Science and Technology Law Review

Volume 13 | Number 2 Article 7

December 2017

Video Software Dealers Association v. Schwarzenegger: Defining the Constitutional Perimeter around State Regulation of Violent Video Games

David S. Dubinsky

Video Software Dealers Association v. Schwarzenegger: Defining the Constitutional Perimeter around State Regulation of Violent Video Games

*David S. Dubinsky**

I. INTRODUCTION

In modern day society, the stigma attached to controversial video games—those involving blood, gore, profanity, and sexual themes—extends far beyond the typical social setting. It has pervaded and percolated down into the jurisprudence of our nation as society wrestles with how best to balance freedom, exploration, and entertainment with healthy physical and psychological development in children. This case originates from the California State Legislature's attempt to do just that. The issue is whether §§ 1746-1746.5 of the recently-enacted California Civil Code ("the Act"), "which impose restrictions and a labeling requirement on the sale or rental of 'violent video games' to minors, . . . violate rights guaranteed by the First and Fourteenth Amendments."[1]

The Ninth Circuit Court of Appeals held that the Act was subject to strict scrutiny "as a presumptively-invalid content-based restriction on speech."[2] The court found that the Act failed strict scrutiny because the State did not demonstrate a compelling interest, did not narrowly tailor the Act to further its asserted interests, and did not utilize the least-restrictive means available to advance such interests.[3] The court premised its decision primarily on the rather dubious social-science evidence supplied by the State to support the alleged causal connection between minors playing violent video games and their subsequent violent or antisocial behavior.[4] A cursory survey of similar cases reveals that the fatal flaw in governmental attempts to regulate the availability of violent video games to minors is the flimsy social science it relies on to establish a causal link between minors playing such games and subsequent violent or antisocial tendencies.[5]

---

* David S. Dubinsky is a 2011 candidate for a Doctorate of Jurisprudence from Southern Methodist University Dedman School of Law. He would like to thank his many friends for their inspiration and influence in his growth as a writer, jurist, and person. He would also like to thank his mother, father, and brother for their support, as well as Jesus Christ, through Whom all things are possible.

1. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 952-53 (9th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3627 (U.S. April 26, 2010) (No. 08-1448).

2. *Id.* at 953.

3. *Id.*

4. *Id.* at 964.

5. *See* Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 958-59 (8th Cir. 2003); *see also* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 578-79 (7th Cir. 2001); *see also* Entm't Software Ass'n v.

II. FACT SITUATION

Plaintiffs Video Software Dealers Association and Entertainment Software Association (collectively "Video Software") "are associations of companies that create, publish, distribute, and sell or rent video games."[6] Defendants consist of various California state and local officials (collectively "the State"), all acting in their official capacities, including Governor Arnold Schwarzenegger and Attorney General Edmund G. Brown, Jr.[7] On October 7, 2005, Governor Schwarzenegger signed into law Assembly Bill 1179, codified as California Civil Code §§ 1746-1746.5.[8] The Act states that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor."[9] Violators are subject to a civil penalty of up to $1,000.[10] Prior to the Act going into effect, Video Software filed an action to contest its constitutionality under the First and Fourteenth Amendments.[11] Section 1746 of the Act defines a "violent video game" as follows:

> (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:
>
> Comes within all of the following descriptions:
>
> (i) A reasonable person, considering the game as a whole, would find that it 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.[12]

Blagojevich, 404 F. Supp. 2d 1051, 1063 (N.D. Ill. 2005); *see also* Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978, 982 (E.D. Mich. 2005); *see also* Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1188-89 (W.D. Wash. 2004).

6. *Schwarzenegger*, 556 F.3d at 952.
7. *Id.* at 952.
8. *Id.* at 953.
9. Cal. Civ. Code § 1746.1(a) (West 2006).
10. *Id.* at § 1746.3.
11. *Schwarzenegger*, 556 F.3d at 955.
12. Cal. Civ. Code § 1746(d)(1) (West 2006).

In addition, the Act imposes a labeling requirement on all violent video games in § 1746.2:

> Each violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white "18" outlined in black. The "18" shall have dimensions of no less than 2 inches by 2 inches. The "18" shall be displayed on the front face of the video game package.[13]

III. Description of Plaintiff's Claim

Video Software initially filed suit in federal court in the Northern District of California before the Act took effect.[14] Video Software sought declaratory relief on the grounds that the Act violated 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the U.S. Constitution.[15] It argued: (1) the Act was a facially invalid restriction on freedom of expression due to its regulation of content and a violation of equal protection;[16] and (2) that through the Act's labeling requirement, California unconstitutionally imposed its own subjective opinion regarding content of certain video games sold within the state.[17]

IV. Procedural and Substantive History

The court, granted Video Software's motion for a preliminary injunction after weighing the hardships. The court balanced the Act's unconstitutional abridgement of free expression against the potential injury to the California State Legislature by striking down the Act as unconstitutional.[18] It concluded that Video Software, its members, and minors throughout California could potentially suffer irreparable harm if the court failed to preliminarily enjoin the Act. The court determined that such harm would greatly outweigh the potential irreparable harm to the legislature by preliminarily enjoining the Act.[19] The court recognized that Video Software had shown a strong likelihood of success on the merits,[20] and the implementation of the regulatory scheme imposed by the Act would be costly and burdensome, with potential to cause irreparable harm to Video Software.[21] Granting a preliminary in-

13. *Id.* at § 1746.2.

14. *See* Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1037-38 (N.D. Cal. 2005), *aff'd*, 556 F.3d 950 (9th Cir. 2009).

15. *Schwarzenegger*, 556 F.3d at 955.

16. *Id.*

17. *Id.* at 965.

18. *Schwarzenegger*, 401 F. Supp. 2d at 1047-48.

19. *Id.* at 1047-48.

20. *Id.* at 1043.

21. *Id.* at 1047.

junction would merely delay the State's enforcement of the Act for a short time, pending appellate review of its constitutionality.[22] Finding that the balance of hardships "tips sharply in [Video Software's] favor," the district court granted Video Software's motion for a preliminary injunction.[23] In further support of its decision to grant the preliminary injunction, the district court also found that Video Software had "shown they are likely to succeed on the merits of their claim that, or at least have raised serious questions about whether the Act's labeling provision violates the First Amendment."[24] Subsequently, both parties filed cross-motions for summary judgment and the district court granted Video Software's motion, denied the State's cross-motion, and permanently enjoined enforcement of the Act.[25] The State then filed a timely appeal.[26]

V. NINTH CIRCUIT'S HOLDING AND OVERVIEW OF RATIONALE

The court held: (1) the Act was subject to strict scrutiny as a presumptively-invalid content-based restriction on speech; (2) the Act violates the First Amendment because the State failed to demonstrate a compelling interest, failed to narrowly tailor the Act to further its asserted interests, and failed to utilize the least-restrictive means necessary to advance such interests;[27] and (3) the Act's labeling requirement, requiring that the front of the packaging of a violent video game contain a four-square-inch label reading "18," was unconstitutional as government-compelled speech.[28] The language of the opinion, however, implies that this result was necessitated by the court's earlier holding that the Act violates the First Amendment.[29] If the court had upheld the Act, the justifications proffered by the State for the labeling requirement may very well have been sufficient to fall within an exception for commercial speech that "dissipate[s] the possibility of consumer confusion or deception."[30]

22. *Id.* at 1047-48.

23. *Id.* at 1048.

24. *Id.* at 1047.

25. *See* Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188, 2007 WL 2261546 at 1 (N.D. Cal. Aug. 6, 2007).

26. *Schwarzenegger*, 556 F.3d at 956.

27. *Id.* at 953.

28. *Id.* at 967.

29. *See id.* at 966.

30. *Id.*

VI. COURT'S RATIONALE

The Ninth Circuit began its analysis with by acknowledging that the proper standard of review for a grant of summary judgment is *de novo*.[31] On appeal, the State conceded that the alternative definition of "violent video games," as delineated in § 1746(d)(1)(B), is unconstitutionally broad.[32] This is because the definition fails to provide an exception for material that has some redeeming value to minors.[33] As a result, Video Software argued that the Act should be invalidated on this basis alone.[34] However, § 1746.5 provides that "the provisions of this title are severable. If any provision of this title or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application."[35] Thus, the State argued that the Act's severability clause rendered it immune as a whole from a finding of unconstitutionality with regards to § 1746(d)(1)(B).[36] The court held that the Act is not wholly invalid as a result of the State's concession because, under California law, there is a general presumption in favor of a statute's constitutionality.[37] Additionally, the court held that § 1746(d)(1)(B) is "grammatically, functionally, and volitionally separable" because it can be removed as a whole without affecting the wording of any of the measure's other provisions, and because it was not of critical importance to the passage of the Act.[38] In fact, the court notes that the only purpose the legislature contemplated in including the alternative definition of a "violent video game" in the Act was to avoid the constitutional pitfalls identified in *Video Software Dealers Association v. Maleng*,[39] where a similar legislative enactment was invalidated as unconstitutionally vague.[40]

The State also conceded on appeal that (1) video games are a form of expression protected by the First Amendment, and (2) the Act seeks to restrict expression in video games based on their content.[41] Nevertheless, the State argued that because the Act targets only minors, the court should apply

31. *Id.* at 956.

32. *Id.* at 954, n.5.

33. *Schwarzenegger*, 556 F.3d at 954.

34. *Id.* at 956.

35. Cal. Civ. Code § 1746.5 (2010).

36. *Schwarzenegger*, 556 F.3d at 956.

37. *Id.*

38. *Id.* at 956.

39. *Id.* at 957.

40. *Maleng*, 325 F. Supp. 2d at 1191.

41. *Schwarzenegger*, 556 F.3d at 958, (noting that, while the Supreme Court has not expressly addressed whether video games contain expressive content protected under the First Amendment, story-laden video games are similar to mov-

the "variable obscenity" test of *Ginsberg v. New York*[42] instead of strict scrutiny.[43] *Ginsberg* held that a state could prohibit the sale of sexually-explicit material to minors, though it would not be able to do the same to adults, as sexual material is deemed "obscene" to minors but not to adults.[44] The State argued that the court should extend this doctrine to violent materials.[45] However, the court distinguished *Ginsberg* as a case invoking the United States Supreme Court's First Amendment obscenity jurisprudence, which involves unprotected sex-based expression, as opposed to violence-based expression, which is generally afforded broad protection under the First Amendment.[46] In addition, other circuits have refused to classify violent materials with sexually-explicit materials as "obscene" within the context of the First Amendment.[47] Consequently, the court settled on strict scrutiny as the appropriate standard of review to apply to the Act.[48]

The court then held the Act unconstitutional under strict scrutiny as an impermissible content-based restriction on speech. In order to survive strict scrutiny, the disputed state action must be narrowly tailored to serve a compelling governmental interest.[49] Additionally, the government must use the least restrictive alternative available to serve its purpose.[50] Here, the California State Legislature offered two purportedly compelling interests in passing the Act: (1) "preventing violent, aggressive, and antisocial behavior" and (2) "preventing psychological or neurological harm to minors who play violent video games."[51] With respect to the first interest, the court stated that the government may not prohibit speech simply "because it increases the chance an unlawful act may be committed at some indefinite future time."[52]

Regarding the second interest, the Ninth Circuit conceded that the "Supreme Court has recognized a compelling interest in protecting the physical

---

ies, which the Court has long determined are entitled to First Amendment protection).

42. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

43. *Schwarzenegger*, 556 F.3d at 957-58.

44. *Id.* at 959- 60.

45. *Id.* at 960

46. *Id.* (citing *Ginsberg*, 390 U.S. at 640).

47. *See* James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002); *see also* Eclipse Enter., Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997); *see also* Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992).

48. *Schwarzenegger*, 556 F.3d at 960.

49. *Id.* at 961.

50. *Id.*

51. *Id.*

52. *Id.* at 961 (citing Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)).

and psychological well-being of minors."[53] However, in order for the government's action to be narrowly tailored to serve this interest, it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[54] The court stated that deference to the California State Legislature is not appropriate here because it failed to draw reasonable inferences based on substantial evidence.[55] The court enumerated the following considerations that tend to expose the tenuous relationship between violent video games and actual psychological harm: (1) the relative scarcity of scholarly literature on the subject; (2) many of the existing studies on the subject are methodologically flawed; (3) many support the opposite inference,[56] finding more aggression in the eighteen and older range than in minors; (4) the studies relied upon by the State relate to the aggression of players against others, which is not the interest purported by the State in the case at bar; and (5) there has been no persuasive causal link established between violent video games and aggressive behavior—in fact, one of the studies relied upon by the State expressly disclaims that "causality was not studied."[57] Accordingly, the court determined that the State failed to meet its burden of demonstrating a compelling interest.[58]

The court also held that the State failed to demonstrate that the Act is the least restrictive means available to prevent psychological or neurological harm to minors who play violent video games.[59] It identified two less-restrictive means that have already been implemented, in California and elsewhere, to deal with the concerns that arise from the effect of violent video games on today's youth: (1) the Entertainment Software Rating Board (ESRB) rating system, which assigns games an advisory rating reflecting its determination of the appropriate age group to play the games; and (2) parental controls on modern gaming systems which allow parents to restrict their

53. *Id.*

54. *Id.* at 962 (quoting Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality op.)).

55. *Id.*

56. *See* Jim Sterling, Buddhist Monk Recommends Games for Treating Aggression, Sept. 21, 2009, http://www.destructoid.com/buddhist-monk-recommends-games-for-treating-aggression-149304.phtml (Trinley Dorje, holding the title of Karmapa Lama, the only Buddhist leader recognized by China, India, and Tibet, is quoted as saying "the aggression that comes out in the video game satiates whatever desire I might have to express that feeling. For me, that's very skillful because when I do that I don't have to go and hit anyone over the head.").

57. *Schwarzenegger*, 556 F.3d at 963-64.

58. *Id.* at 964.

59. *Id.* at 965.

children's access to games they deem inappropriate.[60] The Ninth Circuit took issue with the State's obfuscation of the proper analysis by arguing why it should be permitted to use the "most effective" means instead of the least restrictive.[61]

Moving on to the Act's labeling requirement, the court noted that, in general, "freedom of speech prohibits the government from telling people what they must say."[62] However, it also noted that less constitutional protection is afforded to commercial speech.[63] State compulsion of commercial speech is constitutionally permissible if the required inclusion consists of "purely factual and uncontroversial information."[64] The court stated that, normally, it would inquire into whether the Act's labeling requirement was entitled to full First Amendment protection because it was "inextricably intertwined" with otherwise fully-protected speech,[65] or only entitled to the lesser amount of First Amendment protection as separable commercial speech.[66] However, the court determined that, due to its earlier holding that the Act is unconstitutional, it need not address this distinction because the labeling requirement fails even under the broader "factual information and deception prevention" standard elucidated in *Zauderer*.[67] Because the Act is unconstitutional—and the State is consequently powerless to prosecute a video game retailer for selling or renting violent video games to minors—any label informing consumers that they must be eighteen or older to purchase the game would be erroneous (i.e., not factual).[68] Furthermore, the court held that the labeling requirement fails the rational relationship test established in *Zauderer*, which asks if the "disclosure requirements are reasonably related to the State's interest in preventing deception of customers."[69] The State argued that the labeling requirement achieved this goal because consumers would otherwise be deceived by the ESRB age rating system already implemented for video games.[70] However, the court determined that, because the Act is invalid and cannot mandate an age threshold for the purchase or rental

60. *Id.*

61. *Id.*

62. *Id.* at 966 (quoting Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 61 (2006)).

63. *Id.*

64. *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).

65. *Id.* (quoting Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795-96 (1988)).

66. *Id.*

67. *Id.*

68. *Id.* at 966-67.

69. *Id.*at 967 (quoting *Zauderer*, 471 U.S. at 651).

70. *See id.*

of violent video games, the labeling requirement would actually be conveying false information (buying the game as a minor is unlawful), and "the State has no legitimate reason to force retailers to affix false information on their products."[71]

VII. Critique of Court's Approach

Long gone are the days when video-game violence amounted to no more than a yellow pie with a slice cut out of it gobbling up white pellets and the occasional blue ghost. Advancements in technology are continually leading to improved graphics, physics, in-game immersion, and above all, realism. As a result, video games better portray violence, cruelty, depravity, and torture. But this same technological advancement enables games to tell a better story, evoke more powerful emotions from players, propagate fiercer competition, and pursue other socially-healthy endeavors. Video games are art, just as deserving of First Amendment protection as other artistic media, and, likewise, have the potential to be manipulated in any manner the artist deems fit.[72]

These factors, in conjunction with the growing popularity of video games, have led to concerns among parents and overzealous legislators about the effect such games are having on today's youth. However, a blanket proscription on the sale and rental of violent video games is not the answer. A state legislature certainly has the authority, pursuant to its police powers, to enact legislation for the benefit and welfare of its minors. Nevertheless, such legislation must comport with constitutional standards. Thus, in order for a state's regulation of the sale or rental of violent video games to minors to survive strict scrutiny in the future, the causal relationship between playing violent video games and mental illness, antisocial behavior, or actual violence in minors must be established to the satisfaction of the courts. This will presumably transform a blanket prohibition on the sale and rental of violent video games to minors into a narrowly-tailored means of preventing aggressive behavior and psychological harm in minors, which has already been recognized as a compelling governmental interest.[73] But until this happens, and I surmise that it never will, legislatures need to realize that the First Amendment does not permit the government to impose its own notions of what is too violent for this nation's youth without a compelling reason. And even then, the district court in *Schwarzenegger* expressed doubt that "even if a causal link exists between violent video games and violent behavior, the

71. *Id.*

72. *See St. Louis County*, 329 F.3d at 957 (holding violent video games to be a form of protected speech under the First Amendment by analogizing them to other storytelling mediums).

73. *Schwarzenegger*, 556 F.3d at 961.

First Amendment allows a state to restrict access to violent video games, even for those under eighteen years of age."[74]

In addition, this case is an example of judicial temperance as a check on otherwise unrestrained legislative activism. Contrary to established constitutional principles, the California State Legislature nevertheless enacted the Act as highly visible and publicized patronage to its constituents.[75] While it is ordinarily not the province of the courts to second-guess legislative determinations of how best to promote the health, safety, and welfare of its citizens, such deference is not warranted when the legislative measure seeks to address a phantom harm. Had the California State Legislature chosen instead to criminalize minors attending "violent" movies or purchasing "violent" music, it would have been just as obliged to present compelling evidence to the court establishing the causal connection between these mediums and psychological harm to minors. The only distinction that makes the Act challenged in *Schwarzenegger* less preposterous in the eyes of society is the stigma attached to video games as a storytelling medium.

As far as the impact of the court's holding on First Amendment jurisprudence, it will not be regarded as revolutionary. The decision neither makes new law nor carves out new exceptions from existing law; it merely applies settled law to facts nearly identical to those dealt with by other courts. Indeed, this case should go down in the annals of the Federal Reporter as a prime example of the proper application of the United States Supreme Court's First Amendment jurisprudence. Such jurisprudence has consistently limited the content that falls within the First Amendment analysis of "obscenity" to sexual material.[76] Likewise, it has just as consistently declined to extend obscenity to include exclusively violent material.[77] Thus, the First Amendment mandates the application of strict scrutiny to impermissible content-based restrictions on speech.[78] The Ninth Circuit applied these well-established principles to the Act and correctly concluded that the Act cannot stand when evaluated against strict scrutiny.

VIII. CONCLUSION

In summary, the United States Court of Appeals for the Ninth Circuit's holding in *Schwarzenegger* is indicative of the proper judicial temperament

74. *Schwarzenegger*, 401 F. Supp. 2d at 1046.

75. *See* William Finn Bennett, *Bill Would Restrict Children's Access to Violent Video Games*, N. COUNTY TIMES, Oct. 4, 2005, http://www.nctimes.com/news/local/article_32aecc18-4455-52b7-8c03-174c10eca235.html.

76. *Schwarzenegger*, 556 F.3d at 959.

77. *See* Eclipse Enter., Inc. v. Gulotta, 134 F.3d 63,71 (2d Cir. 1997)71; *see also* Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688 (8th Cir. 1992).

78. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.").

with regard to legislative enactments rooted in dubious social science. Under this nation's current First Amendment jurisprudence, any governmental attempt to regulate the sale or rental of violent video games will be met with strict scrutiny as an impermissible content-based restriction on speech. Thus, passing such an enactment is always going to be a risky endeavor. Nevertheless, given the resentment toward video games arising from parents and other groups—which is largely a product of ignorance and lack of experience with video games—I predict such legislative measures will continue to be popularly perceived as politically savvy. However, as the Ninth Circuit implicitly recognizes in *Schwarzenegger*, the decision on what is appropriate entertainment for minors rests most properly with the parents. After all, they certainly did not elect their state legislators to raise their kids for them.