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## If You Fail, Try, Try Again: The Fate of New Legislation Curbing Minors' Access to Violent and Sexually Explicit Video Games

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# IF YOU FAIL, TRY, TRY AGAIN: THE FATE OF NEW LEGISLATION CURBING MINORS' ACCESS TO VIOLENT AND SEXUALLY EXPLICIT VIDEO GAMES

## I. INTRODUCTION

The new “Hot Coffee” modification discovered within the hugely popular, but exceedingly violent, video game *Grand Theft Auto: San Andreas* (“GTA: San Andreas”) has re-ignited the debate whether such video games have adverse effects on children.<sup>1</sup> “Hot Coffee” refers to the modification which, when installed, brings the player to a secret level prompting that player to have the game’s hero engage in sexually explicit acts.<sup>2</sup> Some parents and psychologists fear that exposure to violent and sexually explicit video games, like the “Hot Coffee”-enabled version of *GTA: San Andreas*, have a deleterious effect on children, leading to heightened aggression and anti-social behavior.<sup>3</sup> The makers of these games deny these claims and argue that the ratings system in existence for video games adequately protects children.<sup>4</sup>

Politicians across the country have jumped into the fray by proposing

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1. See Press Release, Am. Psychological Ass’n, *Violent Video Games Can Increase Aggression* (Apr. 23, 2000), <http://www.apa.org/releases/videogames.html> (discussing several studies on the increase of a person’s aggressive thoughts as a result of playing violent video games); Ainsley Newton, *Children ‘Made More Aggressive by Video Games’*, TIMES (London), Aug. 20, 2005, <http://www.timesonline.co.uk/newspaper/0,175-1742488,00.html> (noting that video games can lead to increased aggressive behavior in children).

2. Curt Feldman, *ESRB to Investigate ‘San Andreas’ Sex Content*, CNET NEWS.COM, July 8, 2005, [http://news.com.com/ESRB+to+investigate+San+Andreas+sex+content/2100-1043\\_3-5780374.html](http://news.com.com/ESRB+to+investigate+San+Andreas+sex+content/2100-1043_3-5780374.html) (noting that the modification was hidden within the game’s code and must be unlocked in order to access it).

3. Ronald Bailey, *Video Violence = Real Violence? Blast, Bomb, and Strafe in Peace*, REASON ONLINE, July 25, 2005, <http://reason.com/rb/rb062905.shtml>; see also Press Release, Am. Psychological Ass’n, *Violent Video Games Can Increase Aggression* (Apr. 23, 2000), <http://www.apa.org/releases/videogames.html>; Craig A. Anderson, *Violent Video Games: Myths, Facts, and Unanswered Questions*, APA ONLINE, October 2003, <http://www.apa.org/science/psa/sb-anderson.html>.

4. IRMA, *Others File Suit to Stop Video Game Law*, IRMA.ORG, July 25, 2005, <http://www.irma.org/news/contentview.asp?c=27394>.

and passing legislation to restrict the sale of violent and sexually explicit video and computer games to minors.<sup>5</sup> Illinois became the first state to pass legislation restricting minors' access to such games when Governor Blagojevich signed House Bill 4023 into law on July 25, 2005.<sup>6</sup> Michigan and California also passed similar legislation, on September 14, 2005 and October 7, 2005, respectively.<sup>7</sup> In addition, North Carolina and a number of other states have legislation pending to accomplish similar goals.<sup>8</sup>

Despite the invalidation of previous attempts at similarly restrictive legislation, lawmakers continued to push these bills through their respective legislatures. Over the past six years, federal courts have declared as unconstitutional legislation that would have controlled the sale of video games to minors in Indianapolis, Indiana, St. Louis County, Missouri, and Washington State.<sup>9</sup> Each of these courts declared such legislation unconstitutional as a violation of First Amendment rights.<sup>10</sup> However, politicians are still proposing and passing similar new bills in their own state assemblies. The legislative histories of these bills indicate that the legislators believe these new versions are significantly different from the older legislation, and thus constitutional. For instance, Michigan legislators feel that providing new data describing the adverse psychological effects that violent and sexually explicit video games have on children will render their law constitutional.<sup>11</sup> Nevertheless, each one of

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5. Peter Cohen, *E3: Calif. Bill Proposes Video Game Sales Restrictions*, MACWORLD.COM, May 16, 2005, <http://www.macworld.com/news/2005/05/16/gamebill/index.php>.

6. Press Release, State of Illinois Home-IGNN (Illinois Government News Network), *Gov. Blagojevich Signs Law Making Illinois the Only State in the Nation to Protect Children from Violent and Sexually Explicit Video Games* (July 25, 2005), <http://www.illinois.gov/PressRelease/s/ShowPressRelease.cfm?SubjectID=3&RecNum=4170>.

7. See Simon Carless, *Governor Schwarzenegger Signs California Games Bill*, GAMASUTRA.COM, Oct. 7, 2005, [http://www.gamasutra.com/php-bin/news\\_index.php?story=6777](http://www.gamasutra.com/php-bin/news_index.php?story=6777); Brendan Sinclair, *Michigan Governor Signs Gaming Bill into Law, Sort of*, GAMEPOT.COM, Sept. 9, 2005, [http://www.gamespot.com/news/2005/09/12/news\\_6133055.html](http://www.gamespot.com/news/2005/09/12/news_6133055.html); Heidi Hanson, *Granholt Signs Final Bills Protecting Children from Violent and Sexually-Explicit Video Games*, MICHIGAN.GOV, Sept. 14, 2005, <http://www.michigan.gov/som/0,1607,7-192-29939-126123-00.html>.

8. See Game Politics.com, *North Carolina Video Game Bill Dies in Committee*, <http://www.livejournal.com/users/gamepolitics/2005/09/12/> (Sept. 12, 2005 8:52 AM) (noting that legislation will not be passed this year because it died in the North Carolina Assembly, but that it can be revived intact next year).

9. Reuters, *Illinois Bans Graphic Video Games to Minors*, MSNBC.COM, July 27, 2005, <http://www.msnbc.msn.com/id/8723546>.

10. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 572-73 (7th Cir. 2001); *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 955 (8th Cir. 2003); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1180 (W.D. Wash. 2004).

11. See Act to Amend 1978 PA 33, Pub. A. No. 108, 2005-5 Mich. Adv. Legis. Serv. 275, 277-78 (LexisNexis) (S.B. 416); Act to Amend 1978 PA 33, Pub. A. No. 104, 2005 Mi. P.A. 104

the newly enacted bills faces an uphill constitutional battle.

This Comment examines the new laws in Illinois, California, and Michigan to determine whether any of these laws will pass constitutional muster in light of past litigation on this issue. Most of these laws suggest unique strategies to overcome the constitutional problems that plagued past attempts at such legislation. This Comment suggests that despite the lofty, albeit commendable, goals of these enacted laws, they will eventually fail, as did their predecessors. These laws generally do not serve compelling state interests, and when they do, those interests are not narrowly tailored to overcome the strict scrutiny test applied by reviewing courts. The legal precedent on this issue will certainly play a large role in the decisions of courts reviewing this new legislation. As an alternative to restrictive legislation, this Comment suggests new ways for concerned parents, legislators, and other interested citizens to help keep violent and sexually explicit video games from children. The solution lies not in government control, but in a much less invasive form of protection: the ratings system established by the Entertainment Software Ratings Board (ESRB) and, more importantly, hands-on parenting.

Part II of this Comment discusses the First Amendment protections of the freedom of speech with particular attention to minors' rights as determined by the Supreme Court. Part II also discusses the historical development of violent and sexually explicit video games and provides a brief description of the ESRB, the nonprofit organization responsible for rating video games, and its rating system. Part II ends by noting early attempts to impose restrictive legislation on video game sales and the three landmark cases in recent years guaranteed to have a significant effect on the outcome of future legislation on this issue. Part III outlines the Illinois, Michigan, and California laws, noting the differences and similarities between these laws and their predecessors. Part IV analyzes each law's likelihood of not being found unconstitutional and concludes that none of the discussed legislation will withstand the strict scrutiny of a reviewing court. Finally, Part V outlines alternative strategies to keep violent and/or sexually explicit video games out of the hands of minors without the need for government intervention or the suppression of speech.

## II. BACKGROUND

### A. Minors and Their First Amendment Rights

The First Amendment of the United States Constitution protects all forms of free speech.<sup>12</sup> Accordingly, courts have broadly defined what constitutes free speech.<sup>13</sup> Video games, even violent ones, have been determined by the courts to constitute a form of protected speech.<sup>14</sup> As the court in *Interactive Digital Software Ass'n v. St. Louis County*<sup>15</sup> eloquently held,

If the first amendment [sic] is versatile enough to “shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,” we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection.<sup>16</sup>

However, there is some debate about the First Amendment rights of minors. Certain commentators and court decisions suggest that minors have fewer free speech rights than adults, allowing for laws that restrict their access to video games.<sup>17</sup> The proponents of this position point to *Ginsberg v. New York*,<sup>18</sup> in which the Supreme Court upheld as constitutional a New York law that prevented minors' access to pornography.<sup>19</sup> Yet, these proponents mistakenly assume that this case stands for unequal constitutional rights. Even *Ginsberg* maintains that minors have constitutional rights similar to adults.<sup>20</sup> *Ginsberg* simply

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12. See U.S. CONST. amend. I.

13. See Rodney Smolla, *Speech: Overview*, FIRSTAMENDMENTCENTER.COM, Feb. 20, 2005, <http://www.firstamendmentcenter.org/Speech/overview.aspx> (stating that “[o]ver the course of roughly the last 50 years the U.S. Supreme Court has set our nation on a remarkable experiment, often construing the First Amendment in a manner that strenuously defies the natural and logical impulse to censor. In scores of decisions, the Supreme Court has interpreted the First Amendment in a manner that to most of the world seems positively radical.”).

14. *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 958 (8th Cir. 2003).

15. *Id.*

16. *Id.* at 957 (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995)).

17. See Nathan Phillips, Note, *Interactive Digital Software Ass'n v. St. Louis County: The First Amendment and Minor's Access to Violent Video Games*, 19 BERKELEY TECH. L.J. 585, 586 (2004).

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

19. *Id.*

20. See *id.* at 637; see also *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231 (2003)

differentiates between the obscenity standards for minors and adults.<sup>21</sup> The Court held that certain forms of media could be obscene to children, but not adults; and since obscenity is not protected under the First Amendment, states can restrict minors' access to obscenity while preserving their free speech rights.<sup>22</sup> Accordingly, obscenity can take a video game out of the free speech protected class.<sup>23</sup> As a result, some of the legislation to restrict minors' access to video games has internalized this notion, claiming that some video games are obscene and "appeal to the prurient interest" of minors.<sup>24</sup>

### B. Historical Development of the Controversy over Violent Video Games

Video games have always been violent. In the early 1970s, video games like *Space Invaders*, *Tank*, and *Spacewar* were all "shoot-'em-up" games based on destruction and violence. These games did not feature the realistic "blood and guts" we see in today's video games, but this was only because the necessary technology did not exist at the time. It took over twenty years of technological innovation to achieve the realistic violence only dreamed of in those early games. As Steven Poole notes in *Trigger Happy: Video Games and the Entertainment Revolution*, "[p]erhaps the purest, most elemental video game pleasure is the heathen joy of destruction. You've got your finger hovering over the trigger, you line up an enemy and you fire."<sup>25</sup>

The controversy over video games deemed too violent and/or obscene for children also dates back to the near beginning of video games.<sup>26</sup> For instance, the first game to spark nationwide outrage for violence appeared on the market in 1976.<sup>27</sup> *Death Race*—a rudimentary video game based on a popular movie of the time—allowed the players steering vehicles around the playfield to run over stick-men, ostensibly

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("Minors enjoy the protection of the First Amendment.")

21. See *Ginsberg*, 390 U.S. at 636 (stating that the concept of obscenity may vary based on the group from whom the material is being quarantined).

22. See *id.* at 636–37.

23. See David L. Hudson, Jr., *Pornography and Obscenity*, FIRSTAMENDMENTCENTER.ORG, <http://www.firstamendmentcenter.org/Speech/adultent/topic.aspx?topic=pornography> (last visited Feb. 9, 2006).

24. See *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the accepted, albeit flawed, standard for defining obscenity).

25. STEVEN POOLE, *TRIGGER HAPPY: VIDEO GAMES AND THE ENTERTAINMENT REVOLUTION 21* (Arcade Publishing 2004) (2000).

26. See *The Dot Eaters*, <http://www.emuunlim.com/doteaters/play2sta1.htm> (last visited Sept. 30, 2005).

27. *Id.*

called “Gremlins,” to gain points.<sup>28</sup> When a player successfully pummeled a “Gremlin,” the creature would scream and a cross would appear where it once stood.<sup>29</sup> By today’s standards, the game is rather mild in content, but in 1976, the game sparked so much controversy that it prompted a *60 Minutes* episode.<sup>30</sup> The manufacturers eventually pulled *Death Race* off the market.

Though there were further controversies throughout the 1970s and 80s, the release of *Mortal Kombat* in 1992 reinvigorated the anti-violence-in-gaming forces. *Mortal Kombat*, released by Midway Games, is a person-to-person fighting game that pits players against one another, or against the central processing unit or CPU, in a fight to the death.<sup>31</sup> Upon its release, the realistic-looking, blood-soaked game attracted the ire of some parents, and later the U.S. Senate, for its “fatalities”—the violent endings of battles where the winner rips his opponent’s spine from his body.<sup>32</sup> The violence in *Mortal Kombat* and the reverberations from parents and Congress served as the impetus for the founding of the ESRB and its video game rating system.<sup>33</sup>

As technology and graphic arts in fighting games continued to improve from the *Mortal Kombat* benchmark, the violence in video games became more realistic and more detested by its opponents. The release of *Doom* in 1994, which popularized the first-person-perspective shooter game, became an instant focus of hatred by detractors “for its level of violence and its potential . . . to lure youth into real-world violence.”<sup>34</sup> The Columbine shootings in 1999 enhanced the stigma attached to the game when authorities discovered that the two students behind the shootings were avid *Doom* players.<sup>35</sup> Certain individuals, intent on finding connections between playing video games and real-life violence, quickly blamed *Doom* for the Columbine shootings.<sup>36</sup> Authorities disproved this link, however, when they determined that the shooters’ psychological and

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28. *Id.*

29. *Id.*

30. *Id.*

31. Lauren Gonzalez, *When Two Tribes Go to War: A History of Video Game Controversy*, GAMESPOT.COM, <http://www.gamespot.com/features/6090892/p-6.html> (last visited Jan. 23, 2006).

32. *See id.* (containing a screen shot of a *Mortal Kombat* fatality).

33. *See id.*

34. Lauren Gonzalez, *When Two Tribes Go to War: A History of Video Game Controversy*, GAMESPOT.COM, Mar. 7 2004, <http://www.gamespot.com/features/6090892/index.html?q=when two tribes> (last visited Jan. 23, 2006).

35. *See id.*

36. *See id.*

emotional damage ran deeper than their interest in playing violent video games.<sup>37</sup> Courts dismissed all litigation against the game's manufacturers on this issue, finding that the link between video games and real-life violence was tenuous at best.<sup>38</sup>

More recently, games like *25 to Life*, in which the player "attack[s] police with an arsenal of Molotov cocktails, broken bottles and baseball bats," and the *Grand Theft Auto* series have transcended the outrage provoked by these games and prompted legislative action.<sup>39</sup> In 2005, Doctor Leland Yee, a child psychologist and California State Assemblyman, proposed legislation to make it a finable offense for game retailers to sell or rent any games deemed violent to persons sixteen or younger.<sup>40</sup> Doctor Yee claimed that the ESRB ratings are not an effective deterrent to prevent minors' access to these games and called for a more easily enforceable punishment for retailers that sell these games to minors.<sup>41</sup> This type of legislative action is occurring in numerous states throughout the nation.

### C. The ESRB and Its Role in Video Game Ratings

The ESRB is a non-profit organization similar to the Motion Picture Association of America (MPAA), that assigns letter ratings to virtually all video games.<sup>42</sup> Each letter rating is accompanied by a corresponding description of what a video game player would expect to see in the game, as well as a recommended minimum age for playing that game.<sup>43</sup> There are seven categories of game ratings, ranging from "EC" (Early Childhood), games appropriate for ages three and up; to "E" (Everyone), appropriate for ages ten and up; to "AO" (Adults Only), recommended only for persons

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37. See *id.* (stating that one of the shooters, Harris, was taking Luvox, an antidepressant, and had been rejected from the military).

38. *Id.*; see *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1281–82 (D. Colo. 2002).

39. See Rivka Bukowsky, *Violent Game Furor*, N. Y. DAILY NEWS, June 20, 2005, <http://www.nydailynews.com/news/local/story/320618p-274211c.html>.

40. Peter Cohen, *E3: Calif. Bill Proposes Video Game Sales Restrictions*, MACWORLD.COM, May 16, 2005, <http://www.macworld.com/news/2005/05/16/gamebill/index.php>.

41. See *id.*; see also Nich Maragos, *California Game Restrictions Bill Stalls Before Passing Committee*, GAMASUTRA.COM, May 5, 2005, [http://www.gamasutra.com/php-bin/news\\_index.php?story=5441](http://www.gamasutra.com/php-bin/news_index.php?story=5441) (tracing the Bill's progress and presenting the Interactive Entertainment Merchants Association's response).

42. ESRB Game Ratings, Frequently Asked Questions, [http://www.esrb.org/esrbratings\\_faqs.asp](http://www.esrb.org/esrbratings_faqs.asp) (last visited Oct. 23, 2005).

43. ESRB Game Ratings, Game Rating and Descriptor Guide, [http://www.esrb.org/esrbratings\\_guide.asp](http://www.esrb.org/esrbratings_guide.asp) (last visited Sept. 30, 2005).



eighteen and older.<sup>44</sup>

ESRB's mission is to inform parents about the content of video games before parents buy or allow their children to buy and play particular games.<sup>45</sup> The ESRB does not claim to provide the perfect solution to keeping certain games out of the hands of curious minors, but maintains that "ESRB ratings [be used] in conjunction with [parents'] own tastes and standards and their individual knowledge about what's best for their kids."<sup>46</sup>

The ESRB rating assigned to a video game significantly affects the financial success of that game.<sup>47</sup> An "AO," or Adults Only, rating is a death sentence for a video game, since most major retailers refuse to sell games bearing such a rating.<sup>48</sup> Some argue that as a result, the ESRB has assigned an "AO" rating to very few games upon release.<sup>49</sup> However, manufacturers may simply produce few games that fall within "AO" description because of the potential financial repercussions. *GTA: San Andreas*, in stores since October 2004, bore an "M" rating, for mature audiences age seventeen and older, until the "Hot Coffee" incident.<sup>50</sup> Following a prompt investigation into the event, the ESRB changed *GTA: San Andreas's* rating to "AO."<sup>51</sup> According to the ESRB's official definition, an "AO" rating means that the current version of the game "should only be played by persons [eighteen] years and older" and "may include prolonged scenes of intense violence and/or graphic sexual content and nudity."<sup>52</sup> As a result of the rating change, Rockstar Games, the maker of *GTA: San Andreas*, ceased manufacturing the "AO" version of *GTA: San Andreas* and began production of a new version with increased security to prevent the "Hot Coffee" modification.<sup>53</sup> The new version will bear an

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44. See *id.* (showing all the ESRB rating symbols and corresponding descriptions).

45. *Id.*

46. *Id.*

47. See Michael Kanellos, *The Case Against Grand Theft Auto*, CNET NEWS.COM, Aug. 3, 2005, [http://news.com.com/The+case+against+Grand+Theft+Auto/2010-1071\\_3-5815960.html](http://news.com.com/The+case+against+Grand+Theft+Auto/2010-1071_3-5815960.html) (discussing the influence of ratings on video game sales).

48. Curt Feldman, *ESRB to Investigate 'San Andreas' Sex Content*, CNET NEWS.COM, July 8, 2005, [http://news.com.com/ESRB+to+investigate+San+Andreas+sex+content/2100-1043\\_3-5780374.html](http://news.com.com/ESRB+to+investigate+San+Andreas+sex+content/2100-1043_3-5780374.html).

49. See *id.*

50. Tor Thorson, *Sex Content Leads to Adult Rating for 'Theft'*, CNET NEWS.COM, July 20, 2005, [http://news.com.com/sex+content+leads+to+adult+rating+for+Theft/2100-1043\\_3-5797090.html?tag=nl](http://news.com.com/sex+content+leads+to+adult+rating+for+Theft/2100-1043_3-5797090.html?tag=nl).

51. *Id.*

52. ESRB Game Ratings, Game Rating and Descriptor Guide, [http://www.esrb.org/esrbratings\\_guide.asp](http://www.esrb.org/esrbratings_guide.asp) (last visited Sept. 30, 2005).

53. See Thorson, *supra* note 50.

“M” rating and keep *GTA: San Andreas* on the shelves.

#### D. Early Attempts to Impose Restrictive Legislation

As previously noted, the controversy surrounding violence in video games has existed almost as long as video games themselves. However, legislators did not attempt to limit access to such games through government intervention until the early 2000s. The most dramatic display of government intervention occurred in May 2002 when United States Representative Joe Baca, D-CA, proposed legislation that would “make selling or renting video games to minors a federal crime.”<sup>54</sup> Congress appropriately named the bill the Protect Children from Video Game Sex and Violence Act of 2003.<sup>55</sup> Baca, during an interview at the press release of the bill, promoted his legislation by commenting: “Do you really want your kids assuming the role of a mass murderer or a carjacker while you are away at work?”<sup>56</sup> Unfortunately for the bill’s proponents, the bill did not have immediate success. However, Baca’s bill, now almost four years old, is still alive and pending action from the House Judiciary Committee.<sup>57</sup>

Even before Baca’s bill, local legislators in a few other cities had passed laws restricting minors’ access to certain types of video games. In July 2000, Indianapolis Mayor Bart Peterson signed into law a city council ordinance that “require[d] businesses to label coin-operated games featuring graphic violence or strong sexual content and prohibit[ed] children under [eighteen] from playing them without parental consent.”<sup>58</sup> Two months later, in September 2000, the City of St. Louis passed Ordinance § 20,193, which restricted minors’ access to “harmful” video games as well.<sup>59</sup> Though these laws claimed a commendable goal—the health and safety of children—the statutes faced immediate legal challenges from the makers, manufacturers, and retailers of the affected games.

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54. Lauren Gonzalez, *When Two Tribes Go to War: A History of Video Game Controversy*, GAMESPOT.COM, <http://www.gamespot.com/features/6090892/p-6.html> (last visited Jan. 23, 2006).

55. Protect Children from Video Game Sex and Violence Act, H.R. 669, 108th Cong. (2003).

56. Gonzalez, *supra* note 54.

57. IGDA, *Anti-Censorship Lobbying*, <http://www.igda.org/censorship/lobbying.php> (last visited Jan. 23, 2006).

58. Press Release, Office of the Mayor, Bart Peterson, Peterson Signs Violent Video Games Ordinance Into Law, (July 17, 2000) <http://www.indygov.org/eGov/Mayor/PR/2000/7/20000717a.htm>.

59. See ST. LOUIS, MO., CODE § 20,193 (2000) (“There shall be a rebuttable presumption that video games rated ‘M’ or ‘AO’ by the ESRB are harmful to minors.”).

### *E. Three Landmark Decisions Over Video Game Access*

In the past six years, three federal court cases have defined the limits of the government's ability to restrict minors' access to video games deemed violent and/or obscene. All three cases focused on the chilling effect that the restrictive laws would have on First Amendment free speech rights as well as the unconstitutional vagueness of each law. Each subsequent case built upon the foundation set by the prior case and created strong legal precedent for future legal challenges.

#### 1. *American Amusement Machine Association v. Kendrick*,<sup>60</sup> the Trailblazer for the Unconstitutionality of Video Game Laws

In July 2000, the Indianapolis City-County Council unanimously approved an ordinance proposed by Mayor Peterson, regulating amusement machines.<sup>61</sup> In doing so, Indianapolis became the first city in the nation to pass a measure restricting minors' access to violent and sexually explicit video games without parental consent. The law specifically required businesses to label coin-operated games featuring graphic violence or strong sexual content and prohibited children under the age of eighteen from playing these games without parental consent.<sup>62</sup> The law also fined businesses \$200 per day per violation.<sup>63</sup> Almost immediately following the codification of this law, two video game industry groups—the American Amusement Machine Association and the Amusement and Music Operators Association—challenged this law to secure an injunction to prevent the law from going into effect.<sup>64</sup> These groups claimed the law violated First Amendment rights despite the mayor's assurance that “[w]e did quite a bit of research to make sure that this would stand up under judicial scrutiny.”<sup>65</sup> In October 2000, district court Judge David Hamilton issued a preliminary ruling upholding the ordinance and the City-County Council's authority to pass such restrictive laws.<sup>66</sup> The district court held

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60. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

61. See REVISED CODE OF CONSOLIDATED CITY AND COUNTY FOR INDIANAPOLIS, MARION COUNTY, IN., CODE § 831 (2000); Press Release, Office of the Mayor, Bart Peterson, Peterson Signs Violent Video Games Ordinance Into Law (July 17, 2000), <http://www.indygov.org/eGov/Mayor/PR/2000/7/20000710a.htm>.

62. *Id.* § 831-5 (2000).

63. *Id.* § 831-9.

64. Associated Press, *Industry Groups Challenge Indianapolis Violent Video Game Law*, FREEDOMFORUM.ORG, Aug. 22, 2000, <http://www.freedomforum.org/templates/document.asp?documentID=3860>.

65. *Id.*

66. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 943 (S.D. Ind. 2000).

that minors' First Amendment rights are not as broad as those of adults, and thus a strict scrutiny test should not be applied.<sup>67</sup> The court also found a sufficient rationale in the psychological studies produced by the city that connected playing violent video games with aggressive behavior.<sup>68</sup>

However, the city's victory did not last long. Following the ruling, the gaming industry immediately appealed to the Seventh Circuit Court of Appeals and again asked for an injunction.<sup>69</sup> The Seventh Circuit issued a preliminary injunction less than a week after Judge Hamilton's ruling, preventing enforcement of the city ordinance.<sup>70</sup>

After hearing oral arguments in December 2000, the Seventh Circuit reversed the lower court decision and remanded the case back to the district court.<sup>71</sup> The court, in a unanimous opinion by Judge Posner, agreed with the district court's determination that the video games were "speech" within the meaning of the First Amendment, but disagreed with the district court's application of a rational basis standard for determining constitutionality.<sup>72</sup> The Seventh Circuit court held that the ordinance inappropriately "brackets violence with sex," pigeonholing the violence in the games into an obscenity class not protected by the First Amendment.<sup>73</sup> The district court erred in using this modified class to break away from the protections of the First Amendment.<sup>74</sup> Posner declared that children have First Amendment rights and the grounds for restricting violence in video games must be "compelling, and not simply plausible."<sup>75</sup> The city's claim of harm to its young citizens from these games based on psychological studies was not compelling.<sup>76</sup> The court declared that "[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low," thus necessitating protection of such violence for the normal growth of our children.<sup>77</sup> Just like violence in the classic works of Homer, Dante, and Tolstoy, the violence in video games serves an important cultural function and cannot

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67. *See id.* at 960–62.

68. *See id.* at 972.

69. *See* Associated Press, *Federal Appeals Court Puts Indianapolis Video Game Law on Hold*, FREEDOMFORUM.ORG, Oct. 19, 2000, <http://www.freedomforum.org/templates/document.asp?documentID=3322>.

70. *See id.*

71. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

72. *See id.* at 573–76.

73. *Id.* at 574.

74. *See id.*

75. *See id.* at 576.

76. *See id.* at 578–79.

77. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

be curtailed without a compelling reason.<sup>78</sup>

2. Following the Seventh Circuit's Precedent in *Interactive Digital Software Association v. St. Louis County*<sup>79</sup>

Not long after Indianapolis passed their city ordinance in 2000, the St. Louis County Council passed an ordinance "barring minors from purchasing, renting, or playing violent video games deemed 'harmful to minors' unless the minor is accompanied by a consenting parent or guardian."<sup>80</sup> As expected, the video game industry immediately shot back. The Interactive Digital Software Association (IDSA), which represents stores, arcades, and companies that make and sell video games and game software, responded to these restrictions on behalf of the video game industry by filing a lawsuit against St. Louis County.<sup>81</sup> The IDSA cited *Kendrick* to support their claim that the ordinance violated freedom of speech, protected by the First Amendment.<sup>82</sup>

Despite the apparent similarities between the facts in *IDSA* and its predecessor *Kendrick*, district court Judge Limbaugh upheld the constitutionality of the ordinance.<sup>83</sup> The court found that video games are not a form of speech protected by the First Amendment, adding in dictum that even if they were protected, the county presented a compelling interest to overcome even a strict scrutiny standard.<sup>84</sup>

However, on appeal, the Eighth Circuit agreed with *Kendrick* that video games are a protected form of free speech, noting, "they are as much entitled to the protection of free speech as the best of literature."<sup>85</sup> As a result, the court applied a strict scrutiny standard, maintaining that the county's reasons for restricting this right must be compelling.<sup>86</sup> The Court of Appeals reversed the district court's decision and remanded the case, ordering the district court to enter an injunction not inconsistent with its

78. *See id.*

79. *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 959 (8th Cir. 2003).

80. Judith F. Krug and Deborah Caldwell-Stone, *First Amendment and the Media*, MEDIAINSTITUTE.ORG, <http://www.mediainstitute.org/ONLINE/FAM2003/6-a.html>.

81. *See id.*

82. *Id.*

83. *See id.*

84. *See Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 956–57 (8th Cir. 2003).

85. *Id.* at 958 (citing *Winters v. New York*, 333 U.S. 570, 510 (1948)).

86. *See id.*

opinion.<sup>87</sup>

The Court of Appeals rejected a number of arguments made by the county and accepted by the district court.<sup>88</sup> First, the Eighth Circuit rejected the claim that the ordinance protected the “psychological well-being of minors” by preventing their exposure to these violent games.<sup>89</sup> The psychological studies failed to show a link between exposure to these games and increased aggressive behavior in minors.<sup>90</sup> In addition, the court found that the ordinance cannot be compelling merely because society believes exposure to violence harms children.<sup>91</sup> Second, the court rejected the argument that the county had a compelling interest in “assisting parents to be the guardians of their children’s well-being.”<sup>92</sup> The court held the county may not limit the Constitution’s force to aid parental authority.<sup>93</sup> Though the government may constitutionally regulate sexually explicit materials that are obscene to minors, the government may not limit protected speech.<sup>94</sup> Violent video games are not obscene, but are protected speech. Thus, for a second time, a federal appellate court held laws restricting minors’ access to violent video games unconstitutional.

### 3. *Video Software Dealers Association v. Maleng*<sup>95</sup> Strikes Down State Attempts at Video Game Legislation

Despite the warnings set forth by *Kendrick* and its progeny, legislators continued to propound bills to restrict minors’ access to video games. In early 2003, the Washington State House of Representatives proposed House Bill 1009, which provided, in summary, that “a person who sells, rents, or permits to be sold or rented to a minor, a violent video game that depicts violence against a public law enforcement officer is guilty of a misdemeanor.”<sup>96</sup> In May 2003, after passing in both Houses, the governor signed HB 1009 into law.<sup>97</sup> Washington Revised Code §9.91.180

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87. *See id.* at 960.

88. *See id.*

89. *Id.* at 958.

90. *See Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954, 958 (8th Cir. 2003).

91. *See id.*

92. *Id.* at 959.

93. *Id.*

94. *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 636–640 (1968)).

95. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

96. PSV Ratings – The Issue, [http://psvratings.com/issue\\_legislation.html#WASHINGTON](http://psvratings.com/issue_legislation.html#WASHINGTON) (describing the house bill).

97. *See* WASH. REV. CODE § 9.91.180 (2004).

was unique in that it only sought to restrict games that depicted violence against public law enforcement officers.<sup>98</sup> The video game industry, led by the IDSA, immediately challenged the law as unconstitutional.<sup>99</sup>

The IDSA, joined by a number of other industry groups, including the Video Software Dealers Association (VDSA), challenged the law claiming it violated the First Amendment by restricting minors' access to video games based solely on content and viewpoint.<sup>100</sup> Judge Robert Lasnik, after hearing oral arguments, agreed with the plaintiffs and struck down the law.<sup>101</sup> Guided by *Kendrick*, the court held that video games are a form of protected speech.<sup>102</sup> As a result, the court applied strict scrutiny and tested the state's arguments for compelling interests.<sup>103</sup> Addressing the state's concern that these games fostered antisocial behavior including aggression and hostility towards law enforcement officers, Judge Lasnik determined that the "belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence."<sup>104</sup> None of the studies presented by the state were designed to test the effects of such games on the player's attitudes or behavior toward law enforcement officers.<sup>105</sup> Furthermore, the court held that the definition of violence against law enforcement officers was vague and would be nearly impossible to apply without violating the First Amendment.<sup>106</sup>

Thus, for a third time, a court struck down a law restricting minors' access to violent video games. Following the decision in *Maleng*, the three cases combined created a formidable barrier to the enactment of any similar law in the future. Yet, state legislators continually tried to pass such legislation.

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98. *See id.*

99. *See* Press Release, Entm't Software Ass'n, *IDSA Announces Plans to Challenge Washington State HB 1009 As Unconstitutional* (May 20, 2003), [http://www.theesa.com/archives/2003/05/idsa\\_announces.php](http://www.theesa.com/archives/2003/05/idsa_announces.php).

100. *See Maleng*, 325 F. Supp. 2d at 1183.

101. *See id.* at 1191.

102. *See id.* at 1185.

103. *See id.* at 1186.

104. *Id.* at 1189.

105. *See id.* at 1188.

106. *See Maleng*, 325 F. Supp. 2d at 1190–91 (noting that the terms of the statute are unconstitutionally vague, because it is not clear who would be considered a law enforcement officer).

### III. THE LATEST INCARNATIONS OF RESTRICTIVE VIDEO GAME LAWS

#### A. Illinois Takes the First Plunge into Constitutionally Unfriendly Waters

On July 25, 2005, Illinois Governor Rod Blagojevich made much fanfare about his signing of the Safe Games Illinois Act of 2005.<sup>107</sup> On that day, surrounded by parents and pre-teens in a public library in Aurora, Illinois, the governor signed House Bill 4023 into the Illinois Criminal Code, making Illinois “the first state in the nation to ban the sale and rental to children of violent and sexually explicit video games.”<sup>108</sup> Under the law, a retailer who sold such offending games to minors may be charged with a misdemeanor and face a fine of \$1,000.<sup>109</sup> Games subject to this law included *Doom 3*, *GTA: San Andreas*, and *Mortal Kombat: Deception*.<sup>110</sup>

The Act is separated into two distinct sections: Article 12A, covering violent video games, and Article 12B, covering sexually explicit video games. Article 12A defines “violent video games” as those games that depict “human-on-human violence in which the player kills, seriously injures, or otherwise causes serious physical harm to another human.”<sup>111</sup> The definition of “sexually explicit video games” in Article 12B, on the other hand, is an adaptation of the *Miller* test developed by the Supreme Court for defining obscenity in *Miller v. California*.<sup>112</sup> In *Miller*, the Supreme Court laid out “basic guidelines” for jurors to determine whether a particular media is obscene: (1) “whether ‘the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;” (2) “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;” and (3) “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>113</sup> In

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107. See Press Release, State of Illinois Home-IGNN (Illinois Government News Network), *Gov. Blagojevich signs law making Illinois the only state in the nation to protect children from violent and sexually explicit video games* (July 25, 2005), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4170>.

108. *Id.*

109. See 720 ILL. COMP. STAT. 5/12B-15 (West 1993).

110. *Top Lists of Violent and Sexually Explicit Video Games*, <http://www.safegamesillinois.org> (last visited Jan. 3, 2006).

111. 720 ILL. COMP. STAT. 5/12A-10(e) (West 1993) (defining “serious physical harm” includes dismemberment, decapitation, maiming, and rape.).

112. See, 720 ILL. COMP. STAT. 5/12B-10(e) (West 1993); see also *Miller v. California*, 413 U.S. 15 (1973) (holding that obscenity is not protected as free speech under the First Amendment.).

113. *Miller*, 413 U.S. at 24 (internal citations omitted).



composing the definition for “sexually explicit video games,” the Illinois legislature incorporated the first two factors of the *Miller* test, but left out the third factor.<sup>114</sup>

Irrespective of the differing definitions, the language in the two Articles is virtually identical.<sup>115</sup> The only difference is the compelling interest presented by the legislature for passing the law. A state’s compelling interest, or rationale for passing a law, is a crucial factor that allows a particular law to overcome a strict scrutiny standard applied by a court.<sup>116</sup> Whereas Article 12A lists five compelling interests for banning violent video games from minors, Article 12B only lists one compelling reason with respect to sexually explicit video games.<sup>117</sup> In a clear attempt to improve the law’s chances of passing constitutional muster, the Illinois legislature appealed to different interests for each Article of their video game law. In Article 12A, the Legislature’s compelling interests centered on the damaging effects that violent video games have on children and society.<sup>118</sup> In Article 12B, the Legislature’s sole stated compelling interest was “assisting parents in protecting their minor children from sexually explicit video games.”<sup>119</sup>

Almost immediately after the governor signed the law, a number of video game-related groups filed suit to enjoin its enforcement.<sup>120</sup> The Entertainment Software Association (ESA), joined by VSDA and the Illinois Retail Merchants Association (IRMA), sued Governor Blagojevich, in his official capacity, claiming that “[t]his law will have a chilling effect on free speech.”<sup>121</sup> They asserted that it will “limit First Amendment rights not only for [Illinois’] residents, but for game developers and publishers, and for retailers who won’t know what games can and cannot be sold or rented under this vague new statute.”<sup>122</sup> The ESA contended that

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114. 720 ILL. COMP. STAT. 5/12B-10 (West 1993).

115. 720 ILL. COMP. STAT. 5/12A-B (West 1993).

116. See BLACK’S LAW DICTIONARY 670 (2d ed. 2001) (stating that strict scrutiny is the maximum level of examination applied by a reviewing court when determining the constitutionality of any given law.).

117. See 720 ILL. COMP. STAT. 5/12A-B (West 1993) (noting that the compelling reasons for restricting violent games generally include the alleged psychological, mental and physical effects these games have on children).

118. See 720 ILL. COMP. STAT. 5/12A-5 (2005).

119. See, 720 ILL. COMP. STAT. 5/12B-5 (2005).

120. See *Entm’t Software Ass’n v. Blagojevich*, No. 05-C-4265, 2005 U.S. Dist. LEXIS 31100 (N.D. Ill., 2005).

121. Press Release, Entm’t Software Ass’n, Video Game Industry to File Suit Seeking Relief from Illinois Governor’s Unconstitutional Law (July 25, 2005), [http://www.theesa.com/archives/2005/07/video\\_game\\_indu\\_1.php](http://www.theesa.com/archives/2005/07/video_game_indu_1.php).

122. *Id.*

proponents of the bill disregarded the effectiveness of industry self-regulation.<sup>123</sup> They also pointed to the binding precedent set by the Seventh Circuit in *Kendrick*, which established the unconstitutionality of such a statute.<sup>124</sup>

### *B. Michigan Follows Suit With Its Own Video Game Law*

The Michigan Video Game Law is a compilation of four bills—two from the Michigan House of Representatives (HB 4702 and 4703) and two from the Michigan Senate (SB 416 and 463).<sup>125</sup> Like the Illinois Law, these four bills are designed to keep ultra-violent and sexually explicit video games out of the hands of minors.<sup>126</sup> House Bill 4702 adds sexually explicit video games to the state's obscenity laws.<sup>127</sup> Michigan's obscenity laws, compiled under Public Act 33 of 1978, make the "dissemination, exhibiting, or displaying of certain sexually explicit matter to minors" a felony punishable by up to two years in prison and/or a large fine.<sup>128</sup> House Bill 4703 requires video game retailers to provide signs or brochures explaining the current video game "rating" system.<sup>129</sup> The Senate version of the law, Senate Bill 416, expands on the House bills to make it illegal to "knowingly disseminate to a minor an ultra-violent explicit video game that is harmful to minors."<sup>130</sup> A person who violates this section may be ordered to pay a civil fine of not more than \$5,000.00.<sup>131</sup> Senate Bill 463 amends Public Act 33 of 1978 to add sexually explicit video games to the list of "sexually explicit performances" and to the list of visual representations in the definition of "sexually explicit visual material" that depict nudity, sexual excitement, erotic fondling, sexual intercourse, or

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123. *See id.*

124. *See id.*

125. *See* Press Release, Granholm Signs Final Bills Protecting Children from Violent and Sexually-Explicit Video Games (Sept. 14, 2005), <http://www.michigan.gov/som/0,1607,7-192-29939-126123--,00.html>.

126. *See id.*

127. *See* Act to Amend 1978 PA 33, Pub. A. No. 104, 2005 Mi. P.A. 104 (LexisNexis) (H.B. 4702).

128. MICH. COMP. LAWS § 722.671–678 (West 1993).

129. *See* Act to Amend 1978 PA 33, Pub. A. No. 105, 2005 Mi. P.A. 105 (LexisNexis) (H.B. 4703) (stating that a violation of the law would be a state civil *infraction* the retailer could be ordered to pay a fine of not more than \$1,000.).

130. Act to Amend 1978 PA 33, Pub. A. No. 108, 2005 Leg., Reg. Sess. (Mich. 2005 Adv. Legis. Serv. 108 (LexisNexis) (S.B. 416) (adding an affirmative defense of good faith to the law prohibiting the dissemination of violent video games.).

131. Act to Amend 1978 PA 33, Pub. A. No. 107, 2005 Leg., Reg. Sess. (Mich. 2005 Adv. Legis. Serv. 107 (LexisNexis) (S.B. 463), available at [http://www.legislature.mi.gov/\(bte0s02zg13112z55rxux2zq\)/mileg.aspx?page=BillStatus&objectname=2005-sb-0463](http://www.legislature.mi.gov/(bte0s02zg13112z55rxux2zq)/mileg.aspx?page=BillStatus&objectname=2005-sb-0463).

sadomasochistic abuse.<sup>132</sup>

In an attempt to survive strict scrutiny, the state lists three compelling interests for passing this law: (1) “safeguarding both the physical and psychological well-being of minors;” (2) “preventing violent, aggressive, and asocial behavior from manifesting itself in minors;” and (3) “directly and substantially alleviating the real-life harms perpetrated by minors who play ultra-violent explicit video games.”<sup>133</sup> These state interests are not much different from those interests listed in the legislation deemed unconstitutional in *Kendrick* and its progeny. Nevertheless, the Michigan legislature believes that new data on the psychological effects of these games on children will substantiate its compelling interests.<sup>134</sup>

On September 12, 2005, Michigan Governor Jennifer M. Granholm signed House Bills 4702 and 4703 into law despite the law’s potential constitutional issues.<sup>135</sup> Two days later, she signed Senate Bills 416 and 463 into law as well.<sup>136</sup> Granholm accompanied the signing by noting that “[t]his [four bill package] is a common-sense law that provides parents with the tools they need to protect their children from the effects of violence and graphic adult content.”<sup>137</sup>

As expected, the video game industry filed suit just one week after the law’s passage to enjoin its enforcement.<sup>138</sup> The ESA, accompanied by the VSDA and the Michigan Retailers Association, brought claims against the Governor and Attorney General of Michigan in their official capacities.<sup>139</sup> The plaintiffs claim that the portion of the law prohibiting the sale or rental of ultra-violent, explicit video games upsets the freedom of expression guaranteed by the First Amendment and is unconstitutionally vague.<sup>140</sup>

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132. Act to Amend 1978 PA 33, Pub. A. No. 107, 2005 Leg., Reg. Sess. (Mich. 2005 Adv. Legis. Serv. 107 (LexisNexis) (S.B. 463).

133. MICH. COMP. LAWS § 722.685(e)–(g) (2005).

134. *See id.*

135. *See* Press Release, Governor of Michigan, Granholm Signs New Laws to Protect Children from Violent and Sexually-Explicit Video Games (Sept. 12, 2005), [http://www.michigan.gov/gov/0,1607,7-168-23442\\_21974-126002—M\\_2005\\_9,00.html](http://www.michigan.gov/gov/0,1607,7-168-23442_21974-126002—M_2005_9,00.html); Brendan Sinclair, *Michigan Governor Signs Gaming Bill into Law, Sort of*, GAMESPOT.COM, Sept. 12, 2005, [http://www.gamespot.com/news/2005/09/12/news\\_6133055.html](http://www.gamespot.com/news/2005/09/12/news_6133055.html).

136. *See* Press Release, Granholm Signs Final Bills Protecting Children from Violent and Sexually-Explicit Video Games (Sept. 14, 2005), <http://www.michigan.gov/som/0,1607,7-192-29939-126123—.00.html>.

137. *Id.*

138. *See* Complaint at 1–2, *Entm’t Software Ass’n v. Granholm*, No. 05-CV-73634, 2005 U.S. Dist. LEXIS 28318, (E.D. Mich. Sept. 21, 2005), 2005 WL 2916109.

139. *See id.*

140. *See id.* at 17–22; *see also* *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1190 (W.D. Wash. 2004) (“[I]t is reasonable to ask whether a state may ever impose a ban

The plaintiffs sought a preliminary injunction while the case was pending because the law was due to take force on December 1, 2005.<sup>141</sup>

On November 9, 2005, Judge George Steeh granted the plaintiffs' motion for a preliminary injunction, stating that the Act is "unlikely to survive strict scrutiny" and will probably be struck down as unconstitutional.<sup>142</sup>

### *C. California Marches On with Its Own Video Game Legislation*

On October 7, 2005, California joined Illinois and Michigan and passed Assembly Bill 1179, which made it illegal to sell or rent violent video games to minors in California.<sup>143</sup> The bill, authored and sponsored by California Speaker Pro Tempore Leland Yee, originated as Assembly Bill 450 before the Legislature modified it into its current state.<sup>144</sup> After encountering some difficulties in committee meetings, the bill breezed through the Assembly and Senate. However, the bill faced stiff lobbying from industry representatives while it sat on action-star-turned-Governor Arnold Schwarzenegger's desk for an official signature.<sup>145</sup>

The law prohibits the sale or rental of violent video games to minors under eighteen years of age and requires that such games be specifically labeled before being imported into or distributed in California.<sup>146</sup> Violators of either provision are liable for up to \$1,000 per violation.<sup>147</sup> Unlike the

on the dissemination of video games to children under 18. The answer is 'probably yes' if the games contain sexually explicit images . . .").

141. See Complaint at 2

, 23, *Entm't Software Ass'n v. Granholm*, No. 05-CV-73634, 2005 U.S. Dist. LEXIS 28318, (E.D. Mich. Sept. 21, 2005), 2005 WL 2916109.

142. *Entm't Software Ass'n v. Granholm*, No. 05-CV-73634, 2005 U.S. Dist. LEXIS 28318, at \*11 (E.D. Mich. Nov. 9, 2005).

143. See Simon Carless, *Governor Schwarzenegger Signs California Games Bill*, GAMASUTRA.COM, Oct. 7, 2005, [http://www.gamasutra.com/php-bin/news\\_index.php?story=6777](http://www.gamasutra.com/php-bin/news_index.php?story=6777).

144. See Cathy Kirkman, *California Enacts Violent Video Game Legislation*, <http://www.svmedialaw.com/content-195-california-enacts-violent-video-game-legislation.html> (Oct. 9, 2005).

145. See Brendan Sinclair, *Violent Games Bill Passes California Legislature*, GAMESPOT.COM, Sept. 9, 2005, [http://www.gamespot.com/news/2005/09/09/news\\_6132907.html](http://www.gamespot.com/news/2005/09/09/news_6132907.html); see also Simon Carless, *IEMA Steps Up California Game Bill Response, Urges Veto*, GAMASUTRA.COM, Sept. 14, 2005, [http://www.gamasutra.com/php-bin/news\\_index.php?story=6519](http://www.gamasutra.com/php-bin/news_index.php?story=6519).

146. See 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179) (West) (setting forth the bill that gave rise to the law and explaining that each violent video game that is distributed in California for retail sale must be labeled with a prominent "18" label on the front of the packaging). See generally CAL. CIV. CODE § 1746 (Deering 2005).

147. See 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179) (West).

laws in Illinois and Michigan, California does not have a specific provision restricting sexually-explicit video games.<sup>148</sup> The only mention of sexual content in the law is under the definition of a “violent video game.”<sup>149</sup>

The California Assembly took great care in defining relevant terms in the statute. Most importantly, a “violent video game” is defined under the law as one that involves “killing, maiming, dismembering or sexually assaulting an image of a human being,” if the acts depicted in the game either: (1) fail the *Miller* test and thus deemed obscene, or (2) “[e]nable 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.”<sup>150</sup> Unlike Illinois, the California Assembly included all three relevant *Miller* test factors in its description of a violent video game.<sup>151</sup> This addition makes it more difficult to survive strict scrutiny, as courts have often found that video games have significant artistic value.<sup>152</sup> In addition, by attempting to clearly define each term, the Legislature seeks to avoid the Act from being ruled unconstitutionally vague.

To survive a court’s application of the strict scrutiny standard, AB 1179 posits a compelling interest in “preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.”<sup>153</sup> This compelling interest is very similar to the interests described in previous legislation, including legislation declared unconstitutional.<sup>154</sup>

As expected, members of the video game industry joined together and filed suit to declare the Act unconstitutional.<sup>155</sup> The VSDA and ESA, as

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148. See generally CAL. CIV. CODE § 1746 (Deering 2005).

149. *Id.* § 1746(d)(1).

150. *Id.* § 1746(d)(1)–(d)(3) (noting that the terms mentioned above, including “heinous,” “cruel,” and “depraved” are all defined under the Act).

151. See *id.* § 1746(d)(1)(A).

152. See *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991) (noting that “To hold . . . that *all* video games—no matter what their content—are *completely* devoid of artistic value would require us to make an assumption . . . *perhaps* totally at odds with reality” despite holding that the video games at issue in that case were not constitutionally protected as free expression).

153. 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179) (West).

154. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) [hereinafter *AAMA*]; *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1186 (W.D. Wash. 2004); 720 ILL. COMP. STAT. 5/11-21 (West 1993).

155. See Reuters, *Video Game Makers Vow to Fight California Law*, MSNCOM, Oct. 10, 2005, <http://www.msnbc.msn.com/id/9623616>.

plaintiffs in this action, brought claims against the Governor and the Attorney General.<sup>156</sup> They alleged the new law is an impediment to the freedom of expression as protected under the First Amendment and is unconstitutionally vague.<sup>157</sup> Upon the signing of the bill, Doug Lowenstein, President of the ESA, declared that “everyone involved with this misguided law has known from the start that it is an unconstitutional infringement on the First Amendment freedoms of those who create and sell video games.”<sup>158</sup> However, Cathy Kirkland, a noted media attorney, indicated that the law was meticulously constructed to address the First Amendment concerns that plagued its predecessors and that “if it survives [this] challenge and this is the magic language, then on a case by case basis, it will stand up.”<sup>159</sup>

Yet, on December 21, 2005, Judge Ronald Whyte granted the plaintiffs’ motion for a preliminary injunction, stating that the “balance of hardships tips sharply in the plaintiff’s favor as the potential infringement of First Amendment rights and the costs . . . outweigh the potential harm of a short delay in the implementation of the Act . . . .”<sup>160</sup>

#### IV. ANALYSIS: ALL THREE LAWS WILL BE DECLARED UNCONSTITUTIONAL

The Illinois, Michigan, and California video game laws each present individual methods to create seemingly constitutionally sound legislative policy to combat youth access to inappropriate video games. Yet, despite the hard work of legislators in these states, all three laws will be declared unconstitutional. In fact, during the production of this Comment, the federal district court in Illinois struck down as unconstitutional the Safe Games Illinois Act.<sup>161</sup> Furthermore, the Michigan law, S.B. 416, took a hit when Judge Steeh granted a preliminary injunction against the statute and declared it “unlikely to survive strict scrutiny.”<sup>162</sup> Finally, the California

156. See Complaint at 1, *Video Software Dealers Ass’n v. Schwarzenegger*, No. 05-4188 (N.D. Cal. Oct. 17, 2005).

157. See *id.* at 14-17; see also U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1.

158. Press Release, Entm’t Software Ass’n, Statement from the ESA on its California Lawsuit (Oct. 17, 2005), [http://www.theesa.com/archives/2005/10/statement\\_from.php](http://www.theesa.com/archives/2005/10/statement_from.php).

159. Posting of Dean Takahashi to The Mercury News Blog, [http://blogs.mercurynews.com/aei/2005/10/california\\_viol.html](http://blogs.mercurynews.com/aei/2005/10/california_viol.html) (Oct. 7, 2005, 5:15 p.m.).

160. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1048 (N.D. Cal. 2005).

161. See *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1055 (N.D. Ill. 2005).

162. *Entm’t Software Ass’n v. Granholm*, 404 F. Supp. 2d 978, 984 (E.D. Mich. Nov. 9, 2005).

law, despite its careful attention to detail, was preliminarily enjoined when Judge Whyte held that the plaintiffs “are likely to succeed on the merits of their claim that the Act violates the First Amendment . . . .”<sup>163</sup>

### A. Standard of Review for Constitutional Challenges

As previously mentioned, video games constitute speech protected by the First Amendment.<sup>164</sup> As a result, any law that restricts video games based on their content is subject to the highest form of scrutiny, namely strict scrutiny.<sup>165</sup> For a law to survive strict scrutiny, the law must: (1) serve a compelling state interest; and (2) be narrowly tailored to fulfill that interest.<sup>166</sup> The Supreme Court noted in *U.S. v. Playboy Entertainment Group* that “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”<sup>167</sup> Furthermore, even if the law survives strict scrutiny, the law must not be unconstitutionally vague.<sup>168</sup> It is undisputed that these Acts in question seek to regulate the distribution of video games purely for their content. However, the United States Supreme Court has held that “[c]ontent-based restrictions are presumptively invalid.”<sup>169</sup> Minors’ First Amendment rights should not be infringed by content-based regulations. Furthermore, minors have the right to be free from content-based regulation of their First Amendment free speech rights.<sup>170</sup> The Seventh Circuit noted the danger of allowing the government to control the free speech access of children by explaining that “[p]eople are unlikely to become well-functioning, independent-minded adults and

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

164. See *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001).

165. See *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003); *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1091 (9th Cir. 1998).

166. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003); see also *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1091 (9th Cir. 1998).

167. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

168. See, e.g., *Interactive Digital Software Ass’n*, 329 F.3d at 958; see generally *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[S]tatutes [are] sufficiently certain, [and not vague if] . . . they employ words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . . or [having] a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ . . . .”).

169. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

170. See *Kendrick*, 244 F.3d at 575–76 (“Children have First Amendment Rights.”); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975) (“[T]he values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”).

responsible citizens if they are raised in an intellectual bubble.”<sup>171</sup>

### *B. The Violent Video Game Portions of These Laws Fail Strict Scrutiny*

Depictions of violence are fully protected under the First Amendment.<sup>172</sup> Whereas the government has long held the power to enact laws to protect people from violence, the power to regulate the images or pictures of violence is a “novelty.”<sup>173</sup> In *Winters v. New York*, the Supreme Court recognized the “importance of the exercise of a state’s police power to minimize all incentives to crime,” but held that violent expression is “as much entitled to the protection of free speech as the best of literature.”<sup>174</sup> To survive strict scrutiny, each state must present at least one compelling interest to prevent minors’ access to violent video games and prove that their respective laws are narrowly tailored to serve that interest alone.

#### 1. The States Do Not Present Compelling Interests

Though each state presents a different number of compelling interests for their respective laws, these interests generally fall into two general interests: (1) preventing violent, aggressive, and antisocial behavior which may lead to real-life harms perpetrated by minors; and (2) preventing physical, psychological, and neurological harm to minors who play violent video games.<sup>175</sup>

With respect to the first interest, each state independently asserts that exposure to violent images in video games will lead to violent and aggressive behavior in minors.<sup>176</sup> These assertions rest upon congressional “findings” that generally rely on the psychological work of Doctor Craig Anderson.<sup>177</sup> These studies conclude that high levels of violent video game

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171. *Kendrick*, 244 F.3d at 577 (noting that “[t]o shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”).

172. *See Kendrick*, 244 F.3d at 575–76; *see also Winters v. New York*, 333 U.S. 507, 510 (1948).

173. *Kendrick*, 244 F.3d at 575–76; *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding that insulting or “fighting” words, those which by their very utterance inflict injury or tend to incite in the reasonable person an immediate breach of the peace, i.e. violence, are not protected by the First Amendment).

174. *Winters*, 333 U.S. at 510.

175. *See* MICH. COMP. LAWS § 722.685 (2005) (noting three compelling interests); *compare* 720 ILL. COMP. STAT. 5/12A-5(d)–(h) (West 1993) (maintaining five compelling interests) *and* CAL. CIV. CODE § 1746(c) (Deering 2005) (listing only one compelling interest).

176. *See* 720 ILL. COMP. STAT. 5/12A-5(e) (West 1993); CAL. CIV. CODE § 1746(c) (Deering 2005); MICH. COMP. LAWS § 722.685 (2005).

177. *See Entm’t Software Ass’n v. Granholm*, 404 F. Supp. 2d 978, 984 (E.D. Mich. Nov. 9,



exposure are linked to delinquency, fighting at school, and violent criminal behavior.<sup>178</sup> However, every court that has considered the potential nexus between minors' exposure to violent video games with aggressive behavior and potential to commit real-life harm has discounted such a link.<sup>179</sup> Although states like Michigan and California claim that new data on the potential connection between video game playing and aggressive behavior will overcome the constitutional problems from the past cases, this new data is nothing more than a repackaging of the old data and will not suffice.<sup>180</sup> In early November 2005, the Michigan district court in *ESA v. Granholm*, granted ESA a preliminary injunction, stating that Dr. Anderson's work had previously been rejected, that the studies do not support the ordinance, and that there is an equivalent amount of data disproving such a link between violent video games and aggression.<sup>181</sup> Furthermore, many of the studies presented by the states are much broader than the relationship between video games and violence; they look at violent media as a whole, instead of focusing solely on video games and their effect on children.<sup>182</sup>

Statistics also indicate that youth violence has actually decreased since 1993, the year when the onslaught of violent video games began.<sup>183</sup> The Bureau of Justice Statistics National Crime Victimization Survey, a study conducted by the U.S. Department of Justice, indicates that the proportion of serious violent crimes committed by juveniles has generally declined since 1993.<sup>184</sup> The study shows that there has been a 69% drop—from 1,108,000 in 1993 to 345,000 in 2004—in violent crimes committed by persons between the ages of twelve and seventeen.<sup>185</sup> Though a number of factors lead to this decrease in overall youth violence, violent video games have clearly not caused an increase in overall youth aggression and

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2005).

178. See Craig A. Anderson, *Violent Video Games: Myths, Facts, and Unanswered Questions*, APA ONLINE, October 2003, <http://www.apa.org/science/psa/sb-anderson.html>.

179. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578–79 (7th Cir. 2001); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004).

180. See, e.g., MICH. COMP. LAWS § 722.685 (2005).

181. See *Granholm*, 404 F. Supp. 2d at 982 (granting preliminary injunction).

182. See *id.*

183. See U.S. Department of Justice, Bureau of Justice Statistics, *Key Facts at a Glance*, <http://www.ojp.usdoj.gov/bjs/glance/tables/offagetab.htm> (last visited Jan. 12, 2006); U.S. Department of Justice, Bureau of Justice Statistics, *Perceived Age of Offenders*, <http://www.ojp.usdoj.gov/bjs/glance/offage.htm> (last visited Feb. 17, 2006).

184. See U.S. Department of Justice, Bureau of Justice Statistics, *Key Facts at a Glance*, <http://www.ojp.usdoj.gov/bjs/glance/tables/offagetab.htm> (last visited Jan. 12, 2006).

185. See *id.*

violence.

Furthermore, in order for a state to successfully prove that playing violent video games will lead to increased aggression and real-world violence, it must satisfy the strict standard set forth in *Brandenburg v. Ohio*.<sup>186</sup> In *Brandenburg*, the Supreme Court excluded from constitutional protection communicated ideas and images that incite others to violence.<sup>187</sup> The Court held that the states may attempt to guard against the tendency of certain expressions that lead to lead to violence by regulating only that speech which is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>188</sup> In *Ashcroft v. Free Speech Coalition*, the Supreme Court confirmed that “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”<sup>189</sup> Thus, the content of a violent video game can only be restricted if it directs or induces the player to engage in immediate violent acts.

None of the laws in question include findings that the depiction of violent images in video games, or the playing of violent video games, direct players to commit unlawful violent acts. None of these games tell children to burn down a house in real life, or to murder a police officer. In addition, there is a dearth of findings by the states that violent video games are unlikely to incite imminent violence. The Seventh Circuit, binding precedent for the Illinois law, concluded in *Kendrick* that there was no evidence that “video games have ever caused anyone to commit a violent act... or have caused the average level of violence to increase anywhere.”<sup>190</sup> The district court in Illinois followed this precedent in *ESA v. Blagojevich* and held that the government presented no evidence that video game violence will incite imminent lawlessness among minors.<sup>191</sup> The court noted that the government presented data showing a correlation between violence and aggressiveness in minors, but did not make a sufficient showing that violence in video games causes real-life violence and aggressive behavior.<sup>192</sup> Thus, the first compelling interest of the states’ laws fails strict scrutiny.

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186. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

187. See *id.* at 447–48.

188. *Id.* at 447; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”).

189. *Free Speech Coal.*, 535 U.S. at 253 (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

190. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578–79 (7th Cir. 2001).

191. See *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1057–58 (N.D. Ill. Dec. 2, 2005).

192. See *id.* at 1059.

The second compelling interest noted here—that these laws are aimed at preventing physical, psychological, and neurological harm to minors who play violent video games—will also fail. Each state maintains a “harmful to minors” provision, setting forth the criteria that prove a particular expression is harmful to minors in a physical, psychological and/or neurological way.<sup>193</sup> However, as the plaintiffs in *ESA v. Blagojevich* noted, the only articulation of a “harmful to minors” standard was the one created by the court in *Ginsberg* and redesigned in *Miller*.<sup>194</sup> Yet, this standard only applies to sexually explicit media,<sup>195</sup> and not to violence. In *Miller*, the Supreme Court clearly limited the “harmful to minors” standard to sexually explicit material.<sup>196</sup> As a result, such a test is inapplicable to violent expression. The California and Michigan legislatures altered the *Miller* obscenity test, replacing the phrase “appeals to the prurient interest of minors” with “appeals to a deviant or morbid interest of minors,” to carve out an obscenity standard for violent media.<sup>197</sup> However, redesigning the “harmful to minors” standard to include violent video games is tantamount to considering violent video games obscene.<sup>198</sup> Despite the imaginative character of these provisions, they are unlikely to persuade a judge to consider the states’ interests compelling. The reviewing courts will not create a new free-speech exemption for violence that is on par with obscenity.

The states may try to use the data collected for the “preventing aggressive behavior” rationale to prove various harms to minors, but this data will surely meet the same fate here as it did in previous cases on this matter.<sup>199</sup> In fact, the court in *Granholm* noted that after a cursory review of Michigan’s research that “it is unlikely that the State can demonstrate a

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193. CAL. CIV. CODE § 1746(d)(1)(A)(i)–(iii) (Deering 2005); 720 ILL. COMP. STAT 5/11-21(b)(1) (West 1993); MICH. COMP. LAWS § 722.674(a) (2005).

194. See Memorandum in Support of Plaintiffs’ Motion for a Preliminary Injunction at 16, *Entm’t Software Ass’n v. Blagojevich*, No. 05-C-4265 (N.D. Ill. Aug. 23, 2005), 2005 U.S. Dist. LEXIS 31100; *Ginsberg v. New York*, 390 U.S. 629, 636–643 (1968); *Miller v. California*, 413 U.S. 15, 24–25 (1973).

195. See *Ginsberg*, 390 U.S. at 638; *Miller*, 413 U.S. at 24 (1973).

196. See *Miller*, 413 U.S. at 24; see also *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004) (interpreting the *Miller* obscenity standard to only apply to sexually explicit expression).

197. Compare CAL. CIV. CODE § 1746(d)(1)(A)(i) (Deering 2005), and MICH. COMP. LAWS § 722.686(h)(i) (2005) with *Miller v. California*, 413 U.S. 15, 24 (1973).

198. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001).

199. See generally CAL. CIV. CODE § 1746(d)(1)(A)(i) (Deering 2005); 720 ILL. COMP. STAT 5/11-21 (West 1993) (including findings that playing violent video games cause a reduction of activity in the frontal lobes of the brain but this finding is nothing more than a rewording and refurbishment of old scientific data previously rejected by courts in Illinois, Indiana, and Washington.).

compelling interest in preventing a perceived ‘harm.’”<sup>200</sup> The district court in California, relying heavily on *Blagojevich*, reached the same result.<sup>201</sup> Thus, both compelling interests presented by the legislatures in Illinois, Michigan, and California do not suffice and fail the strict scrutiny test.

## 2. The State Laws are Not Narrowly Tailored

Assuming that the states’ justifications for enacting such laws were valid, these disputed Acts would still fail strict scrutiny. The respective state laws must be narrowly tailored to achieve their purposes.<sup>202</sup> Each state must prove that there are no “less restrictive alternatives [that] would be at least as effective in achieving the [state’s interest].”<sup>203</sup> In other words, if there are methods to achieve the respective state’s interests that are less speech-restrictive than banning minors’ access to violent video games, then the law is not narrowly tailored and will fail strict scrutiny. The three laws are not narrowly tailored because they will not only affect minors’ access to speech, but will also have a chilling effect on speech by adults.<sup>204</sup> In Illinois and Michigan, the threat of criminal penalties for retailers who rent or sell violent video games to minors will undoubtedly cause many retailers to stop selling violent video games with an “M” rating. This will prevent adults from renting or purchasing such games, unnecessarily limiting their freedom of expression. Recent statistics indicate that the average age of video game players is thirty, and the average age of video game purchasers is thirty-seven years old.<sup>205</sup> Thus these laws will burden the vast majority of video game players by limiting adult’s rights just as much as children’s rights.

Furthermore, there are multiple alternatives to a statute that infringes on minors’ free speech rights. First, the ESRB rating system, considered by many to be the most comprehensive private ratings system available for any media, already provides guidance to parents and retailers.<sup>206</sup>

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200. *Entm’t Software Ass’n v. Granholm*, 404 F. Supp. 2d 978, 988-89 (E.D. Mich. Nov. 9, 2005) (granting preliminary injunction).

201. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1046 (N.D. Cal. 2005).

202. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 264 (2002).

203. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

204. This problem does not apply to the California law because the California law mounts only civil penalties for violations of the Act, not criminal penalties.

205. Top Ten Industry Facts, ESA.COM, [http://www.theesa.com/facts/top\\_10\\_facts.php](http://www.theesa.com/facts/top_10_facts.php) (last visited Jan. 12, 2006).

206. *See* ESRB Game Ratings, Game Rating and Descriptor Guide, [http://www.esrb.org/esrbratings\\_guide.asp](http://www.esrb.org/esrbratings_guide.asp) (last visited Sept. 30, 2005); *see also* *About ESRB, Fast Facts*, ESRB.COM, [http://www.esrb.com/about\\_facts.asp](http://www.esrb.com/about_facts.asp) (last visited Nov. 30, 2005).

Encouraging the widespread use of these ratings will ensure that violent video games do not end up in the wrong hands.<sup>207</sup> Second, encouraging vendors to “card” unaccompanied minors will help achieve the states’ goals. Such a program works for movie theatres, so there is no reason to believe it will not work for video game vendors. Finally, a public awareness campaign to inform parents about the ESRB ratings and the violence in certain games will accomplish the states’ objectives and prevent minors from playing these games without burdening their free speech rights. In short, all three state laws are not narrowly tailored. Therefore, they fail strict scrutiny and must be struck down as unconstitutional.

### C. *The “Sexually Explicit” Portion Fails Strict Scrutiny*

The Michigan and Illinois Acts also ban minors’ access to sexually explicit video games.<sup>208</sup> Like the violent video game laws, these prohibitions intend to restrict the content of minors’ free speech. As a result, the laws are subject to strict scrutiny, and the states bear the burden of proving the laws’ constitutionality.<sup>209</sup>

Under a strict scrutiny standard, the two laws succeed in presenting a compelling interest, but ultimately fail because they are not narrowly tailored to achieve that interest. The Supreme Court has determined that states have a compelling interest in protecting minors from exposure to inappropriate sexually explicit materials.<sup>210</sup> However, the law must still be narrowly tailored to achieve that particular interest.<sup>211</sup>

The Michigan and Illinois laws are not narrowly tailored because similar to the violent portions of the respective laws, they will impinge upon adults’ free speech rights and less restrictive alternatives are available. In *Reno v. American Civil Liberties Union*, the Supreme Court held the Communications Decency Act (CDA)—a law designed to protect minors from “obscene or indecent” material over any communication line, including television, radio, and the Internet—unconstitutional because it swept too broadly, and suppressed more speech than necessary.<sup>212</sup> While

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207. See Daniel Terdiman, *Unlevel Playing Field for Video Games?*, CNET NEWS.COM, Aug. 22, 2005, [http://news.com.com/Unlevel+playing+field+for+video+games/2008-1082\\_3-5840293.html](http://news.com.com/Unlevel+playing+field+for+video+games/2008-1082_3-5840293.html).

208. See 720 ILL. COMP. STAT 5/11-21 (West 1993); MICH. COMP. LAWS § 722.674 (2005).

209. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

210. See *Ginsberg v. New York*, 390 U.S. 629, 640 (1968); see also *Reno v. ACLU*, 521 U.S. 844, 863 n.30 (1997) (“Government generally has a compelling interest in protecting minors from ‘indecent’ and ‘patently offensive’ speech.”).

211. *ACLU*, 542 U.S. at 664 (2004).

212. *Reno v. ACLU*, 521 U.S. 844 (1997).

the Court recognized the government's compelling interest in protecting minors from this material, the CDA suppressed speech that adults had the constitutional right to obtain.<sup>213</sup> Adults have a constitutional right to send and receive indecent, yet not obscene, material through the mail or over the Internet.<sup>214</sup> Because the law prevented adults as well as minors from engaging in this type of speech, the law was not the least restrictive means for achieving the government's interest.<sup>215</sup> The *Reno* Court emphasized that "the Government may not limit speech to "only what is fit for children."<sup>216</sup> Here, the criminal penalties, levied upon retailers who violate this law, lead to speech suppression. Retailers will refuse to carry certain games in fear of such criminal charges, thus depriving adults of the constitutional right to obtain these games. Less restrictive alternatives, such as the ESRB rating system, will adequately prevent minors from obtaining sexually explicit material without unnecessarily suppressing the free speech rights of adults. As a result, both laws fail strict scrutiny.

The "sexually explicit" portion of the Safe Games Illinois Act suffers from yet another constitutional defect. In *Ginsberg* and later in *Miller v. California*, the Supreme Court set forth a "harmful to minors" test to determine if certain non-obscene speech may still be restricted to minors.<sup>217</sup> The three-part test, elucidated above, must be completely satisfied in order to restrict sexually explicit non-obscene materials from minors.<sup>218</sup> The Illinois Act contains two "harmful to minors" provisions—one located in the broader criminal code and another second provision within Article 12B, the portion of the law addressing sexually explicit video games.<sup>219</sup> Within Article 12B, the Illinois legislature defined "sexually explicit video games" to include the "harmful to minors" standard.<sup>220</sup> However, this definition removed the vital third prong of the test—that the game "lacks serious literary, artistic, political, or scientific value for minors."<sup>221</sup> In *ESA v. Blagojevich*, the court held that intentionally removing the third criteria does not conform to constitutional standards for defining what is obscene

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213. *Id.* at 874.

214. *Id.*

215. *Id.*

216. *Id.* at 875 (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)).

217. See *Ginsberg v. New York*, 390 U.S. 629, 632–33 (1968) (stating that speech under this standard may be determined obscene to minors, but not to adults.); *Miller v. California*, 413 U.S. 15, 24 (1973).

218. See *Reno v. ACLU*, 521 U.S. 844, 864–66 (1997).

219. See 720 ILL. COMP. STAT. 5/11-21 (West 1993); 720 ILL. COMP. STAT. 5/12-B (West 1993).

220. 720 ILL. COMP. STAT. 5/12-B (West 1993).

221. See *id.*

for minors and renders the law not narrowly tailored.<sup>222</sup>

Thus, if the *Blagojevich* court had decided to accept Illinois' modified standard, it would have seriously chilled free speech and would have "broaden[ed] the government's power to regulate expression far beyond the narrow contours of *Miller* and *Ginsberg*."<sup>223</sup> As David Horowitz, director of the Media Coalition—an association that defends the First Amendment right to produce and sell various media—stated, "[t]his legislation is an attempt to create a whole new category of speech that can be restricted as to minors . . . . [T]here is nothing to say that such an approach would not be carried over to other media."<sup>224</sup> Omitting the third prong should render this entire portion of the Illinois law unconstitutional.

If the Act included the third prong in the definition of "sexually explicit video game," it is likely that the vast majority of video games would not satisfy the *Miller* test and would not be deemed harmful to minors. Most video games contain complex storylines and are masterpieces of graphical art. In addition, many video games require players to figure out difficult puzzles and navigate perplexing scenes to achieve ultimate mastery of the game. The players learn lessons and battle classic quandaries, such as the fight between good and evil. Such characteristics are similarly found in books, movies, and other media protected by the First Amendment. The Court in *Ashcroft v. Free Speech Coalition* appropriately held that the "artistic merit of a work does not depend on the presence of a single explicit scene."<sup>225</sup> The Illinois legislature may not circumvent the sound judicial standard of *Ginsberg* and *Miller* in order to restrict minors' free speech rights. The "sexually explicit" portion of the Safe Games Illinois Act is unconstitutional.

#### D. All Three Laws are Unconstitutionally Vague

Despite the free speech problems of the three contested video game laws, each law is unconstitutional on an independent basis: vagueness. Because First Amendment rights are very fragile and easily "chilled," a law must give adequate notice as to what is proscribed and not allow for

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222. See *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 at 1078 (N.D. Ill. 2005).

223. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 17, *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

224. David L. Hudson, Jr., *What's on the Horizon*, FIRSTAMENDMENTCENTER.ORG, [http://www.firstamendmentcenter.org/speech/arts/horizon.aspx?topic=arts\\_horizon](http://www.firstamendmentcenter.org/speech/arts/horizon.aspx?topic=arts_horizon) (last visited Feb. 9, 2006).

225. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002).

discriminatory enforcement.<sup>226</sup> The three laws at issue are all impermissibly vague, because many of the key terms are not sufficiently precise to allow a reasonable person to understand the law and to act accordingly.<sup>227</sup> This defect places the burden on retailers to determine whether a particular video game falls within the purview of each statute. Different retailers will almost certainly reach conflicting determinations as to which games are likely to be restricted by the new law. Therefore, retailers may refuse to carry certain titles because of incorrect determinations and fear of criminal punishment, resulting in the suppression of legitimate speech.

A number of important terms defined within the statutes are too unclear to provide for uniform enforcement. For example, the definition of a “violent” video game under the Safe Games Illinois Act is one that “include[s] depictions . . . of human-on-human violence.”<sup>228</sup> However, the term “human” is an inappropriate term for video games that often use imaginary creatures, aliens, and other non-human characters to engage in violent encounters. Under the Act, retailers will be burdened with determining whether a particular character is human or not. It would be incumbent upon each individual retailer to examine the entire length of a video game before deciding whether the game is banned for minors. Yet, no retailer has the time or the ability to survey a complete video game for signs of “human” violence. The retailer would be subject to harsh criminal penalties if the retailer guesses wrongly about a game. As a result, many retailers will choose to remove questionable video games from their shelves even if those games did not violate the statute. The district court in *Maleng* confirmed this effect by striking down Washington State’s violent video game law as vague.<sup>229</sup>

Vagueness as a constitutional defect is not unique to the Illinois law. Both the Michigan and California laws also contain unclear, vague terms. Defined terms within the Michigan law such as “ultra-violent explicit video game” and “extreme and loathsome violence” are subject to varied interpretations that will result in the suppression of protected speech.<sup>230</sup> The definition of an “ultra-violent explicit video game” is one that

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226. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

227. See *id.* at 108.

228. 720 ILL. COMP. STAT. 5/12A-10(e) (West 1993).

229. See *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004) (noting that “a conscientious retail clerk (and her employer) [are] likely to withhold from minors all games that could possibly fall within the broad scope of the Act . . . and game designers will likely ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked.’” (quoting *Grayned*, 408 U.S. at 109)).

230. MICH. COMP. LAWS § 722.686(g)(l) (2005).



“continually and repetitively depicts extreme and loathsome violence.”<sup>231</sup> The definition of “extreme and loathsome violence” is even more complex, meaning “real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings . . . .”<sup>232</sup> However, there is no clear standard to determine what is realistic enough to be human. The court in *Maleng* recognized this ambiguity, asking, “[w]ould a game built around *The Simpsons* or the *Looney Tunes* characters be ‘realistic’ enough to trigger the Act?”<sup>233</sup> Such indefiniteness, the court held, rendered the Washington Act unconstitutional, especially when free expression was at stake.<sup>234</sup>

The California Video Game Act carefully defines relevant terms, but will nonetheless be held void for vagueness. The definition of a “violent video game” is one that “[e]nables 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.”<sup>235</sup> The California legislature attempted to define terms like “heinous” and “cruel,” but ended up with definitions that only create more questions. For example, the definition of “heinous” is “shockingly atrocious.” This definition provides no more guidance to the reasonable person applying this law than if there was no definition at all.<sup>236</sup> In addition, the California law suffers from the same problem as the Illinois and Michigan laws—it fails to define “human” or “substantially human.”<sup>237</sup> There is no clear, uniform way to determine which games fall under the Act and which games do not. Like the Illinois and Michigan laws, the California law is rife with unconstitutionally vague terms.<sup>238</sup> For these reasons, all three laws will be struck down as unconstitutional.<sup>239</sup>

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231. *Id.* § 722.686(l).

232. *Id.* § 722.686(g).

233. *Maleng*, 325 F. Supp. 2d at 1190.

234. *See id.* at 1191.

235. CAL. CIV. CODE § 1746(d)(1)(B) (Deering 2005).

236. *Id.* § 1746(d)(2)(C).

237. *Id.* § 1746(d)(1)(B).

238. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1042 (N.D. Cal. 2005) (holding that plaintiffs have not sufficiently shown they are likely to succeed on this claim, despite such arguments by the plaintiffs).

239. *See Julie Tamaki and Chris Gaither, Judge Halts Limits on Game Sales to Kids*, L.A. TIMES, Dec. 23, 2005, at A1 (stating that to date courts have ruled in favor of game makers six times to block video game sales bans.).

## V. ALTERNATIVE STRATEGIES TO PREVENT MINORS' ACCESS TO INAPPROPRIATE VIDEO GAMES

This Comment has suggested that legislation preventing minors' access to violent and/or sexually explicit video games is unconstitutional and will ultimately fail in the courts. However, permitting free access for minors to all video games is not a viable solution. The legislation discussed above professes commendable goals and focuses on minors' best interests. Yet, there are better ways to keep inappropriate games from the hands of minors than speech-suppressing legislation.

Proponents of the laws restricting minors' access to these video games claim that such restrictive legislation is necessary because the ESRB ratings are not effective.<sup>240</sup> In particular, all three states point to a 2003 undercover Federal Trade Commission (FTC) study, which concluded that 69% of unaccompanied teens age thirteen to sixteen were able to purchase "M" rated games.<sup>241</sup> However, this study is now almost three years old. Legislation that imposes negative incentives is not the answer. Speech suppression should never be the answer. ESRB ratings have become more respected, understood, and followed since the 2003 study. Moreover, additional protective measures taken by the industry, combined with hands-on parenting, will undoubtedly decrease the number of unaccompanied minors who will purchase and play such games.

The most important factor in preventing minors from accessing and playing inappropriate video games is parenting. Involved parenting (i.e. accompanying minors to the video game store, being aware of and understanding ESRB ratings, communicating to minors how the content of video games relates to "real life" and setting limits for playtime) is ultimately the answer to solving our nation's problem with minors' access to inappropriate video games. Matthew Ford, a professional video game developer for over twelve years and parent of a ten-year-old son, recently suggested helpful parenting tips.<sup>242</sup> Perhaps surprisingly, Ford encourages parents to let their children play video games.<sup>243</sup> He compares the recent backlash against video games to the backlash against rock-and-roll, comic

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240. ELIZABETH LINTON, A.B. 1179 ASSEMBLY BILL ANALYSIS (2005), [http://leginfo.ca.gov/pub/bill/asm/ab\\_1151-1200/ab\\_1179\\_cfa\\_20050908\\_235925\\_asm\\_floor.html](http://leginfo.ca.gov/pub/bill/asm/ab_1151-1200/ab_1179_cfa_20050908_235925_asm_floor.html).

241. *See id.*

242. *See* Tom Loftus, *Parenting and Video Games: One Dad's Tips*, MSNBC.COM, <http://www.msnbc.msn.com/id/9129712/print/1/displaymode/1098/> (last visited Dec. 28, 2005).

243. *See id.*

books, and jazz music when he was a child.<sup>244</sup> Ford expounds the beneficial aspects of video game playing (i.e. development of the mind) but strongly suggests that parents set rules outlining what the child should or should not play, and the amount of time the child should play such games.<sup>245</sup> Finally, Ford strongly encourages parents to watch their children play video games and discuss the games with them.<sup>246</sup> He suggests that talking about such video games is a great way to teach life lessons, history lessons, and morality lessons (i.e. the battle of good versus evil).<sup>247</sup> The sooner a parent uses these tips, the more beneficial the outcome will be, especially when these habits become ingrained in a child before they become a teenager.<sup>248</sup> In short, the sooner a parent begins actively monitoring their child's video game playing, the less likely their child is to be negatively influenced by the violent and sexual content in them.<sup>249</sup>

Improved video game technology will also have a large impact on minors' access to inappropriate video games. Video game console makers Nintendo, Sony, and Microsoft<sup>250</sup> are now including parental control devices in their new machines.<sup>251</sup> These new machines will allow parents to restrict the use of the console to play only video games with an approved ESRB rating.<sup>252</sup> For example, parents can limit the machine to play only "T" rated games and prevent the functioning of "M" rated games. In addition, the consoles that allow for online gaming include a device that will limit who a child player may interact with while online.<sup>253</sup> Jeff Brown, the spokesman for Electronic Arts, Inc., the world's largest independent video game publisher, believes that new technology in video game consoles

244. *See id.* (noting that if parents do not allow their children access to appropriate age-range video games that the child desires to play, the child will somehow get access to such games with the parent thus losing the chance to "influence their approach to games, their personal limits, and their bridge of communication with [the child]").

245. *See id.* (suggesting that parents learn and use the ESRB ratings as a guide to decide which games are appropriate for their children).

246. *See id.*

247. *See id.* (stating that Ford claims that parents will even become more "cool" if a child thinks their parents understand such games.).

248. *See* Tom Loftus, *Parenting and Video Games: One Dad's Tips*, MSNBC.COM, <http://www.msnbc.msn.com/id/9129712/print/1/displaymode/1098/> (last visited Dec. 28, 2005).

249. *Id.*

250. There are the three major video game consoles: Microsoft produces the new X-box 360, Sony produces the new PlayStation 3, and Nintendo produces the new Revolution, the next generation of the Nintendo Game Cube system.

251. *See* May Wong, *Sony Will Let Parents Control Access to Console*, USATODAY.COM, Nov. 28, 2005, [http://www.usatoday.com/tech/gaming/2005-11-28-sony-parental-controls\\_x.htm](http://www.usatoday.com/tech/gaming/2005-11-28-sony-parental-controls_x.htm).

252. *See id.*

253. *See id.*

will permanently solve this issue within five years.<sup>254</sup> Though this new technology will certainly help limit minors' access to violent and/or sexually explicit games, it remains the duty of involved parents to make sure the device is properly set up and maintained.

## VI. CONCLUSION

The emergence of video game laws such as those enacted in Illinois, Michigan, and California point to a current trend in state legislatures to create laws banning minors' access to violent and/or sexually explicit video games. These laws are being passed despite the inherent constitutional problems facing laws of this nature. District courts in three jurisdictions have already struck down such laws, providing the necessary precedent to invalidate this new batch of unconstitutional legislation. The First Amendment freedom of speech violations and the facial vagueness of these laws render them invalid, leaving legislators with the choice of abandoning such laws or creating more narrowly tailored versions of them.

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254. Tamaki, *supra* note 239, at A26.

Some commentators suggest that legislators' ultimate goal is not to enact substantive laws to protect children, but to gain politically from taking a pro-child stance by supporting these bills. Politicians do not want to appear soft on child protection laws in front of the public, so they refuse to vote against these laws despite knowing that the laws will be declared unconstitutional. Nevertheless, these laws consistently contain major constitutional defects and will consistently be held unconstitutional by reviewing courts. The most current versions of these laws—the ones enacted in Illinois, Michigan, and California—will almost certainly be permanently struck down as unconstitutional by district courts reviewing the statutes.<sup>255</sup> Still, minors' access to inappropriate video games will remain a significant problem. However, the combination of involved parenting and improved technology will protect our children from the negative effect of violent and sexually explicit games without the speech-suppressing consequences of overly restrictive legislation.

*Russell Morse\**

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255. See *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d at 1086-87 (N.D. Ill. 2005) (As previously noted, this law has recently been struck down as unconstitutional by the federal district court in Illinois. Governor Blagojevich is seeking an appeal on the decision. The two other laws are still awaiting final judicial review.).

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