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Thinking of the Children: The Failure of Violent Video Game Laws

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Thinking of the Children: The Failure of Violent Video Game Laws

Cover Page Footnote

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Thinking of the Children: The Failure of Violent Video Game Laws

Gregory Kenyota*

INTRODUCTION

If asked to name a video game where players can drive a car and run over people, one's likely response is a game from the Grand Theft Auto series. The Grand Theft Auto series is arguably one of the most controversial video games released in recent years.¹ Critics such as Senator Joseph Lieberman (I-CT) and Senator Hillary Clinton (D-NY) have blasted the game for its depictions of sex and violence.² Without seeing anything more than a short trailer video of the game,³ New York City officials condemned the unreleased Grand Theft Auto IV for looking too

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¹ See Chris Morris, *Grand Theft . . . Ping Pong?*, CNNMONEY.COM, Mar. 7, 2006, http://money.cnn.com/2006/03/06/commentary/game_over/column_gaming/index.htm; see also *NYC Officials Upset About Latest Version of 'Grand Theft Auto' Video Game*, ASSOCIATED PRESS, Mar. 31, 2007, available at <http://www.foxnews.com/story/0,2933,263033,00.html>.

² Raymond Hernandez, *Clinton Seeks Uniform Ratings In Entertainment for Children*, N.Y. TIMES, Mar. 10, 2005, at B5.

³ The video at issue is available online. *Grand Theft Auto IV*, http://www.rockstargames.com/TV/trailer_splash.html (last visited Nov. 16, 2007).

much like New York City,⁴ even though the game will take place in a fictional city based on New York City called Liberty City.⁵

Not surprisingly, the Grand Theft Auto series has been the lynchpin of recent legislative efforts to prevent the sale of violent and sexually explicit video games to minors by both the federal and state governments.⁶ In the past four years, at least seven states passed statutes regulating the sales of violent video games to minors, and the federal courts in those states subsequently invalidated each one by striking them down or granting a preliminary injunction.⁷ Each court has ruled against these statutes

⁴ As of writing, Grand Theft Auto IV's release date is set for Apr. 29, 2008. Press Release, Take-Two Interaction, Rockstar Games Announces Release Date for Grand Theft Auto IV (Jan. 24, 2008), <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=289342>.

⁵ Ivan Pereira, Michael Saul & Alison Gendar, *Pols Rage as Vid Game Takes Shot at City*, N.Y. DAILY NEWS, Mar. 31, 2007, available at http://www.nydailynews.com/entertainment/2007/03/31/2007-03-31_pols_rage_as_vid_game_takes_shot_at_city-4.html. However, this is not the first time Liberty City has been used in a Grand Theft Auto game. See Chris Faylor, *Officials Already Upset with GTA IV*, SHACKNEWS, Apr. 3, 2007, <http://www.shacknews.com/onearticle.x/46391>.

⁶ Press Release, Senator Hillary Clinton, Senator Clinton Announces Legislation to Keep Inappropriate Video Games Out of the Hands of Children (July 14, 2005), available at <http://www.senate.gov/~clinton/news/statements/details.cfm?id=240603&&>; Press Release, Michigan Senate Democratic Caucus, Senate Dems: Pull Grand Theft Auto (July 27, 2005), available at <http://senate.michigan.gov/dem/PR/01-19-072705.pdf>. The game has also been the subject of controversy in numerous private lawsuits against video game companies by Florida attorney Jack Thompson, a topic that exceeds the scope of this Note. See Matt Slagle, *Maker Defends School 'Bully' Video Game*, ASSOCIATED PRESS, Oct. 13, 2006 (detailing Thompson's crusade against violent video games). Recently, Grand Theft Auto's publisher Take-Two Interactive filed a lawsuit to enjoin Thompson from bringing any future lawsuits enjoining the sale of Grand Theft Auto IV, to which Thompson replied, "I have been praying, literally, that Take-Two and its lawyers would do something so stupid, so arrogant, so dumb, even dumber than what they have to date done, that such a misstep would enable me to destroy Take-Two." Lou Kesten, *'God of War II' Takes Over PlayStation 2*, ASSOCIATED PRESS, Mar. 21, 2007, available at <http://abcnews.go.com/Technology/wireStory?id=2970182>.

⁷ Entm't Merchs. Ass'n v. Henry, 2006 U.S. Dist. LEXIS 74186, at *9 (W.D. Okla. Oct. 11, 2006); Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823, 837 (M.D. La. 2006); Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065, 1073 (D. Minn. 2006); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 656 (E.D. Mich. 2006); Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1048 (N.D. Cal. 2005); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1083 (N.D. Ill. 2005); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).

for First Amendment reasons.⁸ However, this has not stopped state legislatures from continuing to pass statutes that would prevent the sale of violent and sexually explicit video games to minors.⁹

The attempts of state legislatures to pass legislation regulating the sales of violent video games to minors have almost become a fool's errand and the states should instead allow the current system of self-regulation to continue. This Note attempts to analyze the statutes passed by different states trying to regulate the sale of violent video games to minors and looks at how self-regulation compares as a solution. Part I of this Note details the history of controversial video games and the response to the controversies by Congress, the video game industry, and the states. Part II of this Note gives an overview of the First Amendment issues facing the government in its attempts to regulate violent video games and the responses from the federal courts. Part III argues that self-regulation by the video game industry should be the goal supported by legislators instead of legislation.

I. BACKGROUND

A. *Early Video Game Controversies*

Controversy over video games is not a new phenomenon and dates back to 1976, when Exidy Games released *Death Race*, a game where players would drive a car and run “gremlins” over to kill them.¹⁰ Besides being able to drive a car on a screen and kill pixelated characters, the game shares another similarity with the *Grand Theft Auto* series in that the “bloodless black-and-white arcade game in which a crude car ran over stick-figure ‘gremlins’ caused a national furor.”¹¹ In 1983, the game company *Mystique*

⁸ See discussion *infra* Part II.

⁹ Mary Beth Schneider, *Bill Aims to Enforce Age Limits on Games*, INDIANAPOLIS STAR, Feb. 20, 2007, at Metro & State 1.

¹⁰ STEVEN L. KENT, *THE ULTIMATE HISTORY OF VIDEO GAMES 90–92* (Three Rivers Press 2001); Lauren Gonzales, *When Two Tribes Go to War: A History of Video Game Controversy: The Major Offenders*, GAME SPOT, <http://www.gamespot.com/features/6090892/p-2.html> (last visited Nov. 17, 2007).

¹¹ Nick Chordas, *More Nice than Naughty; ‘Bully’ Game Nowhere Near as Violent as Critics Feared*, COLUMBUS DISPATCH, Oct. 23, 2006, at 01B.

caused the next controversy in releasing Custer's Revenge, a game where the object of the game was to "guide a naked, horny, General Custer across the screen while avoiding incoming arrow fire. Waiting at the other side is a naked Indian maiden, and you earn points by . . . scoring. The slogan of the game was something like 'When you score, you score!'"¹² Custer's Revenge drew protests due to its nudity, "ethnic insensitivity," and raping of a female Native American character.¹³ Despite the protests and furor over these two games, the controversy only led to retailers taking the two games partially off the market.¹⁴

B. The Rise of the Entertainment Software Ratings Board

After the Custer's Revenge controversy, video games stayed off the radar of legislators until 1992 when two games would draw Congress' attention. The first game was Night Trap, which SEGA released in 1992.¹⁵ Night Trap was a full motion video game where players "were required to save five college-aged girls who were staying together in a house haunted by vampirelike creatures."¹⁶ Midway Games released the second most controversial game that year, Mortal Kombat, which was a realistic looking fighting game with excessive amounts of blood and gore.¹⁷ The public outcry over these two video games led Congress to hold hearings in 1993 and 1994 on whether or not to regulate the sale of video games.¹⁸

¹² Fragmaster, *Game of The Week: Custer's Revenge*, CLASSICGAMING, <http://www.classicgaming.com/rotw/custer.shtml> (last visited Nov. 17, 2007); see also KENT, *supra* note 10, at 226–27.

¹³ Chordas, *supra* note 11; Jenifer Johnston, *GAME OVER?*, SUNDAY HERALD, Aug. 14, 2005, at 15.

¹⁴ Death Race was "eventually pulled off the market after moving 1000 machines." *Player 2 Stage 1: The Coin Eaters*, DOT EATERS, http://www.thedoteaters.com/p2_stage1.php (last visited Nov. 17, 2007). Custer's Revenge was "banned from being sold in many places, and most stores refused to carry it. The stores that did carry the game had to carry it behind the counter, out of sight." Fragmaster, *supra* note 12.

¹⁵ Gonzales, *supra* note 10, at 4.

¹⁶ *Id.*

¹⁷ Gonzales, *supra* note 10, at 5.

¹⁸ See 140 CONG. REC. S788 (daily ed. Feb. 3, 1994). For a detailed account of the hearings including a heated rivalry between the then-executive vice president of Nintendo of America and the then-vice president of Sega of America, see KENT, *supra* note 10, at 467–78.

The Congressional hearings initially appeared to be leading up to government regulation of the video game industry. After the first hearing, Senator Lieberman and Senator Herb Kohl (D-WI) drafted the “Video Game Rating Act of 1994,” which established a Commission to assist the video game industry in developing a voluntary ratings system.¹⁹ If the industry failed to develop a voluntary ratings system that was satisfactory after one year, the Commission would “gain the power to review and rate video games, and to require video game companies to place a ratings [sic] on their games. The Commission would not have the power to ban games.”²⁰ Senator Kohl made a bold statement to the video game industry in his statement on the Video Game Rating Act:

We want you to develop a voluntary rating system; we want you to let parents know what they are buying for their children. We would prefer self-regulation to Government regulation. But we are prepared to move ahead if your efforts falter: Regulate yourselves or we will have to do it for you.²¹

Before Congress could enact the Video Game Rating Act, the video game industry complied with Congress’ wishes. The video game industry first formed the Interactive Digital Software Association (“IDSA”), an independent organization that would act as the industry’s “dedicated trade and lobbying organization.”²² The IDSA in turn created another independent organization, the Entertainment Software Rating Board (“ESRB”), to implement a ratings system for video games.²³ Congress praised the industry

¹⁹ 140 CONG. REC. S788 (daily ed. Feb. 3, 1994) (statement of Senator Lieberman).

²⁰ *Id.*

²¹ *Id.*

²² KENT, *supra* note 10, at 479. The group changed its name to the Entertainment Software Association on July 21, 2003. *Computer and Video Game Group Retires IDSA Name; Reborn as the Entertainment Software Association*, BUSINESS WIRE, July 21, 2003.

²³ KENT, *supra* note 10, at 480. The ESRB eventually developed a system to rate games based on self-reports of video game content by the video game maker, an independent review of the video game by at least three trained video game raters, and a review by the ESRB staff of the raters’ reports. ESRB: Ratings Process, http://www.esrb.org/ratings/ratings_process.jsp (last visited Nov. 17, 2007). The ESRB then assigns the video game one of six ratings symbols and attaches a brief description of

for taking voluntary steps to self-regulate and the video game industry enjoyed a short reprieve from controversy.²⁴

C. *Columbine Reawakens the Video Game Controversy*

While the Congressional hearings took place, Congress focused mostly on *Mortal Kombat* and *Night Trap* and missed games that could have been just as controversial. The prime example was *Doom*, which id Software released on December 10, 1993.²⁵ *Doom* was a first-person shooter where players took the role of a marine trapped on Mars that had to shoot and kill aliens in order to escape.²⁶ *Doom* became popular among video gamers for being one of the first video games to provide a 3D environment,²⁷ but it also became popular among critics for being too violent.²⁸ However, *Doom* somehow managed to escape the focus of Congress as the hearings on violent video games went on.²⁹

Even though *Doom* was not a focus in the nationwide controversy about video games upon its initial release, years later it would find itself in the center of the controversy. On April 20, 1999, two teenagers attending Columbine High School conducted one of the deadliest school shootings in U.S. history.³⁰ In subsequent investigations of the shooting, officials revealed that the two teenagers were “obsessed” with *Doom*,³¹ and in a videotape recorded before the shootings, one of the teenagers even

the content that triggered the rating. ESRB: Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (listing and describing the ESRB ratings) (last visited Nov. 17, 2007).

²⁴ Karen J. Cohen, *Game Makers Introduce Rating System*, STATES NEWS SERVICE, July 29, 1994.

²⁵ DOOM, <http://www.mobygames.com/game/doom> (last visited Nov. 18, 2007); Mike “Cyb” Watson & Andrew “Linguica” Stine, *Ten Years of Doom*, DOOMWORLD, <http://www.doomworld.com/10years/> (last visited Nov. 18, 2007). Some places inaccurately report *Doom*’s release date as December 10, 1994. Gonzales, *supra* note 10, at 7.

²⁶ Lev Grossman, *The Age of Doom*, TIME, Aug. 9, 2004, at 82; Gonzales, *supra* note 10, at 7.

²⁷ GameSpy.com, *GameSpy’s Top 50 Games of All Time*, <http://archive.gamespy.com/articles/july01/top501aspe/index4.shtm> (last visited Nov. 12, 2007).

²⁸ Gonzales, *supra* note 10, at 7.

²⁹ *Id.*

³⁰ *Columbine Survivors Mark 7th Anniversary*, UNITED PRESS INT’L, Apr. 20, 2006.

³¹ Matt Bai, *Anatomy of a Massacre*, NEWSWEEK, May 3, 1999, at 24.

said: “It’s going to be like fucking Doom!”³² This connection between Doom and the school shooters led critics such as President Bill Clinton to denounce video games for their role in making “children more active participants in simulated violence.”³³

The backlash over violent video games as well as other forms of violent media came shortly after the revelations of their connection to the Columbine shootings. Congress held hearings about the marketing of violence to children at Senator Sam Brownback’s (R-KS) urging on May 4, 1999.³⁴ At President Clinton’s behest, the Federal Trade Commission (“FTC”) and the Department of Justice (“DoJ”) conducted a study on the effects of violence in music, movies, and video games on children.³⁵ The families of the Columbine victims also filed a wrongful death suit against video game companies and movie studios.³⁶

The backlash that had come so suddenly, however, led to very few immediate impacts on video games. Senator Brownback later stated, “[n]ot much came out of the [Congressional] hearings. It was a nice discussion, but I haven’t seen much follow-up.”³⁷ The FTC and DoJ study on the effects of violent media on children found that while there were problems with video game companies targeting advertising of violent video games to children³⁸ and retailers not preventing sales to minors,³⁹ the ESRB was still “the most comprehensive of the three industry systems studied by the Commission.”⁴⁰ The wrongful death suit against the video game

³² KENT, *supra* note 10, at 545; *see also* Nancy Gibbs & Timothy Roche, *The Columbine Tapes*, TIME, Dec. 20, 1999, at 40.

³³ *Clinton Puts Onus on Entertainment*, UNITED PRESS INT’L, Apr. 24, 1999.

³⁴ Press Release, U.S. Senate Committee on Commerce, Science, and Transportation (April 30, 1999), *available at* <http://commerce.senate.gov/press/106-45.htm>; KENT, *supra* note 10, at 545–55.

³⁵ FEDERAL TRADE COMMISSION, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2000), *available at* <http://www.ftc.gov/reports/violence/vioreport.pdf> [hereinafter FTC REPORT].

³⁶ *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002).

³⁷ KENT, *supra* note 10, at 555.

³⁸ FTC REPORT, *supra* note 35, at 44–52.

³⁹ *Id.* at 51–52.

⁴⁰ *Id.* at 37. The implications of this finding are discussed in Part III of this Note.

companies and movie studios ended when the defendants made a successful motion to dismiss.⁴¹

It was within the backdrop of the post-Columbine controversy that lawmakers would begin to regulate the access of minors to violent video games despite the controversy's few immediate impacts on video games. City governments led the way, as Indianapolis' reaction to the controversy was to pass a general ordinance on July 10, 2000 that addressed the problem.⁴² The general ordinance forbade the operators of video game arcades in the city from allowing minors to use arcade machines deemed "harmful to minors" if they were unaccompanied by their parents.⁴³ St. Louis also passed an ordinance on October 26, 2000 that made it unlawful "to sell, rent, or make available graphically violent video games to minors, or to 'permit the free play of' graphically violent video games by minors, without a parent or guardian's consent."⁴⁴ State governments would follow the trend later, such as Washington in 2003.⁴⁵ While the states slowly followed and passed laws on violent video games, it would only be a few years until an even greater call for regulating the sale of violent video games would occur.

D. Hot Coffee Spills

Rockstar Games, the publisher of the Grand Theft Auto series, released Grand Theft Auto III in October 2001.⁴⁶ The game received an ESRB rating of "M" for "mature"⁴⁷ and created a wave of controversy as it allowed players to "run prostitutes, deliver

⁴¹ Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002).

⁴² Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943 (S.D. Ind. 2000), rev'd, 244 F.3d 572 (7th Cir. 2001). The general ordinance specifically cites the 2000 Congressional Hearings in its text. *See id.* at 981-82.

⁴³ *Id.* at 946-47.

⁴⁴ Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 956 (8th Cir. 2003).

⁴⁵ Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1183 (W.D. Wash. 2004).

⁴⁶ Steven Kent, *Game Glorifies Life of Crime*, USA TODAY, Dec. 20, 2001, at 3D.

⁴⁷ "Titles rated M (Mature) have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content and/or strong language." ESRB: Ratings Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Oct. 17, 2007).

drugs, make gangland hits and generally flout the law.”⁴⁸ One aspect of the game that the media especially focused on was that players “could solicit a prostitute, employ her services, then rob or murder her and, as a reward, get their money back.”⁴⁹ Senator Lieberman and Senator Kohl, the two senators behind the Video Game Rating Act of 1994 and Congressional hearings that led to the creation of the ESRB, gave the game a “dishonorable mention” in its annual list of video games to avoid.⁵⁰ Other than that, however, the controversy over Grand Theft Auto III did not lead to any Congressional hearings or other governmental action against it.⁵¹

In October 2002, Rockstar Games released its follow-up to Grand Theft Auto III, Grand Theft Auto: Vice City.⁵² Grand Theft Auto: Vice City was similar to its predecessor except that it took place in Miami and its story was set in the 1980s.⁵³ The game also received an ESRB rating of M and initially received the same criticisms over its violence and adult themes as Grand Theft Auto III, including a denouncement from Senator Lieberman.⁵⁴ Grand Theft Auto: Vice City still managed to create more controversy due to a mission that told players to “kill the Haitians.”⁵⁵ The revelation of this in-game message a year after the game’s release led to Haitian groups filing lawsuits against Rockstar Games and its parent company Take Two Interactive as well as some cities in

⁴⁸ Kent, *supra* note 46.

⁴⁹ Mike Snider, *Car-theft Video Game Should See Big Sales—and Big Outcry*, USA TODAY, Oct. 30, 2002, at 4D.

⁵⁰ Kent, *supra* note 46.

⁵¹ In Australia, however, the government banned sales of Grand Theft Auto III. Kent, *supra* note 46.

⁵² Press Release, Take Two Interactive, Rockstar Games Ships Grand Theft Auto: Vice City (Oct. 29, 2000), *available at* <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=131844>.

⁵³ Snider, *supra* note 49.

⁵⁴ John Leland, *Bigger, Bolder, Faster, Weirder*, N.Y. TIMES, Oct. 27, 2002; Peter Hartlaub, *Vice City Rises Above the Controversy*, S.F. CHRON., Nov. 7, 2002.

⁵⁵ *Florida Video Law: Parents Decide*, REUTERS, Jan. 18, 2004, *available at* <http://www.wired.com/politics/law/news/2004/01/61958> [hereinafter *Florida Video Law*]. The goal of the mission, however, was not to kill Haitians in general, but to wipe out members of a Haitian mafia. John P. Mello, Jr., *Video Game Violence Leads to Florida Law*, TECHNEWSWORLD, Jan. 20, 2004, <http://www.technewsworld.com/story/32638.html>.

Florida attempting to pass ordinances restricting the sales of violent video games to minors.⁵⁶ New York City Mayor Michael Bloomberg even threatened legal action if Rockstar Games did not remove the offending language.⁵⁷ Rockstar Games agreed to remove the offending language from future versions of the game, but the controversy did not lead to any other long-lasting effects.⁵⁸

Rockstar Games continued its controversial Grand Theft Auto series in October 2004 with the release of Grand Theft Auto: San Andreas.⁵⁹ As had become the norm for the Grand Theft Auto series, the game received an M rating from the ESRB and initially received criticisms over its violence and adult themes.⁶⁰ Like its immediate predecessor, the major controversy over the newest Grand Theft Auto game came some time after its initial release. On June 7, 2005, Rockstar Games released the PC and XBOX versions of Grand Theft Auto: San Andreas.⁶¹ Two days later, a programmer from the Netherlands unlocked a hidden mini-game in the PC version that allowed players to play “uncensored interactive sex-games,” called it the “Hot Coffee Mod,” and released it over the Internet.⁶² The mini-game went unnoticed for a few weeks

⁵⁶ *Florida Video Law*, *supra* note 55.

⁵⁷ Tor Thorsen, *Take-Two Self-Censoring Vice City*, GAME SPOT, Dec. 9, 2003, <http://www.gamespot.com/pc/action/grandtheftautovicecity/news.html?sid=6085346>.

⁵⁸ *Florida Video Law*, *supra* note 55.

⁵⁹ Press Release, Take Two Interactive, Rockstar Games Ships Grand Theft Auto: San Andreas for PlayStation 2 (Oct. 25, 2004), <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=146359>.

⁶⁰ Charles Homans, *High-profile Video Games Bad for Kids, Group Says*, CHICAGO TRIBUNE, Nov. 24, 2004, at C16.

⁶¹ Press Release, Take Two Interactive, Rockstar Games Ships Grand Theft Auto: San Andreas for Xbox and PC (June 7, 2005), <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=165282>.

⁶² Patrick Wildenborg, PatrickW GTA-Modding, <http://patrickw.gtagames.nl/mods.html> (listing June 9, 2005 as the original release date of the mod) (last visited Apr. 26, 2007); *see also* Steve Lohr, *In Video Game, a Download Unlocks Hidden Sex Scenes*, N.Y. TIMES, July 11, 2005, available at <http://www.nytimes.com/2005/07/11/technology/11game.htm?ex=1176955200&en=8ddcc291e3aad98a&ei=5070>. Rockstar Games initially responded to its release by stating that it required “intentional and significant technical modifications and reverse-engineering of the game’s source code” to create the Hot Coffee scenes, but owners of the Playstation 2 version disproved that statement by accessing the Hot Coffee scenes without modifying the content using a cheat device. Tor Thorsen, *Confirmed: Sex Minigame in PS2 San Andreas*, GAME SPOT, July 15, 2005, <http://www.gamespot.com/news/6129301.html>. The cheat device can only

until California Assemblyman Leland Yee (D-San Francisco) criticized the ESRB on July 6, 2005 for failing to rate Grand Theft Auto: San Andreas as “AO” for “adults only” due to the content from the Hot Coffee Mod.⁶³

Assemblyman Yee’s public statements thrust Grand Theft Auto: San Andreas into the center of the largest video game controversy since 1993.⁶⁴ On July 8, 2005, the National Institute on Media and the Family issued a “National Parental Warning” to parents informing them of the Hot Coffee Mod.⁶⁵ On July 14, 2005, Senator Clinton called for a federal investigation into the Hot Coffee Mod and announced she would “introduce a bill to fine dealers \$5,000 for selling adult- and mature-rated games to underage buyers.”⁶⁶ At Congress’ urging, the FTC launched an investigation on July 26, 2005 to determine whether Rockstar Games deceived the ESRB to obtain an M rating rather than an AO rating.⁶⁷ On November 29, 2005, Senator Clinton followed through on her earlier promise and announced that she would introduce the “Family Entertainment Protection Act” to Congress in response to the Hot Coffee incident along with Senator

“tweak preexisting variables in [the] system memory with cheats, they cannot inject new models, animations, and/or code into a game.” *Id.*

⁶³ Curt Feldman & Tor Thorsen, *Politician Wants San Andreas Rated Adults Only*, GAMESPOT, July 7, 2005, <http://www.gamespot.com/news/6128702.html>.

⁶⁴ Brendan Sinclair, *Spot On: Leland Yee Talks Hot Coffee*, GAMESPOT, July 15, 2005, <http://www.gamespot.com/news/6129209.html> (noting that “Yee’s vocal criticism of the ESRB triggered a chain reaction . . . taking what could have been an overlooked novelty mod of a hit PC game and making it the flash point of a much larger debate”).

⁶⁵ *National Institute on Media and the Family Joins Senator Clinton in Demanding the Truth about Secret Grand Theft Auto: San Andreas Pornographic Content*, BUSINESS WIRE, July 14, 2005.

⁶⁶ Steven Bodzin & Alex Pham, *Modified Video Game Spurs Clinton Protest*, L.A. TIMES, July 15, 2005, at A21.

⁶⁷ Press Release, Take Two Interactive, Take-Two Interactive Software, Inc. Announces Federal Trade Commission Inquiry (July 26, 2005), <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=169679>; Ronna Abramson, *FTC to Probe Take-Two*, THESTREET.COM, July 26, 2005, http://www.thestreet.com/_yahoo/tech/ronnaabramson/10234761.html. After an investigation by the ESRB, the ESRB re-rated the game with an AO rating. Press Release, Take Two Interactive, Take-Two Interactive Software, Inc. Announces Conclusion of ESRB Investigation (July 20, 2005), <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=169278>.

Lieberman.⁶⁸ The Act, however, never made it past the Senate Committee.⁶⁹

The Hot Coffee incident failed to bring about Federal regulation of the video game industry, but it still managed to start a trend where states would pass statutes restricting the sales of violent video games to minors. Soon after the Hot Coffee incident, California passed Assemblyman Yee's bill restricting "the sale and rental of certain violent video games to minors,"⁷⁰ a bill that had stalled in the California legislature before the Hot Coffee incident.⁷¹ Michigan and Illinois each passed a statute a few months after the Hot Coffee incident that would regulate the sale of both violent and sexually explicit video games to minors.⁷² This trend would follow in 2006 as other states passed similar statutes such as Minnesota,⁷³ Oklahoma,⁷⁴ and Louisiana.⁷⁵ In 2007, Massachusetts,⁷⁶ Oregon,⁷⁷ Delaware,⁷⁸ Utah,⁷⁹ New York,⁸⁰ and

⁶⁸ Press Release, Senator Hillary Clinton, Senators Clinton, Lieberman Announce Federal Legislation to Protect Children from Inappropriate Video Games (Nov. 29, 2005), available at <http://clinton.senate.gov/news/statements/details.cfm?id=249368&&>

⁶⁹ See 2005 Bill Tracking S. 2126, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=s109-2126>.

⁷⁰ Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1038 (N.D. Cal. 2005). The statute was authored by California Senator Leland Yee. See Press Release, Senator Leland Yee, California Legislature Approves Bill to End Sales of Violent Video Games to Children (Sept. 8, 2005), available at http://dist08.casen.govoffice.com/index.asp?Type=B_PR&SEC={7C652212-5BC1-444D-B61A-08E8FA40A1E7}&DE={413121B7-C101-433F-AA27-47585E4E9500}.

⁷¹ Sinclair, *supra* note 64.

⁷² Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 648 (E.D. Mich. 2006); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1058 (N.D. Ill. 2005).

⁷³ Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065, 1067 (D. Minn. 2006).

⁷⁴ Entm't Merchs. Ass'n v. Henry, 2006 U.S. Dist. LEXIS 74186, at *2 (W.D. Okla. Oct. 11, 2006).

⁷⁵ Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823, 824 (M.D. La. 2006).

⁷⁶ H.R. 1423, 2007 Leg., 185th Sess. (Mass. 2007), available at <http://www.mass.gov/legis/bills/house/185/ht01pdf/ht01423.pdf>.

⁷⁷ H.R. 3511, 2007 Leg., 74th Sess. (Or. 2007), available at <http://landru.leg.state.or.us/07reg/measures/hb3500.dir/hb3511.intro.html>.

⁷⁸ H.R. 77, 2007 Leg., 144th Gen. Assem. (Del. 2007), available at <http://legis.delaware.gov/LIS/LIS144.NSF/vwLegislation/HB+77?Opendocument>.

⁷⁹ H.J.R. 15, 2007 Gen. Session (Utah 2007), available at <http://le.utah.gov/~2007/htm/doc/hbillhtm/HJR015.htm>. This bill's last location as of March 13, 2007 was in the "House file for defeated bills." *Id.*

Indiana⁸¹ each considered enacting a statute regulating the sale of violent video games to minors.

II. FIRST AMENDMENT ISSUES IN VIOLENT VIDEO GAME LEGISLATION

This part of the Note discusses the First Amendment issues that legislators face when enacting statutes regulating the sales of violent video games to minors.

A. *Video Games as a Form of Speech*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech”⁸² The U.S. Supreme Court held in 1931 that the First Amendment’s freedom of speech provision also applies to the states through the Fourteenth Amendment.⁸³ The question therefore becomes whether video games are a form of “speech” that the First Amendment protects, and, if so, whether violent video games fall under any exceptions to the First Amendment’s protections.

The issue of whether video games are a form of speech was present in the first few cases challenging violent video game legislation. At least one district court held that video games were not a form of speech because “they must ‘be designed to express or inform, and there has to be a likelihood that others will understand that there has been some type of expression’ before they are entitled to constitutional protection.”⁸⁴ However, the U.S. Supreme Court had previously held that “the First Amendment protects ‘entertainment, as well as political and ideological

⁸⁰ 2007 NY A.B. 2024 (NS), 2007 Assem. (N.Y. 2007), available at <http://assembly.state.ny.us/leg/?bn=A02024>.

⁸¹ 2007 IN S.B. 238 (NS), 2007 Reg. Sess. (Ind. 2007), available at <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2007&session=1&request=getBill&doctype=SB&docno=0238>.

⁸² U.S. CONST. amend. I.

⁸³ Near v. Minnesota, 283 U.S. 697, 707 (1931).

⁸⁴ Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954, 956–57 (8th Cir. 2003) (citing Interactive Digital Software Ass’n v. St. Louis County, 200 F. Supp. 2d 1126 (E.D. Mo. 2002) and referring to the lower court’s conclusion that video games were not a protected form of speech).

speech . . .’ and that a ‘particularized message’ is not required for speech to be constitutionally protected.”⁸⁵ Video games also “contain original artwork, graphics, music, storylines, and characters similar to movies and television shows.”⁸⁶ Accordingly, federal courts have since found that the First Amendment’s definition of speech extends to video games.⁸⁷

The next issue then becomes what level of protection video games receive under violent video game legislation. When a statute undergoes constitutional analysis, the courts generally use one of three levels of protection: strict scrutiny, intermediate scrutiny, and rational basis.⁸⁸ In First Amendment speech cases, courts utilize either strict scrutiny or intermediate scrutiny for non-commercial speech.⁸⁹ Strict scrutiny requires that a statute be constitutional only if the government passed it (1) “to promote a compelling interest” and (2) “it chooses the least restrictive means” (3) “to further the articulated interest.”⁹⁰ The lower level of scrutiny, intermediate scrutiny, requires the government to prove that a statute (1) “is narrowly tailored to serve a significant governmental interest” and (2) leaves “open ample alternative channels for communication of the information.”⁹¹

Whether a court uses strict scrutiny or intermediate scrutiny depends on the target of the statute. Laws regulating speech based

⁸⁵ *Id.* at 957 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995); *Winters v. New York*, 333 U.S. 507, 510 (1948)).

⁸⁶ *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006). Some states have unsuccessfully tried to argue that video games are different than other forms of media because they are interactive and should not be compared. *See Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 830 (M.D. La. 2006). Courts’ responses have been that movies, television, and even photography have some level of interactive elements. *Id.* (citing *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)).

⁸⁷ *See, e.g., Granholm*, 426 F. Supp. 2d at 651 (citing *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002)).

⁸⁸ *See Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 790–91 (1994) (Scalia, J., concurring in part, dissenting in part) (citations omitted).

⁸⁹ *Id.* Rational basis applies to non-speech activities. *Id.* at 791. This Note also examines commercial speech, which has its own test, in considering the labeling requirements by some states. *See infra* Part II.C.1.

⁹⁰ *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989).

⁹¹ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

on its content are “presumptively invalid” and subject to strict scrutiny.⁹² One reason for this is that content-based restrictions “raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”⁹³ This applies to any statute “that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government.”⁹⁴ Laws that are unrelated to the content of speech are subject to intermediate scrutiny.⁹⁵ This is because most content-neutral statutes “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”⁹⁶ Since the laws at issue regulate video games based on its violent content, federal courts have held that such laws are content-based and subject to strict scrutiny.⁹⁷

Despite the protection of video games under strict scrutiny, there are exceptions to the First Amendment’s protection of freedom of speech that may include video games.⁹⁸ As the U.S. Supreme Court has stated, the First Amendment’s freedom of speech “does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”⁹⁹ This also includes speech that courts have considered “harmful to minors.”¹⁰⁰ The next section further examines these exceptions.

B. Exceptions to the First Amendment’s Freedom of Speech

Some states have advanced arguments that video games fall under exceptions to the First Amendment’s protections. These arguments assert that video games constitute obscene speech,¹⁰¹

⁹² R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

⁹³ Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994) (citing Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

⁹⁴ Turner Broad. Sys., 512 U.S. at 641.

⁹⁵ Clark, 468 U.S. at 293.

⁹⁶ Turner Broad. Sys., 512 U.S. at 642.

⁹⁷ See, e.g., Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

⁹⁸ Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002).

⁹⁹ Id.

¹⁰⁰ Ginsberg v. New York, 390 U.S. 629, 641 (1968).

¹⁰¹ See *infra* Part II.B.1.

speech harmful to minors,¹⁰² and speech that incites imminent lawless action.¹⁰³ This section summarizes the arguments advanced for each exception and why they do not apply to violent video game legislation.

1. Obscenity

One of the unprotected forms of speech that states claim violent video games fall under is the category of obscene speech. The U.S. Supreme Court has held that the First Amendment does not protect obscenity.¹⁰⁴ The obscenity exception, however, has been found to be “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”¹⁰⁵ The problem with applying this definition to video games is that violence is not included as a form of obscenity. States that raise the obscenity argument claim that it should include violent content in its definitions, but the federal courts have been unwilling to extend the definition of obscenity to include violence since the Supreme Court was clear on limiting obscenity to sexual works.¹⁰⁶ Violent video games are therefore not obscene speech.

2. Harmful to Minors Language

In an argument related to obscenity, states have also claimed that violent video game laws are “harmful to minors” and the courts should analyze them under the U.S. Supreme Court’s decision in *Ginsberg v. New York*.¹⁰⁷ In *Ginsberg*, New York passed a statute using the “harmful to minors” language to prohibit the sale of sexually explicit material to minors even though the same restriction for adults would be unconstitutional.¹⁰⁸ The

¹⁰² See *infra* Part II.B.2.

¹⁰³ See *infra* Part II.B.3.

¹⁰⁴ *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957).

¹⁰⁵ *Miller*, 413 U.S. at 24.

¹⁰⁶ See, e.g., *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004).

¹⁰⁷ 390 U.S. 629 (1968).

¹⁰⁸ *Id.* at 634–43.

Supreme Court upheld the statute, finding that New York had a rational basis for limiting the access of sexual material to minors.¹⁰⁹ Similar to the obscenity exception, however, the Supreme Court has never extended *Ginsberg*'s holding to apply to violent content so other federal courts have declined to do so as well.¹¹⁰ Therefore, a claim that *Ginsberg* should apply to violent video game laws is unavailing.¹¹¹

3. Imminent Lawless Action

Another relevant exception to the First Amendment that some states have tried to argue is that violent video games fail the U.S. Supreme Court's test from *Brandenburg v. Ohio*.¹¹² The U.S. Supreme Court held in *Brandenburg* that states may regulate otherwise protected expression if the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹¹³ The *Brandenburg* test therefore requires the state to prove that (1) playing video games somehow tells people to commit violent acts and (2) video game players are likely to do so if the state wants to regulate the sale of violent video games.¹¹⁴ The violent acts must also occur immediately after playing the video game as "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"¹¹⁵ For the government to do otherwise would go against the requirement of inciting "imminent lawless action."¹¹⁶

¹⁰⁹ *Id.* at 643.

¹¹⁰ Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1045 (N.D. Cal. 2005).

¹¹¹ The Northern District of Illinois has also found that Illinois's separate statute prohibiting the sale of sexually explicit video games to children was also unconstitutional even under the *Ginsberg* standard. Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1077–81 (N.D. Ill. 2005). Other states have not yet considered the issue, as the statutes tend to focus on violent video games only.

¹¹² See, e.g., *Blagojevich*, 404 F. Supp. 2d at 1073 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

¹¹³ *Brandenburg*, 395 U.S. at 447.

¹¹⁴ See *id.*

¹¹⁵ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

¹¹⁶ See *Brandenburg*, 395 U.S. at 447.

The problem with claiming that violent video games fall under the *Brandenburg* exception is that studies have not shown that violent video games will either (1) direct or incite people to commit violent acts or (2) cause people to do so.¹¹⁷ Before ruling on a case regarding the constitutionality of a law regulating violent video games, the Northern District Court of Illinois held an evidentiary hearing to determine the effect of video games on youth.¹¹⁸ The court listened to testimony from psychologists on both sides who have studied the issue.¹¹⁹ Illinois's witness, Dr. Craig Anderson, summarized research, including his own,¹²⁰ and concluded that violent video games increase aggressive behavior and thinking.¹²¹ Dr. Jeffrey Goldstein and Dr. Dmitri Williams testified for the video game industry and found many problems with the studies cited by Dr. Anderson, which the court agreed with.¹²² Dr. Goldstein and Dr. Williams also pointed out that "Dr. Anderson not only had failed to cite any peer-reviewed studies that had shown a definitive causal link between violent video game play and aggression, but had also ignored research that reached conflicting conclusions."¹²³ Dr. Goldstein and Dr. Williams also testified that "several studies concluded that there was no relationship between [violent video game play and aggression]."¹²⁴ In fact, according to Dr. Goldstein and Dr. Williams, "in certain instances, there was a *negative* relationship between violent video game play and aggressive thoughts and behavior" such as where the "initial increases in aggression wore off if the individual was allowed to play violent video game [sic] for longer period."¹²⁵

¹¹⁷ Video Software Dealers Ass'n v. Schwarzenegger, 2007 U.S. Dist. LEXIS 57472, at *12 (N.D. Cal. Aug. 6, 2007).

¹¹⁸ Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1057 (N.D. Ill. 2005).

¹¹⁹ *Id.* at 1058–67.

¹²⁰ Dr. Anderson summarized about five studies, noting that each showed minor differences between the groups exposed to violent video games and the groups exposed to nonviolent video games. *Id.* at 1059–62. In one study involving participants playing a video game and then administering noise blasts, one of the groups exposed to a violent video game administered the lowest intensity noise blasts, which the court felt contradicted Dr. Anderson's conclusion. *Id.* at 1060–61.

¹²¹ *Id.* at 1059–62.

¹²² *Id.* at 1062–63.

¹²³ *Id.* at 1062.

¹²⁴ *Id.*

¹²⁵ *Id.*

At the end of the hearing, the court found that that Dr. Anderson's research could not "establish a solid causal link between violent video game exposure and aggressive thinking and behavior" and that the research Dr. Anderson cited did not "eliminate[] the most obvious alternative explanation: aggressive individuals may themselves be attracted to violent video games."¹²⁶ The district court also found that Dr. Anderson did not "provide[] evidence to show that the purported relationship between violent video game exposure and aggressive thoughts or behavior is any greater than with other types of media violence, such as television or movies, or other factors that contribute to aggression, such as poverty."¹²⁷ Other courts have made similar findings.¹²⁸

Until the social science research can support claims that violent video games direct or incite violent acts and are likely to do so, the laws regulating violent video games will not fall under the *Brandenburg* exception to the First Amendment.

C. Other First Amendment and Constitutional Issues

Laws regulating the sales of video games to minors raise other First Amendment and Constitutional issues. This section analyzes the types of issues some state statutes have raised.

1. Labeling Requirements as Commercial Speech or Compelled Speech

The laws passed in California and Illinois regulating the sales of violent video games to minors included requirements that the violent video games have stickers that say "18" on them.¹²⁹ This has raised the question of whether courts should view such a requirement as being commercial speech or compelled speech in an issue separate from whether states can restrict the sales of video

¹²⁶ *Id.* at 1063.

¹²⁷ *Id.*

¹²⁸ *See, e.g.,* Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1188–89 (W.D. Wash. 2004).

¹²⁹ Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1046 (N.D. Cal. 2005); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1081 (N.D. Ill. 2005).

games to minors.¹³⁰ Commercial speech is “expression related solely to the economic interests of the speaker and its audience” and “assists consumers and furthers the societal interest in the fullest possible dissemination of information.”¹³¹ Compelled speech, on the other hand, “penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda that they do not set.”¹³²

The distinction between commercial speech and compelled speech is important because they are subject to different levels of protection. Compelled speech is subject to strict scrutiny because it is a content-based regulation.¹³³ Commercial speech, however, is subject to a unique form of intermediate scrutiny that courts analyze using what courts refer to as the *Central Hudson* test.¹³⁴ The *Central Hudson* test is a four-part test that requires courts to (1) “determine whether the expression is protected by the First Amendment” in that it “must concern lawful activity and not be misleading” and (2) “ask whether the asserted governmental interest is substantial.”¹³⁵ If the answers to both questions are yes, the court must then determine (3) “whether the regulation directly advances the governmental interest asserted” and (4) “whether it is not more extensive than is necessary to serve that interest.”¹³⁶

The states with labeling requirements in their statutes have argued that the requirements are merely commercial speech in the form of “state mandated commercial disclosures” and require the commercial speech form of intermediate scrutiny.¹³⁷ The U.S. Supreme Court has held that First Amendment rights in state mandated disclosures “are adequately protected as long as disclosure requirements are reasonably related to the State’s

¹³⁰ *Blagojevich*, 404 F. Supp. 2d at 1081.

¹³¹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561–62 (1980).

¹³² *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 9 (1986).

¹³³ *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 795 (1988).

¹³⁴ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 539 (2001).

¹³⁵ *Central Hudson*, 447 U.S. at 566.

¹³⁶ *Id.*

¹³⁷ *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1081 (N.D. Ill. 2005).

interest in preventing deception of consumers.”¹³⁸ The problem with a labeling requirement under this view, however, is that video games already have ESRB ratings on them and adding an “18” sticker on the video games is not going to tell consumers something they do not already know. There is no need to prevent deception because the ESRB ratings properly inform consumers of what the video games contain.¹³⁹

Nevertheless, at least one court that addressed this issue has found that the labeling requirements fall under the definition of compelled speech.¹⁴⁰ According to the court, attaching the “18” label “forces retailers to affix a label that may obscure their own message about the content of the game (i.e., the ESRB ratings) and contradict their own opinion about the content of the game (e.g., putting the ‘18’ label on an [sic] T-rated game¹⁴¹ considered appropriate for thirteen-year olds).”¹⁴² Therefore, the labeling requirement is a form of “compelled speech subject to strict scrutiny.”¹⁴³ Whether the labeling requirements would survive strict scrutiny is unknown, as Illinois offered “no independent defense of the Act’s [labeling requirements] other than to argue that they are subject to the lower level of review for commercial speech requirements”¹⁴⁴ and California did the same.¹⁴⁵

¹³⁸ *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

¹³⁹ See FTC REPORT, *supra* note 35, at 24 (finding that the ESRB “continues to set a high standard for the clear and prominent disclosure of rating information in television, print, and the Internet”).

¹⁴⁰ *Blagojevich*, 404 F. Supp. 2d at 1081–82. In California, the court ultimately found the entire statute unconstitutional and declined to address whether the labeling requirement was compelled speech or commercial speech. *Video Software Dealers Ass’n v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 57472, at *33 (N.D. Cal. Aug. 6, 2007).

¹⁴¹ “Titles rated T (Teen) have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language.” ESRB: Ratings Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Oct. 17, 2007).

¹⁴² *Blagojevich*, 404 F. Supp. 2d at 1082.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1047 (N.D. Cal. 2005). In a related issue, the District Court of Minnesota found that a signage requirement stating that “[a] person under the age of 17 is prohibited from renting or purchasing a video game rated AO or M,” with “[v]iolators . . . subject to a \$25 penalty,” would have been constitutional because it was a plain recitation of the statute at issue.

2. Vagueness

A common claim contained in challenges to video game legislation is that the statute is unconstitutional due to vagueness.¹⁴⁶ Statutes are void for vagueness because “[i]t is a basic principle of due process . . . [that] prohibitions [must be] clearly defined.”¹⁴⁷ The U.S. Supreme Court has held that statutes require “sufficient definiteness that ordinary people can understand what conduct is prohibited.”¹⁴⁸ The statute must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”¹⁴⁹ Since “we can never expect mathematical certainty from our language,”¹⁵⁰ legislators must write statutes precisely if it “abut(s) upon sensitive areas of basic First Amendment freedoms.”¹⁵¹ Content-based regulation of speech must especially be precise as it “raises special First Amendment concerns because of its obvious chilling effect on free speech.”¹⁵²

It is difficult for legislators to draft a statute regulating the sales of violent video games without being vague. For example, the phrase “violent video games” itself, which has been stated many times in this Note, does not have a specific definition. Illinois defined it as “realistic depictions of human-on-human violence in which the player kills, seriously injures, or otherwise causes serious physical harm to another human, including but not limited to depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.”¹⁵³

However, the district court in Illinois found that definition vague because it does not define what a “human” is or what

Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065, 1067, 1071–72 (D. Minn. 2006) (quoting MINN. STAT. § 3251.06 (2006)). However, since the statute behind it was deemed unconstitutional, the signage requirement became unconstitutional as it declared an unenforceable law. *Id.* at 1072.

¹⁴⁶ See, e.g., *Blagojevich*, 404 F. Supp. 2d at 1076 (N.D. Ill. 2005).

¹⁴⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁴⁸ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

¹⁴⁹ *Grayned*, 408 U.S. at 108.

¹⁵⁰ *Id.* at 110.

¹⁵¹ *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

¹⁵² *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997).

¹⁵³ 720 ILL. COMP. STAT. ANN. 5/12A-10 (LexisNexis 2007).

constitutes “serious physical harm.”¹⁵⁴ As the district court stated, video game characters can be humans, “aliens, zombies, mutants, and gods” and can “transform over the course of a game from humans into other creatures or vice versa.”¹⁵⁵ For “serious physical harm,” some games depict injuries “that would be fatal to a normal human being,” but will not affect a character “due to super powers” while some characters “may appear to die but come back to life.”¹⁵⁶

An example of Illinois’s statute possibly applying to a video game not considered “violent” is with *New Super Mario Bros.*, a game rated by the ESRB as “E” for “Everyone.”¹⁵⁷ In the game, two players can play against each other as Mario and Luigi, two human plumbers, in a multiplayer mode where “you can hit your opponent with fireballs, jump on his head, and so on.”¹⁵⁸ A law enforcement official enforcing the statute could construe the above definition of “violent video game” as including *New Super Mario Bros.* as it includes human-on-human violence that may be a realistic depiction of the player causing serious physical harm to another human when Mario jumps on Luigi’s head. However, since the game’s release, there have not been any controversies over the game’s violence even though the game has sold over ten million copies as of June 2007.¹⁵⁹

The danger with this sort of vagueness is that “[n]ot only is a conscientious retail clerk (and her employer) likely to withhold from minors all games that could possibly fall within [the statute], but authors and game designers will likely ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were

¹⁵⁴ *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1077 (N.D. Ill. 2005).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Nintendo.com, *New Super Mario Bros.*, <http://mario.nintendo.com/> (last visited Nov. 15, 2007). “Titles rated E (Everyone) have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.” ESRB: Ratings Guide, *supra* note 141.

¹⁵⁸ Jeff Gerstmann, *New Super Mario Bros. for DS Review*, GAME SPOT, May 16, 2006, <http://www.gamespot.com/ds/action/supermariobrosds/review.html>.

¹⁵⁹ See Matt Casamassina, *Nintendo Sales Update*, IGN, July 25, 2007, <http://wii.ign.com/articles/807/807852p1.html>.

clearly marked.”¹⁶⁰ This possible result makes vague statutes regulating the sales of violent video games to minors unconstitutional.¹⁶¹ However, states may be able to avoid problems of vagueness if they word their statutes very specifically. California passed a statute that originally survived a vagueness claim in a motion for a preliminary injunction,¹⁶² but the court later found in a summary judgment motion that some terms were “broad and not sufficiently narrow.”¹⁶³

III. SELF-REGULATION AS THE ONLY ACCEPTABLE SOLUTION

This part of the Note discusses how self-regulation is the only acceptable solution to the concerns of parents about violent video games.

A. *Regulating the Sales of Violent Video Games Cannot Survive a Strict Scrutiny Analysis*

As explained earlier in this Note, video games are a protected form of speech, and regulation aimed at restricting their sales based on its violent content must stand up to a strict scrutiny analysis.¹⁶⁴ The strict scrutiny analysis requires that a state prove that it has a compelling interest and has chosen the least restrictive means to further the interest that is narrowly tailored to achieve that goal.¹⁶⁵

The general compelling interest advanced by states is that they want to prevent children from suffering the negative effects of playing video games, such as violent behavior.¹⁶⁶ However, the states “must demonstrate that the recited harms are real, not merely

¹⁶⁰ Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).

¹⁶¹ *Id.*; see also *Blagojevich*, 404 F. Supp. 2d at 1077.

¹⁶² Video Software Dealers Ass’n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1040–42 (N.D. Cal. 2005).

¹⁶³ Video Software Dealers Ass’n v. Schwarzenegger, 2007 U.S. Dist. LEXIS 57472, at *29 (N.D. Cal. Aug. 6, 2007).

¹⁶⁴ See *supra* Part II.A.

¹⁶⁵ *Sable Commc’n v. FCC*, 492 U.S. 115, 126 (1989).

¹⁶⁶ See, e.g., *Blagojevich*, 404 F. Supp. 2d at 1072; Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004).

conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”¹⁶⁷ The research and statistics about the alleged harms caused by video games do not support a finding that the harms are real.¹⁶⁸ According to crime statistics, violent crime among juveniles has decreased since the early 1990s,¹⁶⁹ while the video game companies have continually released controversial violent video games such as the Grand Theft Auto series.¹⁷⁰ The studies linking violent video games and aggression have also failed to show any causal link between the two.¹⁷¹ The attempts by states to regulate violent video games based on fears of imaginary harms are not a compelling interest that would allow video game legislation to pass strict scrutiny.

The means advanced to further the compelling interest of the states also fails the strict scrutiny analysis for under-inclusiveness. The states attempt to regulate only video games when video games are “a tiny fraction of the media violence to which modern American children are exposed.”¹⁷² The studies that states rely on also examine the effect of other violent media such as television, but the statutes only target video games.¹⁷³ States cannot claim that their means will prevent harm to children by exposure to violent media when they choose to regulate video games and not the other forms of violent media such as television and movies.¹⁷⁴ This makes especially little sense when, under these statutes, children would be able to buy the movies or books based on a video game, but could not buy the video game itself.¹⁷⁵

The states, in their quest to regulate the sale of violent video games to minors, also fail to look at less restrictive alternatives.

¹⁶⁷ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 624 (1994).

¹⁶⁸ *See supra* Part II.B.3.

¹⁶⁹ Entertainment Software Association, Facts and Research, http://www.theesa.com/facts/games_youth_violence.php (last visited Apr. 27, 2007); Henry Jenkins, *Reality Bites: Eight Myths About Video Game Violence Debunked*, PBS, <http://www.pbs.org/kcts/videogamerevolution/impact/myths.html> (last visited Apr. 27, 2007).

¹⁷⁰ *See supra* Part I.D.

¹⁷¹ *See supra* Part II.B.3; *see also* Entertainment Software Association, *supra* note 169; Jenkins, *supra* note 169.

¹⁷² *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

¹⁷³ *Entm’t Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1070 (D. Minn. 2006).

¹⁷⁴ *See Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 833 (M.D. La. 2006).

¹⁷⁵ *Id.*

The Eastern District Court of Michigan suggested that instead of regulation, the states could support advertising campaigns that inform parents about the ESRB rating system.¹⁷⁶ The Entertainment Software Association (“ESA”) also has pointed out in at least one case that video game systems have parental controls that parents can use to determine which games their children play.¹⁷⁷

B. *Effect on Other Media*

In addition to the First Amendment concerns of violent video game legislation, there is also a concern about the effects of such legislation on other forms of media. For example, the music and movie industries regulate themselves with voluntary ratings systems similar to the video game industry.¹⁷⁸ The First Amendment protection afforded them is also the same as the protection that video games have. If a statute somehow survives a strict scrutiny analysis and the government starts regulating violent video games, it is possible that regulation of other forms of media would follow.

C. *The Efficacy of the ESRB*

Based on the inevitable failure of statutes regulating the sales of violent video games to minors and the possible negative effects on other forms of media, the states should support the self-regulation efforts of the video game industry rather than try to undermine it. The ESRB’s rating system is the best solution to prevent exposure of violent video games to children without government regulation. Senator Lieberman, one of the harshest critics of violent video games, has stated numerous times that he believes “the ESRB system was the best rating system in the entertainment media.”¹⁷⁹

¹⁷⁶ *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 654 (E.D. Mich. 2006).

¹⁷⁷ *Foti*, 451 F. Supp. 2d at 833.

¹⁷⁸ See generally FTC REPORT, *supra* note 35.

¹⁷⁹ Press Release, Senator Joe Lieberman, Kohl, Lieberman Commend New Voluntary Computer and Video Game Ratings Improvements (June 26, 2003), available at <http://lieberman.senate.gov/newsroom/release.cfm?id=207741>.

The ESRB's rating system has consistently improved every year since the FTC started conducting studies on violent media in the wake of Columbine.¹⁸⁰ According to the latest FTC study, "[n]early nine in ten parents (87%) and 75% of children said they are aware that the game rating system exists (compared to 61% of parents and 73% of children reported in 2000)."¹⁸¹ In addition, "[o]f parents familiar with the ESRB system, nearly three quarters (73%) use the video game's rating most or all of the time when their child wants to buy, rent, or play a game for the first time. This result contrasts with the 2000 survey, in which that figure was only 39%."¹⁸² The ESRB also recently took steps to improve its ratings system further by hiring full-time content raters rather than part-time raters.¹⁸³

An ESRB rating can also affect the conduct of the video game retailers and the video game system manufacturers. A video game receiving an ESRB rating of "AO" for "Adult's Only" can have a strong impact. On June 19, 2007, the ESRB gave Rockstar Games' newest title, *Manhunt 2*, an AO rating.¹⁸⁴ Rockstar Games intended to release the game on the Sony PlayStation, the Sony PSP, and the Nintendo Wii on July 10, 2007.¹⁸⁵ As they do with any AO rated game, video game retailers refused to stock the game when Rockstar Games released it.¹⁸⁶ Sony, the manufacturer of the PlayStation 2 and the PSP,¹⁸⁷ and Nintendo, the manufacturer of the Wii,¹⁸⁸ also both refused to publish the game due to their policy not to publish AO rated games, thereby making it impossible for Rockstar Games to release the game.¹⁸⁹ Rockstar Games had no

¹⁸⁰ FTC REPORT, *supra* note 35, at 27.

¹⁸¹ *Id.*

¹⁸² *Id.* (citation omitted).

¹⁸³ Chris Remo, *ESRB Moves to Full-Time Content Raters*, SHACKNEWS, Feb. 21, 2007, <http://www.shacknews.com/onearticle.x/45847>.

¹⁸⁴ Chris Remo, *ESRB Rates Manhunt 2 "Adults Only"*, SHACKNEWS, June 19, 2007, <http://www.shacknews.com/onearticle.x/47499>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ The PlayStation® Story, <http://www.us.playstation.com/Corporate/About/ThePlayStationStory/default.html> (last visited October 17 2007).

¹⁸⁸ Nintendo.com, <http://www.nintendo.com/channel/wii> (last visited October 17 2007).

¹⁸⁹ Chris Remo, *Publication of AO-Rated Manhunt 2 Disallowed by Sony, Nintendo*, SHACKNEWS, June 20, 2007, <http://www.shacknews.com/onearticle.x/47525>. It is

choice but to put the game's release on hold.¹⁹⁰ On August 24, 2007, more than a month after *Manhunt 2*'s initial release date, Rockstar Games announced that it had modified the game and the ESRB gave the modified version an M rating.¹⁹¹ The effect on *Manhunt 2*'s release date and its content because of the ESRB's AO rating is a solid example of how the video game industry is able to regulate itself without the interference of the states.

The Supreme Court has stated that “[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”¹⁹² There is no need for states to regulate the video game industry when it is capable of regulating itself.

CONCLUSION

On April 16, 2007, a lone gunman went on a shooting spree on the Virginia Tech campus, killing thirty people.¹⁹³ Later that night, Dr. Phil McGraw, the host of the “Dr. Phil” show, went on Larry King Live to discuss the Virginia Tech shooting and stated that:

[T]he problem is we are programming these people as a society. You cannot tell me—common sense tells you that if these kids are playing video games, where they’re on a mass killing spree in a video game, it’s glamorized on the big screen, it’s become part of the fiber of our society. You take that and mix it with a psychopath, a sociopath or someone suffering from mental illness and add in a dose of

important to note that Microsoft also has a similar policy for its Xbox and Xbox 360 video game systems, but Rockstar Games was not releasing *Manhunt 2* on either system. *Id.*

¹⁹⁰ Chris Remo, *Manhunt 2 “Suspended,” Pushed Out of July*, SHACKNEWS, June 21, 2007, <http://www.shacknews.com/onearticle.x/47554>.

¹⁹¹ Chris Remo, *Manhunt 2 Reduced to M, Releases Halloween (Updated)*, SHACKNEWS, Aug. 22, 2007, <http://www.shacknews.com/onearticle.x/48625>.

¹⁹² *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 816 (2000).

¹⁹³ Kevin Johnson & Larry Copeland, *Virginia Tech Gunman Fired 170 Times*, USA TODAY, Apr. 25, 2007, available at http://www.usatoday.com/news/nation/2007-04-25-vt-cho-gunshots_N.htm?csp=34.

rage, the suggestibility is too high. And we're going to have to start dealing with that. We're going to have to start addressing those issues and recognizing that the mass murders [sic] of tomorrow are the children of today that are being programmed with this massive violence overdose.¹⁹⁴

The call to blame video games was reminiscent of the Columbine shootings eight years earlier.¹⁹⁵ Unlike Columbine, where the shooters had some connections to video games, subsequent investigations of the Virginia Tech shooter by police found “[n]ot a single video game, console or gaming gadget” and the shooter’s suite-mate “said he had never seen [the shooter] play video games.”¹⁹⁶ Despite this lack of evidence, some people like attorney Jack Thompson still blame video games for the Virginia Tech shooting.¹⁹⁷

The recent controversies and legislation over violent video games are clear examples of critics blaming violent video games for negative effects without any support for those accusations. Video games did not turn the Virginia Tech shooter into a killer.¹⁹⁸ The research on violent video games has not found any causal connection between violent video games and children committing violent acts.¹⁹⁹ The need to regulate violent video games because of the harm they supposedly cause is illusory at best.

Legislators therefore need to stop attempting to regulate violent video games with laws that courts have repeatedly held are unconstitutional.²⁰⁰ The First Amendment protects the content of violent video games and any law attempting to regulate them based on their violent content will be subject to a strict scrutiny

¹⁹⁴ Larry King Live, (ABC television broadcast Apr. 16, 2007) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0704/16/lk1.01.html>).

¹⁹⁵ See *supra* Part I.C.

¹⁹⁶ Winda Benedetti, *Were Video Games to Blame For Massacre?*, MSNBC, Apr. 20, 2007, <http://www.msnbc.msn.com/id/18220228>.

¹⁹⁷ *Id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *supra* Part II.B.2.

²⁰⁰ See *supra* Part III.

analysis.²⁰¹ The exceptions to the First Amendment proffered by the states that video games should fall under such as obscenity, content harmful to minors, and incitement do not apply to violent video games.²⁰² There is no need for these laws and passing them only ends up costing taxpayers money after the courts invalidate them.²⁰³ District Judge Brady of the Middle District Court of Louisiana admonished the Louisiana legislature for its violent video game legislation in stating:

This Court is dumbfounded that the Attorney General and the State are in the position of having to pay taxpayer money as attorney's fees and costs in this lawsuit. The Act which this Court found unconstitutional passed through committees in both the State House and Senate, then through the full House and Senate, and to be promptly signed by the Governor. There are lawyers at each stage of this process. Some of the members of these committees are themselves lawyers. Presumably, they have staff members who are attorneys as well. The State House and Senate certainly have staff members who are attorneys. The governor has additional attorneys—the executive counsel. Prior to the passage of the Act, there were a number of reported cases from a number of jurisdictions which held similar statutes to be unconstitutional (and in which the defendant was ordered to pay substantial attorney's fees). The Court wonders why nobody objected to the enactment of this statute. In this court's view, the taxpayers deserve more from their elected officials.²⁰⁴

²⁰¹ See *supra* Part II.A.

²⁰² See *supra* Part II.B.

²⁰³ Chris Faylor, *Louisiana Pays ESA \$91K for Illegal Game Law*, SHACKNEWS.COM, Apr. 18, 2007, <http://www.shacknews.com/onearticle.x/46603/> (reporting how Louisiana had to pay the ESA attorney's fees in excess of \$90,000).

²⁰⁴ *Entm't Software Ass'n v. Foti*, No. 06-431-JJB-CN, slip op. at 14 (M.D. La. Apr. 10, 2007).

Self-regulation is the only acceptable solution to concerns about children playing violent video games. The Federal government in 1994 wanted the game industry to self-regulate and that is exactly what the video game industry has been doing with the ESRB.²⁰⁵ The FTC has consistently found that the ESRB has improved its ratings system and awareness ever since it first started investigating it.²⁰⁶ If a video game developer develops a game that the ESRB considers too violent, the video game retailers and the video game manufacturers will also take actions that will make sure the game does not even make it to publication.²⁰⁷ There is no evidence that the ESRB has failed as a ratings system in such a way that the government needs to step in and take over.

The proper solution for legislators is to work with the video game industry, not against them. ESA senior VP and general counsel Gail Markels has stated that “[i]t couldn’t be clearer that the real answer is not regulation, but education of parents to empower them to use the video game rating system, parental controls in game consoles, and other available tools We look forward to working with any elected official to help educate parents about making appropriate video games choices for their unique families.”²⁰⁸ Maybe someday legislators across the country will spend their time and taxpayers’ money on educating parents rather than trying to regulate the video game industry.

²⁰⁵ See *supra* Part I.B.

²⁰⁶ See *supra* Part III.C.

²⁰⁷ See *supra* Part III.C.

²⁰⁸ Press Release, Video Game Industry Awarded Legal Fees for Unconstitutional Louisiana Law (Apr. 16, 2007), http://www.theesa.com/archives/2007/04/video_game_indu_10.php.