several trials to compare the accessibility to violent video games and the restricted movies, it is found that Youtube does not allow the access of video clips for NC-17 listed movies without adult verifications.

children. Leaving system failure caused by violent video games just to parental controls or their education of children will not help to protect children, either.

Key words : violent video games, game ratings, content-based regulations, strict scrutiny, First Amendment, free speech, U.S. Constitution

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[국문초록]

표현의 자유, 아동 보다는 폭력적인 비디오 게임을 위한 것은 아닌가?

- 캘리포니아 주의 폭력적인 비디오게임 규제법에 대한
미국 연방대법원의 위헌판결 평석

최영란

원광대학교 법학전문대학원 부교수

2005년 캘리포니아 주 정부는 17세 이하의 미성년자에게 폭력적인 비디오 게임 판매 및 임대를 규제하는 법을 제정하여 시행하려 했으나, 비디오 게임업체가 동법에 대해 위헌소송을 제기하여, 연방지방법원과 항소법원에서 모두 위헌판결을 받게 되었다. 이에 캘리포니아 정부는 연방대법원에 상소하였으나, 2011년 6월 대법원은 동법이 표현의 자유를 침해하여 무효라는 위헌판결을 내렸다.

대법원은 캘리포니아 주법이 단순히 폭력적인 비디오 게임의 '판매' 등을 규제하는 법이 아니라, 동법에서 '폭력'에 대해 정의를 내리고, 그 폭력을 "묘사(depiction)"하는 내용을 규제하는 법으로 보았다. '폭력에 대한 묘사'는 표현의 자유에 의해 보호 받기 때문에, 결국 캘리포니아의 폭력적인 비디오게임 규제법은 '표현'의 자유를 침해하여, 위헌이라고 판결했다.

연방이나 주 정부에서 표현, 즉 표현의 '내용(content)'을 규제하기 위해서는 해당 정부는 왜 정부의 법이 표현의 '내용'을 규제하는데 꼭 필요한 지, 즉 정부가 "compelling interest(강력한 이해관계)"가 있음을 입증해야 한다. 대법원은 미성년자를 위해 비디오 게임의 폭력성 정도에 따라 등급을 달리 정하는 자율적인 비디오 게임 등급제도(Entertainment Software Board Rating)가 있음에도 왜 캘리포니아 주가 별도로 폭력적인 비디오 게임을 규제하는 법을 만드는지에 대한 설득력 있는 증거를 제시하지 못했다고 하였다.

미성년자에게 위대한, 폭력적인 비디오 게임으로부터 미성년자의 접근성을 제한하여, 아동을 부적합한 문화콘텐츠로부터 보호하고, 폭력적인 비디오 게임에 노출 또는 중독되는 아동의 폭력적인 성격 형성이나, 범죄행위를 사전에 예방할 필요성이 대두되고 있는 현 시점에서, 비디오 게임 산업 진흥을 위한 문화 콘텐츠 또는 표현의 자유를 침해하지 않으면서, 폭력 비디오 게임으로부터 아동을 보호할 수 있는 지에 대해, 이 판결은 답을 주지 못했다. 그러나 적어도 표현의 자유가 왜 보호되어야 하는지에 대한 명백한 답을 주는 반면, 미성년자를 폭력적인 비디오 게임으로부터 보호할 필요성이 있음을 깨우쳐 주는 판결로서 의미가 있다고 본다.

주제어 : 폭력적인 비디오 게임, 게임 등급, 표현의 자유, 미국 헌법, 미성년자 보호