



## LESSON 20: Supreme Court and Violent Video Games

**LESSON DESCRIPTION:** Students will become members of the Supreme Court that has agreed to take the case, *Schwarzenegger v. Entertainment Merchants Association* and rule on: (1) Whether the First Amendment permits any limits on offensive content in violent video games sold to minors; and (2) whether a state regulation for displaying offensive, harmful images to children is invalid if it fails to satisfy the exacting “strict scrutiny” standard of review. California along with a number of other states had passed laws making it illegal to sell Violent Video Games to children. California's law, passed in 2005, prohibited the sale or rental of violent games to anyone younger than 18. It defined such a game as one that includes "killing, maiming, dismembering or sexually assaulting an image of a human being" in a way that a reasonable person would find appeals to a "deviant or morbid interest," is patently offensive, and lacks "serious literary, artistic, political, or scientific value for minors."

**FOCUS QUESTIONS:** What are the primary jobs of the Supreme Court. What role does it play in the balance of power? Which has the most power: the executive branch, the legislative branch, or the judicial branch? How does the Supreme Court impact our day to day lives?

**OBJECTIVES:** Students will:

- analyze current issues related to media by reviewing the Supreme Court Case California vs. the Entertainment Industry.
- identify examples of how our Constitution’s “Checks and Balances” are at work in this bill.
- discuss the implications of the Supreme Court Decision.
- evaluate the level of evidence provided by the two written briefs
- evaluate the role of media consolidation

### Core State Standards

**CCSS.ELA-Literacy.SL.9-12.1** Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 9-12 topics, texts, and issues, building on others' ideas and expressing their own persuasively.

**CCSS.ELA-Literacy.WHST.9-10.4** Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.

### LENGTH OF LESSON

Two lessons lasting 50 minutes.

### MATERIALS NEEDED

- Diagram of the United States Federal Courts
- Summary of the Supreme Court Case
- HANDOUT 1: The Supreme Court Decision
- HANDOUT 2: Write an Editorial

## PROCEDURES

### **Activity 20.1: Review the three branches of our government and how they provide checks and balances.**

1. Have students explain to their partner the three branches of our government and how they provide checks and balances. Emphasize the role of the Judicial branch.
2. Review the Diagram of the United States Federal Courts and the different levels of the Federal Courts and discuss the differences.

### **Activity 20.2: Students will become US Supreme Court Justices and look at a case that went before the Supreme Court and take a position.**

1. **Tell Students:** *We're now going to see how the Supreme Court functions today by looking at the Schwarzenegger v. Entertainment Merchants Association case. I'm going to read a summary of the two sides represented in this case. Take notes and ask questions.*
2. Read the summary of the *Schwarzenegger v. Entertainment Merchants Association* case to the students while they take notes. Solicit group discussion as they work on the activity. Ask students to evaluate the level of evidence.

### **Activity 20.3: Students will find out how the Supreme Court ruled and then take a position.**

1. Distribute **HANDOUT 1: The Supreme Court Decision** Have the students read the handout and individually indicate on how they would vote If they were on the court and the case were tried today.

### **Activity 20.4: Students will write an editorial in response to the statement by the Entertainment Software Association after the Sandy Hook Elementary School massacre.**

1. Distribute **Handout 2: Write an Editorial.** Ask for student volunteers to read the handout. Solicit group discussion as they work on the activity.
2. Students write an editorial in response to the statement by the Entertainment Software Association after the Sandy Hook Elementary School massacre:

*"The Entertainment Software Association, and the entire industry it represents, mourns the tragedy at Sandy Hook Elementary School. Our heartfelt prayers and condolences go out to the families who lost loved ones, and to the entire community of Newtown. The search for meaningful solutions must consider the broad range of actual factors that may have contributed to this tragedy. Any such study needs to include the years of extensive research that has shown no connection between entertainment and real-life violence."*

# The United States Federal Courts

**SUPREME COURT**

**UNITED STATES SUPREME COURT**

**APPELLATE COURTS**

**U.S. Courts of Appeals**

12 Regional Circuit Courts of Appeals  
1 U.S. Court of Appeals for the Federal Circuit

**TRIAL COURTS**

**U.S. District Courts**

94 judicial districts  
U.S. Bankruptcy Courts

**U.S. Court of International Trade**

**U.S. Court of Federal Claims**

**FEDERAL COURTS AND OTHER ENTITIES OUTSIDE THE JUDICIAL BRANCH**

**Military Courts (Trial and Appellate)**

**Court of Veterans Appeals**

**U.S. Tax Court**

**Federal administrative agencies and boards**

## Summary of the Supreme Court case

### ***Schwarzenegger v. Entertainment Merchants Association***

In 2010 the Supreme Court agreed to take the case, *Schwarzenegger v. Entertainment Merchants Association* and rule on: (1) Whether the First Amendment permit any limits on offensive content in violent video games sold to minors; and (2) whether a state regulation for displaying offensive, harmful images to children is invalid if it fails to satisfy the exacting "strict scrutiny" standard of review. California along with a number of other states had passed laws making it illegal to sell violent video games to children. California's law, passed in 2005, prohibited the sale or rental of violent games to anyone younger than 18. It defined a game as one that includes "killing, maiming, dismembering or sexually assaulting an image of a human being" in a way that a reasonable person would find appeals to a "deviant or morbid interest," is patently offensive, and lacks "serious literary, artistic, political, or scientific value for minors."

**a. Gruel Written Brief- (Representing State of California)** A written brief was prepared by 13 scientists who had done extensive studies on video game violence. The brief was signed by 102 additional experts in the field of aggression and media. The 36 page brief provides a summary of the research. A number of key findings were identified:

- A minor's exposure to the avalanche of violent video games is staggering. More than 90% of all U.S. children and adolescents play video games. The National Youth Violence Prevention Resource Center (2004) has stated that a 2001 review of the 70 top-selling video games found 49% contained serious violence. ...There is no doubt, violent video games are among the most popular entertainment products for teens and adolescents, especially for boys.
- Playing violent video games by children increases their aggressive thoughts and behavior; increases antisocial behavior and delinquency; engenders poor school performance; and desensitizes the game player to violence.
- Regardless of how many other risk factors are present in a youth's life...playing a lot of violent games is likely to increase the frequency and the seriousness of his or her physical aggression, both in the short term and over time as the youth grows up. Simply stated, adolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school.
- Extended play has been observed to depress activity in the frontal cortex of the brain which controls executive thought and function, produces intentionality and the ability to plan sequences of action, and is the seat of self-reflection, discipline and self-control.
- New data shows that the intensity of interactive video games may be habituating and that 2 to 3 hour sessions of intense interactions with video games raise adrenaline levels in children and produces extended physiological arousal. In the medical community concern has been raised at the possible harmful effects on still developing bodies and brains.
- These studies demonstrate that playing ultra-violent games can cause automatic aggressiveness, increase aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance and reduced activity in the frontal lobes of the brain.
- The relationship between media violence and real life aggression is nearly as strong as the impact of cigarette smoking and lung cancer: not everyone who smokes will get lung cancer, and not everyone who views media violence will become aggressive themselves. However, the connection is significant.

**The Mallet Brief, representing the Entertainment Industry** There was another brief written for the side that represented the entertainment industry but it was unclear who the authors were. That brief makes the claim that there is little or no evidence linking video game violence to aggression. The Mallet Brief, has 82 signatures. It includes the following statement:

“California’s ban on the sale and rental of violent video games to minors is based on profoundly flawed research and disregards recent empirical evidence contradicting the harm to minors that California asserts arises from the playing of violent video games (or any other harm).”

California asserts that its law is necessary to “prevent psychological or neurological harm to minors who play violent video games.” Under strict scrutiny, California must both provide “substantial evidence” that the video games it regulates cause psychological or neurological harm to minors who play them, and demonstrate that the restriction will “alleviate these harms in a direct and material way.” *Turner Broadcasting Sys., Inc. v FCC*, 512 U.S. 622, 664, 666 (1994). See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

California has done neither. Indeed, California does not offer any reliable evidence, let alone substantial evidence, that playing violent video games causes psychological or neurological harm to minors. California confesses it cannot prove causation, but points to studies that it says show a “correlation” between the two.

Nor do they address California’s threshold argument that strict scrutiny is inapplicable on the grounds that, when sold to minors, violent video games are not protected by the First Amendment at all. *Id.* at 13.3 regulating video games sales and rentals to minors to prevent such conduct, and therefore these studies are waived because the argument was waived. The studies are of no help to California in any event because they document neither a causal connection nor a correlation between the playing of violent video games and violent, aggressive, or antisocial behavior. Indeed, whether attempting to link violent video games with psychological and neurological harm or with violent, aggressive, and antisocial behavior, all of the studies that California and Senator Yee cite suffer from inherent and fundamental methodological flaws.”

Both briefs include information that contradicts each other. The Gruel brief states video game violence can cause harm to children and adolescents including an increase in aggression. The Mallet brief states that video game violence do no harm to children and adolescents.

### **Which side has the strongest evidence based on background of supporters?**

An important question is which side has the supporters with the strongest background? Anderson and Bushman published a study that looked at the background of the individuals who authored and signed the two briefs. (*Weighing the Evidence: Comparison of Two Amicus Briefs Submitted to U.S. Supreme Court*, Bushman and Anderson, 2010).

They conducted a thorough search for journal articles, books, and book chapters and essays. They also looked at original research on aggression or violence. They found significant differences between the two groups. The Gruel authors and signees of the Gruel Brief have much more experience on media violence than the Mallett (Entertainment Industry) brief signees. “The average number of media violence articles is over 22 times greater for the Gruel authors and over 5 times greater for the Gruel signers than for the Mallett (Entertainment Industry) signers. Similar differences are found for media effects articles. When it comes to media effects articles published in top-tier journals, the differences are largest (i.e., over 338 times greater for Gruel authors and over 48 times greater for Gruel signers than for Mallett

signers).” The authors of the Mallet brief claim that they have extensive experience with the research on media violence. Anderson and Bushman disagree based on a thorough examination of the credential of the two groups. Only 13% of the Mallet Brief (Entertainment Industry) signees have published at least one article on media violence. In contrast, 100% of the authors and 37% of the signees of the appendix in the Gruel brief have published at least one article on media.

In their summary, Anderson and Bushman urge the Supreme Court to use this information on the different credentials as they review the evidence. “the appendix in the Gruel brief was written by and endorsed by many true aggression and violence experts, and by media violence research experts. The authors and signees of this appendix have concluded that violent video games can harm children and adolescents. In contrast, the signees of the Mallett brief claim that violent video games are not harmful. However, the Mallett brief signees have very little expertise conducting general research on aggression or violence, or in conducting more specific research on violent media.

Most research journals have a statement at the bottom of an article about whether the author had any possible monetary gain from their research. That is a good question. Lawrence Kutner was cited seven times in the Mallet Brief representing the Entertainment Industry. He is a psychology professor at Harvard. In 2008 Lawrence Kutner wrote an article on “The Business of Speaking for Money: First Steps,” *Academic Entrepreneur*.

In the article he states: “Keep in mind that the majority-the vast majority-of paid professional speaking in the United States is corporate training, not keynote addresses or after-dinner speeches. You may find that corporate training is a better match to your skills and interests than other forms of speaking. If that’s the case, you may have an easier time making money.”

His wife, Cheryl Olson, also a psychology professor, has been making videos for parents on *Managing Children’s Video Game Play*. The funding for these videos came from the game company Activision/Blizzard, the world’s second-largest gaming company by revenue after Nintendo. In 2011 their revenue was 4.755 billion. Cheryl Olson was cited 15 times in the Mallet Brief. Activision/Blizzard develops and publishes video games that would be affected by the Supreme Court decision.

## **HANDOUT 1: The Supreme Court Decision**

The Supreme Court on a 7-2 vote, ruled against California's 2005 law covering games sold or rented to those under 18, calling it an unconstitutional violation of free-speech rights. Writing for the majority, Justice Antonin Scalia, said, "Even where the protection of children is the object, the constitutional limits on governmental action apply." Scalia also pointed out the violence in a number of children's fairy tales.

Justice Breyer was one of two judges that dissented. He wrote: California's law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that the industry itself tells us it wants to keep out of the hands of children... This Court upheld the New York statute in *Ginsberg* ... which 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?

### **Could the Court Decision be Reversed?**

Two of the Supreme Court justices, including both a liberal and a conservative judge, voted against the majority and two of the justices indicated they might have voted differently if there were changes in how the case was presented. If the case were tried again with those changes, the Supreme Court decision could be different. The Supreme Court has reversed prior decisions.

### **How Would You Vote If The Case Were Tried Today?**

(1) Whether the First Amendment permit any limits on offensive content in violent video games sold to minors; and (2) whether a state regulation for displaying offensive, harmful images to children is invalid if it fails to satisfy the exacting "strict scrutiny" standard of review. California along with a number of other states had passed laws making it illegal to sell Violent Video Games to children. California's law, passed in 2005, prohibited the sale or rental of violent games to anyone younger than 18. It defined such a game as one that includes "killing, maiming, dismembering or sexually assaulting an image of a human being" in a way that a reasonable person would find appeals to a "deviant or morbid interest," is patently offensive, and lacks "serious literary, artistic, political, or scientific value for minors."

**Does the First Amendment permit any limits on offensive content in violent video games sold to minors?     yes     no**

**Did California fail to satisfy the exacting "strict scrutiny" standard of review?  
 yes     no**

## **HANDOUT 2: Write an Editorial (2 pages)**

After the Sandy Hook Elementary School massacre, the Entertainment Software Association released the following statement:

*“The Entertainment Software Association, and the entire industry it represents, mourns the tragedy at Sandy Hook Elementary School. Our heartfelt prayers and condolences go out to the families who lost loved ones, and to the entire community of Newtown. The search for meaningful solutions must consider the broad range of actual factors that may have contributed to this tragedy. Any such study needs to include the years of extensive research **that has shown no connection between entertainment and real-life violence.**”*

Doug Lowenstein, past President of the Entertainment Software Association, used almost the same statement twelve years earlier in an interview on CNN, after the Columbine tragedy.

*“There is absolutely no evidence, none, that playing a violent video game leads to aggressive behavior.”*

The power of media is huge. Unfortunately, if you say something enough, especially if you have billions of dollars, many people will think it's true.

In 1921 RJ Reynolds spent \$8 million on advertising and began the very successful "I'd Walk a Mile for a Camel" ads. Camel soon captured 45% of the US market. In 1927 - Lucky Strike ads targeted women, urging them to "reach for a Lucky instead of a sweet." Smoking among females tripled and Lucky Strike captured 38% of the market.



In 1938 – A University study reported that smokers do not live as long as nonsmokers. Americans were also noticing that smokers were not as healthy. The Tobacco Industry began using actors dressed as doctors in their ads. Did that help counter any fears about smoking? In 1950 three studies provided the first powerful links between smoking and lung cancer. In 1952 Kent introduced the 'Micronite' filter, which "offers the greatest health protection in cigarette history." It turned out to be made of asbestos.

## **MULTI-MEDIA CONGLOMERANTS**

In the 1980's the number of broadcast stations were greatly reduced allowing media to be controlled by fewer and more powerful companies. The Telecommunications Act of 1996 represented a major change in communication regulation and for the first time allowed multi-media conglomerates. For example, Time Warner is the Largest media conglomerate in the world, with holdings including: CNN, the CW (a joint venture with CBS), HBO, Cinemax, Cartoon Network, TBS, TNT, America Online, MapQuest, Moviefone, Warner Bros. Pictures, Castle Rock and New Line Cinema, and more than 150 magazines including Time, Sports Illustrated, Fortune, Marie Claire and People and in 2009 had revenues of 29 Billion. The deregulations have led to a concentration of media ownership with fewer broadcasters and the elimination of many local, independent and alternative media outlets.

In testimony provided to the Congressional subcommittee, on the Broadcast Decency Enforcement Act of 2004, this concern about allowing the number of Broadcasting Stations to be reduced, was addressed. The Committee had become concerned that there was a connection between the increased size of owners in the media industry and the increased

number of complaints. For example, *Clear Channel*, went from owning 512 stations in 1999 to over 1,200 stations in 2004. That year they were given a fine of \$24,000, the largest ever issued by the FCC, for a Howard Stern program. Not only does this consolidation greatly increase the control of media by these media companies, it also increases their revenue. *Infinity* began as a radio company in 1972. It merged in 1997 with *CBC Corporation* and merged with *Viacom* in 2000. In 2002 *Infinity* was fined \$21,000 by the FCC for a Howard Stern program. However, that year their revenue was \$24,600,000,000. One concern is that for a company with over 24 billion in revenue, a \$21,000 fine is nothing.

*“There has never been a greater need for media literacy education. As mergers and monopolies in the communication industry increase, control of programming is more and more centralized. What is frightening is that fewer and fewer companies control all forms of media: books, films, television, and magazines. A company such as Viacom or Disney can be the gatekeeper to many media formats.”*

(Seels, B., et. al., Research on learning from television. In D. Jonassen (Ed.) *Handbook for Research on Educational Communications and Technology*.)

This consolidation of media ownership has led to six huge media conglomerates. Do you think it is ironic that in a country where freedom of the press is so valued that we allowed our airwaves to become controlled by fewer and more powerful men.

**Write an editorial in response to the statement by the Entertainment Software Association after the Sandy Hook Elementary School massacre:**

*“The Entertainment Software Association, and the entire industry it represents, mourns the tragedy at Sandy Hook Elementary School. Our heartfelt prayers and condolences go out to the families who lost loved ones, and to the entire community of Newtown. The search for meaningful solutions must consider the broad range of actual factors that may have contributed to this tragedy. Any such study needs to include the years of extensive research that has shown no connection between entertainment and real-life violence.”*