

# Attack on Violent Video Games

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Just as legislators condemned comic books in the 1950s based on a concern that horror and crime comics contributed to juvenile delinquency in general and caused specific crimes in particular, video games have been attacked in recent years for their purported negative effects on children's thoughts and behaviors. But unlike comic books, which largely avoided direct government regulation, violent video games have been the target of laws passed in six jurisdictions over the past several years. To date, none of these laws has survived constitutional scrutiny. Courts have repeatedly struck down, on First Amendment grounds, laws restricting minors' access to violent video games.

Despite this unbroken series of decisions striking such laws down, legislative interest in finding a way, any way, to restrict minors' access to such video games continues unabated. Just recently, Senator Hillary Rodham Clinton proposed federal legislation that would restrict the sale or rental of video games to minors based on the games' ratings.<sup>1</sup> And Michigan, Louisiana, and Oklahoma just enacted similar laws, all of which have been challenged in federal court.

In the courtroom, these laws pit legislators concerned about the level of violence in video games against the manufacturers, distributors, and retailers of such games. Legislators have decried the prevalence of popular games such as *Grand Theft Auto* and offer up research studies purporting to show that violent video games cause aggressive thoughts and behavior by minors (though none of these has been accepted by courts as adequate to satisfy strict scrutiny). To the plaintiffs who challenge such statutes, arguing that video games are an expressive medium and laws that regulate games based on their content are presumptively invalid under the First Amendment, they are an issue of free speech. More broadly, this legal battle implicates whether adults and minors may access and play certain

video games without the threat of criminal penalties imposed by the state and whether the control of minors' access to these games will be left in the hands of parents and the private sector (the video game industry already has adopted a voluntary private rating system similar to that used by the movie industry).

The developing case law in this area presents a number of interesting First Amendment issues, including the ability of the government to restrict violent, as opposed to sexual, speech; the limits imposed by the *Brandenburg* doctrine on the government's authority to restrict speech in the name of preventing aggression; the legitimacy of a state interest in regulating minors' thoughts and personalities; the vagueness concerns raised by efforts to define prohibited violent images; and the validity of requiring labels on video games, which might constitute compelled speech subject to strict scrutiny.

## Round One

Between 2000 and 2004, an initial wave of laws and corresponding lawsuits addressed minors' access to violent video games. The legislatures in Indiana, Missouri, and Washington attempted to prohibit, respectively, arcade games, video game sales and rentals, and games involving violence to public law enforcement officers. The courts held that such games constituted protected expression, rejecting theories that such games are harmful to and unsuitable for minors.

## Arcade Games

In 2000, Indianapolis enacted the first law in the nation restricting minors' access to violent video games. The ordinance, which applied only to arcade games, forbade arcade operators from allowing a minor to use "an amusement machine that is harmful to minors." Attempting to adapt the sexually harmful-to-minors formulation established in *Ginsberg v. New York*<sup>2</sup> and *Miller v.*

*California*,<sup>3</sup> the Indianapolis law applied to games that "predominantly appeal[] to minors' morbid interest in violence," are "patently offensive" as to minors, "lack[] serious literary, artistic, political or scientific value as a whole" for minors, and contain "graphic violence." The law defined *graphic violence* as the "visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming, or disfigurement." Arcade owners who violated the ordinance were subject to monetary penalties and the suspension and revocation of their operation licenses.<sup>4</sup>

A group representing video game manufacturers sued to enjoin the ordinance. The district court denied the plaintiffs' motion for a preliminary injunction, and the plaintiffs appealed. In *American Amusement Machine Ass'n v. Kendrick*, the Seventh Circuit reversed.<sup>5</sup> Writing for the panel, Judge Posner concluded that the city could not forbid display of violent depictions to minors on the same grounds that it forbids display or distribution of depictions of sexual content to minors under *Ginsberg*.<sup>6</sup> Analyzing the potential interests advanced by the city, or available in theory, Judge Posner reasoned that if the city wanted to regulate material on the basis of the harm allegedly caused to minors or to the public at large, it must show compelling grounds for doing so.<sup>7</sup> The court was skeptical of such a claim, observing that descriptions of violence exist in literature from *The Odyssey* to *The Divine Comedy* to *War and Peace*, and noted that video

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games have strong literary themes as well, i.e., “age-old themes of literature, and ones particularly appealing to the young.”<sup>8</sup>

The Seventh Circuit thus rejected the notion that the government could prohibit minors from accessing violent images based solely on the unsubstantiated claim that such images were harmful to them. To the contrary, the court noted, “[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.”<sup>9</sup> The court also rejected the argument that government regulation of video games should be subject to greater leeway because of the video games’ interactive nature, noting that “[a]ll literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.”<sup>10</sup>

### **Video Game Sales or Rentals**

Two years later, the Eighth Circuit joined the Seventh Circuit in striking down a city ordinance that prohibited the provision of graphically violent video games to minors, a restriction that reached beyond arcade operators to retailers who sold and rented video games. That case, *Interactive Digital Software Ass’n v. St. Louis County*,<sup>11</sup> concerned a St. Louis County ordinance that made it unlawful for anyone to knowingly sell, rent, or make available graphically violent video games to minors without their parents’ consent. The ordinance contained a definition of *graphically violent* material that paralleled the Indianapolis ordinance.<sup>12</sup>

Plaintiffs, i.e., associations representing video game publishers, manufacturers, and retailers, brought a First Amendment challenge in federal district court. As with the *Kendrick* case, the district court initially denied relief, dismissing the suit on the grounds that video games did not constitute protected speech and that, even if they did, the St. Louis County ordinance was narrowly tailored to serve the compelling

interest of preventing harm to minors.<sup>13</sup>

The Eighth Circuit reversed. The court began by rejecting the district court’s rather cramped view of protected expression, observing that the law was aimed at expression, not conduct, because it sought to restrict access to video games “precisely because their content purportedly affects the thought or behavior of those who play them.”<sup>14</sup> Applying strict scrutiny, the court held that although “protecting the psychological well-being of minors” might be a compelling interest in the abstract, St. Louis County had not shown substantial supporting evidence of harm to children that was caused by their exposure to violent video games. In so holding, the court dismissed the social science research studies proffered by St. Louis County as consisting of “vague generalit[ies].”<sup>15</sup>

The court also rejected the county’s suggestion that assisting parents to safeguard the well-being of their children was sufficient on its own to justify restricting speech to minors. To accept that, the court said, “would be to invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority.”<sup>16</sup>

### **Games That Target the Police**

Despite strong rulings from the Seventh and Eighth Circuits, in 2003 the State of Washington passed a law restricting the rights of minors to access certain video games. Departing somewhat from the previous definitional structure, the Washington law dealt specifically with depictions of violence against law enforcement officers, restricting distribution to minors of video games containing “realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.”<sup>17</sup>

The video game makers and retailers again filed suit, and again the law was struck down. Specifically, in *Video Software Dealers Ass’n v. Maleng*, the district court in Seattle held that video

games were protected expression, rejected the defendants’ attempts to fit violent video games within the narrow category of obscenity, and held that the state could not bar distribution of otherwise-protected speech to minors simply because the state believed the material unsuitable for them.<sup>18</sup> Like the Seventh and Eighth Circuits, the Washington court held that the state did not provide sufficient evidence in support of its asserted interests.<sup>19</sup>

The *Maleng* court also held that the Washington law was void for vagueness. The court noted that the state had been unable to confirm whether firefighters would count as public law enforcement officers for purposes of applying the act, and it found the statute’s other terms, like *realistic violence*, difficult to apply in the fantastical context of video games.<sup>20</sup> Because of the difficulty in applying the act’s terms, the court concluded that retailers and manufacturers would be unable to understand exactly what was prohibited based on the language of the law and, thus, that they would self-censor (in the case of authors and designers) or overly restrict minors’ access to lawful works (in the case of retailers).<sup>21</sup> The district court’s decision was not appealed.

### **Round Two**

The year 2005 brought a new wave of laws targeted at violent video games; three states, i.e., Illinois, Michigan, and California, passed similar laws restricting minors’ access to certain games. Each state’s legislature passed its law despite awareness of the zero-for-three court record for these kinds of laws and, in the case of Illinois, despite binding circuit precedent holding that such laws are unconstitutional.

Not surprisingly, the video game associations challenged each law shortly after it was enacted. Apparently recognizing that the legal standards had not changed, the state defendants attempted in each suit to argue that new social science research providing the requisite substantial evidence to substantiate the government’s claim of compelling interest had emerged since the previous cases. However, each

court reviewing these laws has thus far disagreed, bringing the record thus far to zero-for-six. Each statute is discussed below.

### ***Entertainment Software Ass'n v. Blagojevich***

With the strong support of Governor Rod Blagojevich, Illinois led the pack, passing its law in July 2005. The Illinois law criminalizes the selling or renting of violent or sexually explicit video games to minors.<sup>22</sup> The law imposes a number of burdens on retailers, including requiring all games meeting the statutory definition of *violent* or *sexually explicit* to be labeled with a two-by-two-inch 18 sticker. The statute defines violent video games as including “depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human”; serious physical harm includes “depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.”<sup>23</sup>

The state defended the law as furthering five compelling interests: “preventing violent, aggressive, and asocial behavior; preventing psychological harm to minors who play such games; eliminating societal factors that may inhibit the physiological and neurological development of its youth; facilitating the maturation of Illinois’ children into law-abiding, productive adults; and assisting parents in protecting their children from such games.”<sup>24</sup>

### ***Entertainment Software Ass'n v. Granholm***

Passed less than two months after the Illinois law, the Michigan law imposes civil and criminal penalties on retailers who sell or rent “ultra-violent video game[s] that [are] harmful to minors” to anyone under the age of seventeen. Such a video game is one containing “real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings” as long as the game “appeals to the morbid interest in asocial, aggressive behavior of minors”; is patently offensive to minors; and

lacks serious literary artistic, political, educational, or scientific value when taken as a whole.<sup>25</sup>

### ***Video Software Dealers Ass'n v. Schwarzenegger***

Despite his association with a *Terminator* video game, Governor Arnold Schwarzenegger signed California’s video game act into law on October 7, 2005. The California law prohibits the sale or rental of video games to minors under eighteen, defining a violent video game in a particularly elaborate manner: one in which the players’ options include “killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in one of two ways: (1) the acts “appeal[] to the deviant or morbid interest in minors,” are “patently offensive,” and render the game without “serious literary, artistic, scientific, or political value for minors”; or (2) a player can “virtually inflict serious injury upon an image of human beings or characters with substantial 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>26</sup> The first part of the definition is modeled after the *Ginsberg* obscenity-as-to-minors formulation, and the second is apparently based on federal statutory death penalty factors.

Similar to the Illinois statute, the California law also requires any person who imports or distributes video games within California to label all video games meeting the statutory definition of *violent* with a large black and white 18 sticker.<sup>27</sup>

### **Video Games Are Protected Speech**

Taking a look at the cases reveals several common issues, most of which have been resolved in similar ways by the courts. For example, it is now well established that video games are a form of expression entitled to the same First Amendment protections as music, movies, and literature. These decisions have recognized that, like motion pictures and television programs, video games tell stories and entertain audi-

ences through the use of complex pictures, sounds, and text. These games often contain story lines and character development as richly detailed as (and sometimes based on) books and movies. Like great literature, these games frequently involve familiar themes such as good versus evil, triumph over adversity, struggle against corrupt powers, and quest for adventure. As the Eighth Circuit put it,

If the first amendment is versatile enough to shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jaberwocky 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>28</sup>

A good example is the game *God of War*, a game with a narrative that essentially parallels a classic narrative like *The Odyssey*. *God of War* takes place in ancient Greece, following the story of Spartan warrior Kratos as he endeavors to track down and kill Ares, the god of war, with the assistance of other mythological characters. Kratos fights demons and other humanoid (but not necessarily human) creatures, including zombies, skeletal warriors, and the god Ares. Yet despite the apparent literary value of *God of War*, its depictions of violence quite possibly could bar its access to minors under most laws regarding violent video games; or, at the least, it could be subject to self-censorship by wary retailers uncertain whether a game like *God of War* would be prohibited.<sup>29</sup>

### ***Ginsberg* Does Not Apply**

In some cases, the government has argued that violent video games are unprotected, or at least subject to lower scrutiny, under the *Ginsberg* harmful-to-minors formulation, which gives the government more room to regulate sexually explicit speech that is directed to children than such speech directed to adults. This position has been consistently rejected by the courts, which have held that neither *Ginsberg* nor the obscenity doctrine has been expanded to include violent as opposed to sexual content.<sup>30</sup> As the Eighth Circuit emphat-

ically stated, “Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults.”<sup>31</sup>

Having determined that video game expression is fully protected speech and having rejected the government’s attempts to obtain a weaker level of scrutiny through analogy to the obscenity doctrine, the courts have proceeded, explicitly or implicitly, to apply strict scrutiny to violent-video-game regulations. Under the familiar strict scrutiny test, a law is presumptively invalid, and the government must demonstrate on the basis of substantial evidence that the law serves a compelling interest, materially advances its aims, and is narrowly tailored.<sup>32</sup>

### **The *Brandenburg* Rule**

The interest that the government most often offers to justify these types of laws is a concern that exposure to violent video games will cause minors to become more violent. For example, the legislation adopted by California states that it is intended to “prevent[] violent, aggressive and antisocial behavior.”<sup>33</sup> This argument has faced a steep uphill battle in the courts.

Under Supreme Court precedent of *Brandenburg v. Ohio*,<sup>34</sup> the government may only restrict protected speech on violence-prevention grounds where the speech “is directed to inciting or producing the imminent lawless action and is likely to incite or produce such action.”<sup>35</sup> In other words, the government can only regulate where the speech in question is both intended to and likely to cause imminent violence. The plaintiffs challenging the video game statutes have stressed that there is no evidence showing that video games are intended to cause violence and that it is not plausible to think that video games, played by millions daily, are likely to cause imminent violence.

Nonetheless, the government has frequently tried to defend such laws by pointing to social science evidence, that purports to link violent-video-games exposure to increased aggressive behavior. To date, every court that has looked at these studies has found

them unpersuasive.

After an exhaustive review of the evidence, the Illinois district court concluded that “defendants have come nowhere near making the necessary showing” to support the state’s claimed compelling interests.<sup>36</sup> The court found that the social science

did not establish a solid causal link between violent video game exposure and aggressive thinking [and that even] if one were to accept the proposition that playing violent video games increases aggressive thoughts or behavior, there is no evidence that this effect is at all significant.<sup>37</sup>

The court found even less persuasive evidence based on brain-wave measurements of individuals who had played violent video games.<sup>38</sup> Ultimately, it reasoned that “the glacial process of personality development that violent video games allegedly affect is far from the temporal imminence that we have required to satisfy the *Brandenburg* test.”<sup>39</sup>

A district court in Colorado reached the same conclusion in dismissing a tort suit against video game manufacturers brought by the surviving family members of a teacher killed in the Columbine High School shootings.<sup>40</sup> The court dismissed the suit in part because there was no showing that the video games “were ‘likely’ to cause any harm, let alone imminent lawless action.”<sup>41</sup>

### **Psychological Harm Rationale**

Because the *Brandenburg* test is so stringent, government advocates of restrictions on violent video games have argued that they are seeking not to regulate increased violence but to protect minors from psychological harm. For example, in Michigan, the government has justified restrictions on violent video games as preventing minors from developing an asocial mentality.<sup>42</sup>

The video game plaintiffs have argued that although protecting minors from harm may be a compelling interest in the abstract, the government cannot control how minors think and act by preventing them from being exposed to protected speech. Their position has been that thought control is not even a legitimate interest for the state, much

less a compelling one sufficient to satisfy strict scrutiny. As the Illinois district court put it, “[i]n this country, the State lacks the authority to ban protected speech on the ground that it affects the listener’s or observer’s thoughts and attitudes.”<sup>43</sup>

Although the government defendants have argued for special rules pertaining to minors, the courts have consistently held that in the realm of the First Amendment, limitations on governmental action are in general “no less applicable when [the] government seeks to control the flow of information to minors.”<sup>44</sup> The Seventh Circuit put it this way: preserving children’s First Amendment rights is “not merely a matter of pressing the First Amendment to a dryly logical extreme. . . . People are unlikely to become well-functioning, independent-minded adults, and responsible citizens if they are raised in an intellectual bubble.”<sup>45</sup>

The video game plaintiffs have further argued that even if the government did have a compelling interest in controlling how minors think, there is essentially no evidence showing that violent video games are psychologically harmful to minors. Instead, they point out that available evidence is almost entirely devoted to showing that video games cause minors to behave aggressively (and is thus evaluated under the *Brandenburg* doctrine) rather than to showing that video games are psychologically harmful in some other way. These arguments have generally been successful, with courts concluding that the evidence cannot support the conclusion that video games lead to poorer “executive functioning.”<sup>46</sup>

### **Banning *Grand Theft Auto* but Not *Sin City***

The video game laws have been challenged on the separate grounds that they do not materially advance their goals and that they fail to do so in a narrowly tailored manner. Among other things, plaintiffs have argued that the laws cannot be effective, even on their own terms, when they prevent minors from buying, say, a *Resident Evil* or Tom Clancy video game but allow

them to rent a *Resident Evil* movie or purchase a Tom Clancy book. The government has responded by arguing that video games are different from other forms of entertainment and therefore require regulation in ways that violent movies, music, and books do not. The courts have disagreed, however, consistently concluding that video games do not warrant special regulation and in fact contribute only “a tiny fraction of the media violence to which modern American children are exposed.”<sup>47</sup>

As a result, the video game plaintiffs have had success arguing that such differential treatment of similarly situated media is strong evidence that the act’s true goal is to punish a disfavored speaker, not to advance the state’s asserted interests. At least one court has concluded that “the underinclusiveness of this statute—given that violent images appear more accessible to unaccompanied minors in other media—indicates that regulating violent video games is not really intended to serve the proffered purpose [of giving parents the power to protect children from harmful images].”<sup>48</sup>

### When Is a Zombie a Human?

Video game manufacturers and retailers have also attacked video game restrictions on vagueness grounds. The crux of their argument is that the language describing the kinds of video games regulated does not give manufacturers and retailers a sufficiently clear idea of exactly which games are restricted by the laws. As the court in Washington noted, because retail clerks may not be able to tell what content is regulated by the laws, they may withhold from minors all games that could possibly fall within the scope of the law, even if the games are not covered, and game authors might also “steer far wider of the unlawful zone” and self-censor protected speech.<sup>49</sup>

As an example, the Illinois statute, similar to other laws, regulates games based on whether they depict violence against humans. But although the word *human* has a relatively clear meaning in the real world, it is not at all clear in the fanciful medium of video games.

For example, are zombies humans? What about mythological characters like minotaurs that are half-human and half-animal? Or gods that appear in human form, such as in the game *God of War*? Plaintiffs argue that it is impossible to determine answers to these questions in advance of deciding whether to label a certain game or sell it to minors.

And other terms contained in the statutes pose problems as well: what does it mean to inflict serious physical abuse on such quasi-human creatures? A player might perform actions on the video screen that would cause harm if done in real life to a normal person but would affect a godlike or superhuman character not at all. Likewise, what constitutes killing or harm to zombies (creatures that are already dead or that can come back to life after being seemingly killed)? In the world of video games, these sorts of questions are not at all hypothetical; they arise time and time again in all sorts of variations. Indeed, the Illinois district court found that state’s law unconstitutionally vague on just these grounds.<sup>50</sup>

### Labeling and Compelled Speech

The more recent spate of laws has also presented issues of compelled speech. For example, in both Illinois and California, the laws would require retailers to place a large 18 label on restricted video games. Video game retailers have argued that this amounts to compelled speech in violation of the First Amendment and is therefore subject to strict scrutiny as well.<sup>51</sup> The states’ position is that the labels are more akin to factual commercial disclosure requirements, which, under the Supreme Court case of *Zauderer v. Office of Disciplinary Counsel*, are subject only to rational basis review.<sup>52</sup>

Retailers disagree, arguing that the 18 label imparts not only a stigmatizing message rather than a purely factual message, but also a message that retailers may disagree with, i.e., that certain games are not appropriate for individuals under eighteen. Further, the types of disclosures upheld in *Zauderer* were aimed at dissipating consumer confusion or

deception, and retailers argue that there is no evidence of consumer confusion under the current voluntary rating system; in fact, an 18 label that conflicts with the existing rating system would only cause more consumer confusion.<sup>53</sup> Thus far, the Illinois district court has agreed, and the California district court has agreed on a preliminary basis.<sup>54</sup>

### Sexually Explicit Video Games

The Illinois video games law presents one additional issue now on appeal to the Seventh Circuit: whether the state can regulate video games containing sexual content outside the parameters of the three-prong *Ginsberg/Miller* harmful-to-minors formulation. Although other states have amended existing laws restricting material harmful to minors to include video games as well, the Illinois law goes further in restricting video games that appeal or pander to the prurient interest and depict sexual content that is patently offensive with respect to minors without regard to considering the work as a whole or considering the literary, political, artistic, or scientific value of the video games to minors.


Illinois already restricts video games that are harmful to minors under the three-prong *Ginsberg/Miller* formulation, so the practical effect of the Illinois law is to target and restrict those games that might have serious social value for minors. Video game plaintiffs have not challenged restrictions on video games with sexual content deemed harmful to minors, but they are challenging the sexually-explicit-content provisions of the Illinois law on First Amendment grounds.

The Illinois district court agreed with the video game plaintiffs and concluded that the restrictions on sexually explicit video games failed strict scrutiny, holding that the Illinois law “regulates an unconstitutionally vague amount of speech and is therefore not narrowly tailored” because it omits both a requirement of analyzing the work as a whole and the third prong (i.e., serious value) of the *Miller* test.<sup>55</sup> Applying the Supreme Court’s decision in *Reno v. ACLU*,<sup>56</sup> the district court concluded that the lack of the third

prong meant that the Illinois law would unconstitutionally suppress large amounts of speech with serious value for minors, a problem compounded by the fact that the law allows video games to be suppressed on the basis of one scene regardless of the value of the game as a whole.<sup>57</sup> The court noted the possibility that the law would restrict the sale or rental of a game like *God of War*, which contains some sexually suggestive material, to minors, even though it “essentially parallels a classic book like *The Odyssey*.”<sup>58</sup>

The State of Illinois has appealed this issue to the Seventh Circuit, arguing that the restrictions on sexual speech are designed to protect minors and survive strict scrutiny. The video game plaintiffs have argued in response that the state has provided no evidence of the prevalence or harm of video games with nonobscene sexual content, much less substantial evidence of a compelling state interest; that the law is overbroad and unconstitutionally vague; and that the same less-restrictive alternatives exist as in the case of violent video games. A decision is expected later this year.

### The Battle Continues

The law now seems clear: statutes or ordinances that restrict the availability of violent video games to minors do not pass constitutional muster. One would think that the unbroken string of decisions striking down attempts to regulate violent video games would have some deterrent effect on legislatures. But legislators’ interest in passing such laws continues relatively unabated. Politicians on both sides of the aisle see an easy political hook (few, if any, would vote “for” violent video games), and the judicial decisions often come down with little fanfare and long after elections have passed. If the First Amendment is not a sufficient barrier to passing these laws, perhaps the substantial attorney fees sought and obtained by plaintiffs under 28 U.S.C. § 1988 after succeeding on their constitutional claims will deter future passage. Thus far, however, the strong judicial opinions appear to be falling on deaf ears in legislatures across the country. 

### Endnotes

1. Family Entertainment Protection Act, S. 2126, 109th Cong. (2005).
2. 390 U.S. 629 (1968).
3. 413 U.S. 15 (1973).
4. *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001). The ordinance also required warning signs to be posted and, for an operator of more than five games in one location, a partition to separate machines considered harmful to minors from other machines in the area and to block view of the harmful machines from outside their designated viewing area.
5. 244 F.3d at 572.
6. 390 U.S. at 629 (permitting state to regulate sexually explicit materials as obscene for minors even though they would not be obscene for adults).
7. *Kendrick*, 244 F.3d at 574–77.
8. *Id.* at 577–78.
9. *Id.* at 577.
10. *Id.*
11. 329 F.3d 954 (8th Cir. 2003).
12. *See Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1130 (E.D. Mo. 2002).
13. *Id.* at 1141.
14. *Interactive Digital Software Ass’n (IDSA) v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003).
15. *Id.* at 958–59.
16. *Id.* at 959–60.
17. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1189–90 (W.D. Wash. 2004) (internal citation omitted).
18. *Id.* at 1184–86.
19. *Id.* at 1188.
20. *Id.* at 1190.
21. *Id.* at 1190–91.
22. *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1057 (N.D. Ill. 2005).
23. *Id.*
24. *Id.* at 1072.
25. *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006).
26. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1038 (N.D. Cal. 2005).
27. *Id.* at 1047. In preliminarily enjoining the law, Judge Whyte of the Northern District of California applied strict scrutiny and questioned whether the state could restrict speech access to minors even if it could show that violent video games cause violent behavior, suggesting that this purpose would be inconsistent with the First Amendment. *Id.* at 1045–46. However, the court departed from previous cases in holding that, at least at the preliminary injunction stage, plaintiffs were unlikely to establish that the California law was unconstitutionally vague. *Id.* at 1040–42.
28. *Interactive Digital Software Ass’n (IDSA) v. St. Louis County*, 329 F.3d 954,

957 (8th Cir. 2003) (citation omitted).

29. Indeed, the Illinois district court cited *God of War* as an example of a game with literary merit whose access would likely be unconstitutionally prohibited to minors under the broad sexually-explicit-content provisions of the Illinois law. *Blagojevich*, 404 F. Supp. 2d at 1080.
30. *IDSA*, 329 F.3d at 958.
31. *Id.*
32. *See IDSA*, 329 F.3d at 958.
33. CAL. CIVIL CODE § 1746, pt. 1(c) (2005).
34. 395 U.S. 444 (1969).
35. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg*, 395 U.S. at 447).
36. *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1073 (N.D. Ill. 2005).
37. *Id.* at 1063.
38. *Id.* at 1074.
39. *Id.*
40. *Sanders v. Acclaim Entm’t*, 188 F. Supp. 2d 1264, 1279–81 (D. Colo. 2002).
41. *Id.* at 1281.
42. 2005 Michigan Pub. Acts 108, pt. II, § 15(e).
43. *Blagojevich*, 404 F. Supp. 2d at 1074.
44. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975). *See also McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 231 (2003) (“Minors enjoy the protection of the First Amendment.”).
45. *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 576–77 (7th Cir. 2001).
46. *Blagojevich*, 404 F. Supp. 2d at 1067.
47. *Kendrick*, 244 F.3d at 579. *See also Blagojevich*, 404 F. Supp. 2d at 1075 (finding no evidence demonstrating that video games are more harmful than any other media).
48. *Blagojevich*, 404 F. Supp. 2d at 1075. The video game plaintiffs have also pointed to the existence of less restrictive alternatives, such as parental controls, increased self-regulation, and increased awareness of the industry’s voluntary rating system. For example, all three of the next-generation game consoles manufactured by Microsoft, Nintendo, and Sony will include parental controls allowing parents to limit a child’s access to games based on the games’ Entertainment Software Rating Board rating, an option that Microsoft’s latest console already offers. Associated Press, *Sony to Hand Parents Video Game Controls*, INT’L HERALD TRIB., Nov. 28, 2005, available at [www.ihl.com/articles/2005/11/28/business/sony.php](http://www.ihl.com/articles/2005/11/28/business/sony.php).
49. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).
50. *Blagojevich*, 404 F. Supp. 2d at 1077. In *Maleng*, the court found similar ambiguities. The court questioned whether a game

built around cartoon characters such as the Simpsons or Looney Tunes would constitute a “realistic” depiction of violence and whether it was possible to determine if a level of conflict was “aggressive.” 325 F. Supp. 2d at 1190–91. Another issue with the Washington statute was that it covered only violence against “law enforcement officers,” and the court found that it was unclear whether that term covered characters such as Roman centurions or even firefighters. *Id.* at 1190. The California district court has so far disagreed with the Illinois and Washington courts at the preliminary injunction stage, determining that the plaintiffs were not likely to prevail on their claim that the California law is unconstitutionally vague. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1041 (N.D. Cal. 2005).

51. *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *Pac. Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 9 (1986).

52. 471 U.S. 626 (1985).

53. *Id.* at 651.

54. *Blagojevich*, 404 F. Supp. 2d at 1082; *Schwarzenegger*, 401 F. Supp. 2d at 1047. The Illinois court’s ruling on the labeling provision as applied to sexually explicit video games has been appealed, and the California court has yet to issue its final ruling.

55. *Blagojevich*, 404 F. Supp. 2d at 1080.

56. 521 U.S. 844 (1997).

57. *Blagojevich*, 404 F. Supp. 2d at 1080.

58. *Id.*