



HIGH COURT'S *BROWN v. EMA* MESSAGE: EMPIRICAL JUSTIFICATION MATTERS IN FIRST AMENDMENT CASES

by
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The recent decision of the U.S. Supreme Court in the *Brown v. Entertainment Merchants Ass'n*,¹ in which the Court struck down a California law barring the distribution of violent video games to minors, highlights the remarkable variation in First Amendment jurisprudence over the handling of empirical claims offered by government to justify censorship. In *Brown*, the Court rejected the argument that violent expression in general – or violence in video games in particular – should be treated as outside the full protection of the First Amendment as to minors. It therefore applied “strict scrutiny” to the California statute at issue. That meant that any empirical justification had to not only be compellingly important but also very clearly proved. As the Court put it, “ambiguous proof will not suffice.”² Moreover, the Court gave short shrift to the notion that there should be any deference to the California legislature’s assessment of the social science evidence pertaining to the effects of violent media on minors, explaining that any such deference is inconsistent with strict scrutiny.³

This contrasts with intermediate scrutiny cases, such as commercial speech cases, where the Court has to date generally been much more deferential about assessing the government’s demonstration that the law achieves beneficial effects. The third step of the familiar *Central Hudson* commercial speech test requires that the restriction on speech “directly and materially” advance the asserted government interest.⁴ And the Court has frequently said that this “burden is not satisfied by a mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁵ But the Court has also made clear that this demonstration can be based on studies or anecdotes, as well as appeals to history, consensus, and, “simple common sense.”⁶ So in practice, the level of review is much less demanding than is typical in strict scrutiny cases.

One recent example was the U.S. Court of Appeals for the Fourth Circuit’s decision in *Educational Media Co. at Va. Tech, Inc. v. Swecker*,⁷ where the court upheld a law banning advertising of alcoholic beverages in college media. Relying on intuition and common sense, and in the absence of any real evidence, the court concluded that such advertising likely does increase under-age consumption of alcohol, rather than merely shift brand preferences, and it chided the plaintiffs for not offering contrary proof.⁸

The Supreme Court has taken a similar approach with regard to another form of intermediate First Amendment scrutiny – the *O’Brien* test applicable to content-neutral burdens on speech. In *Turner Broadcasting, Inc. v. FCC*,⁹ involving the constitutionality of the requirement that cable television operators carry all local broadcast channels, the Court recited the need for the government agency to show that the recited harms are real and the regulation will alleviate them materially. But it went on to say that courts should also “accord substantial deference to the predictive judgments of Congress,” because “Congress is far

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better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon an issue as complex and dynamic as that presented here.”¹⁰

Yet a third approach was adopted when the Court first recognized the *Ginsberg* “obscenity for minors” exception to the First Amendment. There, addressing the claim that magazines with “racy” pictures of nude women are harmful to the development of minors, the Court demanded only a rational basis for the restriction at issue, holding that even though the scientific “studies all agree that a causal link has not been demonstrated,” it was enough that “they are equally agreed that a causal link has not been disproved, either.”¹¹

These variations raise the question of whether the Court ought to be more consistent about demanding real proof of claimed justifications in reviewing laws that restrict free expression. In the wake of the *Brown* case, many commentators shared Justice Breyer’s view that the majority “create[d] a serious anomaly in First Amendment law” by allowing sales of violent, but not sexual, materials to minors.¹²

To be sure, if there is an anomaly here, our answer would not be to extend the range of censorship to include violence; it would be to demand *more* justification for “harmful to minors” laws, particularly in an age where they are effectively inapplicable to the Internet. But Justice Breyer certainly has a point that the huge differential between regulation of violence and sex seems puzzling as an empirical matter.

How about commercial speech and other expression subject to intermediate scrutiny? Should “common sense” justifications continue to be allowed there? We believe not. As Judge Posner put it in an earlier video game case, “common sense is sometimes another word for prejudice.”¹³ Or, to quote a recent philosophical article, “[m]odern science was founded on the basis of a skepticism about the value of common sense for explaining the world—a laudable, fertile skepticism about our cognitive capacities and what is immediately given to them, about the received views and explanatory systems passed on within cultures.”¹⁴ A requirement of a real demonstration of the existence of a problem that will be effectively addressed by a speech regulation can avoid decisions based on assumptions about how the world works that may not be true. While judges obviously still need to rely on their “common sense” in appropriate situations, arguably the assessment of speech restrictions is not one of them.

¹ 131 S. Ct. 2729 (2011).

² *Id.* at 2739.

³ *Id.* at 2738-39.

⁴ *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 564 (1980) (restriction on commercial speech “must directly advance the state interest involved”).

⁵ *Edenfield*, 507 U.S. at 770-71.

⁶ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001).

⁷ 602 F.3d 583 (4th Cir. 2010).

⁸ *Id.* at 589-90.

⁹ 512 U.S. 622, 664 (1994).

¹⁰ *Id.* at 665-66 (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)).

¹¹ *Ginsberg v. New York*, 390 U.S. 629, 642 (1968) (internal quotations omitted).

¹² *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

¹³ *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

¹⁴ Noga Arikha, “*Just Life in a Nutshell*”: *Humours as Common Sense*, THE PHILOSOPHICAL FORUM 302, 304 (2008).