

World of Courtcraft: Mortal Kombat at the Supreme Court

November 2, 2010

This morning I attended the oral argument at the U.S. Supreme Court in the “violent video game” case, *Schwarzenegger v. EMA*. In September, CDT filed an [amicus brief](#) [1] on behalf of itself and leading Internet industry groups and others. The case raises the question of whether states can regulate the distribution of violent video games to minors or, conversely, whether parental controls and other tools available to parents are sufficient to shield kids from content the parents want to block. The case was well argued on behalf of the video game industry by my former Jenner & Block partner, Paul Smith.

On one level, the argument went very well, and although predicting court outcomes is a dubious venture, there is a good chance that the California statute at issue in the case will be overturned as unconstitutional under our First Amendment. Many (but not all) of the Justices expressed serious concern about the vagueness of the statute (which prohibits the distribution of violent video games if they appeal to a “deviant or morbid” interest in violence for minors). The attorney for California simply could not effectively answer Justice Kagan’s question, “How would you describe, in plain English, what ‘morbid violence’ is?” She and other Justices seemed very open to Paul Smith’s arguments that video game makers would have no idea what games would be illegal under the California law.

Justice Scalia spoke forcefully (and at times humorously) in support of the First Amendment, expressing concern that unlike sexual content and obscenity, violent content has historically been protected speech in this country. Indeed, Scalia noted that Grimm’s Fairy Tales are, in some places, quite grim.

On the other hand, there were some worrying moments for the First Amendment during the oral argument. Justice Breyer is clearly a very strong advocate for increased content regulation to protect minors. Justice Sotomayor said that she starts from the proposition that there is a “compelling state interest” in protecting kids from violent content – something that I personally think is far from clear in light of the great diversity of user empowerment tools available to parents to control kids’ access to particular types of content. More broadly, and most worryingly, a number of Justices expressed uncertainty about the effectiveness of parental control technology (without really confronting the reality that such technology is in any event more effective than most governmental regulations could ever be).

Toward the end of the argument, Justice Kagan asked the lawyer for California whether “Mortal Kombat” would be illegal under the statute at issue in the case. When the lawyer responded that it would certainly be a “candidate” to be covered, Kagan noted that it was an “iconic” game, and one that many of the Court’s clerks had surely spent much of their youth playing.

My takeaways are that the First Amendment still has some friends on the Supreme Court, and Justice Kagan may prove to be a new one, but that the call for the government to step in and censor speech in order to protect children is also finding some supporters on the Court.

- [video games. video game](#)
- [Supreme Court](#)
- [Schwarzenegger v. EMA](#)
- [free speech](#)



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