

**PRECEDENT BE DAMNED – IT’S ALL ABOUT
GOOD POLITICS & SENSATIONAL SOUNDBITES:
THE VIDEO GAME CENSORSHIP SAGA OF 2005**

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Introduction

Legislative censorship rained down in torrents across the United States on the video game industry throughout 2005.¹ The deluge fell in a decidedly disturbing yet perfectly predictable pattern. In particular, the bill-producing blueprint, followed in near lockstep unison across the country this past year in major states including California, Illinois and Michigan, worked something like this:

- A politician, perhaps groping for a “morality issue”² on which to take a righteous stand, postures and vehemently decries as “shocking”³ and “offensive”⁴ the violent content in video games

¹ While 2005 was a particularly bad year in terms of legislation targeting video games, lawmakers have been attacking video game content with a vengeance ever since the tragic shootings at Columbine High School in April 1999. See Joseph Pereira, *Just How Far Does First Amendment Protection Go?*, WALL ST. J., Jan. 10, 2003, at B1 (writing that “[e]ver since the school shootings in Columbine, Colo., and elsewhere fueled speculation that violent videogames could engender real-life carnage, lawmakers have tried to propose legislation restricting the sale and rental of videogames to children”).

² See Seth Schiesel, *Contesting the Not-So-Virtual World of Politics*, N.Y. TIMES, Sept. 10, 2005, at D7 (addressing the question of why politicians keep bashing video games and quoting political strategist and frequent news commentator Dick Morris for the proposition that “[i]t is a political effort by Hillary and other Democrats to try to create a morality issue, a ‘values’ issue, that they can use”).

³ See Alex Pham, *Debate Flares Anew Over Violence in Video Games*, L.A. TIMES, Oct. 5, 2005, at C1 (quoting California Assemblyman Leland Yee (D-San Francisco), the primary sponsor of anti-access video game legislation in California in 2005, for the proposition that violent video games are “too *shocking*, too realistic not to have an effect on children”) (emphasis added).

⁴ See Press Release, Illinois Governor Rod Blagojevich, Gov. Blagojevich Poised to Make Illinois Only State in the Nation to Protect Children from Violent and Sexually Explicit Video Games (May 28, 2005), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3998>

and declares that the games are “harmful to children;”⁵

- A politician proposes patently unconstitutional legislation to address said content and to keep it out of the hands of minors;

- Legislation, after some amendment and much inflammatory rhetoric published in the press about the urgency and necessity to pass it, is signed into law by a gung-ho governor;

- New law is immediately challenged in federal court on First Amendment⁶ free-speech grounds by major organizations and powerful law firms⁷ representing various segments of the video game industry; and

- New law is swiftly enjoined, its enforcement is prohibited on First Amendment grounds and the social science evidence used to support it is thoroughly rebuked and rebuffed by a federal district

(last visited Dec. 23, 2005) (quoting Illinois Rep. Linda Chapa LaVia (D-Aurora), the primary sponsor behind the “Safe Games Illinois Act,” for the proposition that “I introduced this legislation because these games are graphic, *offensive*, and intended for adults, not children”) (emphasis added).

⁵ See *Games Under Fire*; CHI. TRIB., July 7, 2004, at 52 (quoting Mary Lou Dickerson, a Democratic legislator in Washington state, who sponsored video game legislation (that ultimately was declared unconstitutional in *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004)).

⁶ The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. Amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁷ For instance, the video game industry’s complaint challenging the law in California that is discussed later in this article was filed by attorneys from both Jenner & Block and Gibson, Dunn & Crutcher. See *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. Oct. 17, 2005) (setting forth the caption to the complaint and listing Jenner & Block and Gibson, Dunn & Crutcher as the law firms for the attorneys for the plaintiffs).

Of particular note here is that the lead attorney from Jenner & Block involved in each of three state disputes – Illinois, Michigan and California – described later in this article is Paul M. Smith. Smith argued and won before the United States Supreme Court the privacy case of *Lawrence v. Texas*, 539 U.S. 558 (2003), that overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986). He also recently argued to the Supreme Court the Internet filtering software case of *United States v. American Library Association*, 539 U.S. 194 (2003) and the political gerrymandering case of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Jennifer & Block, Paul M Smith, available at <http://www.jenner.com/people/bio.asp?id-278>.

court judge.

The wreckage of these ill-fated legislative initiatives now lies littered and strewn across the pages of three judicial opinions, each bearing the name of a high-profile governor and each having been decided in the final two months of 2005: *Video Software Dealers Association v. Schwarzenegger*,⁸ *Entertainment Software Association v. Blagojevich*⁹ and *Entertainment Software Association v. Granholm*.¹⁰ In baseball lingo, that was three strikes in 2005 against laws targeting minors' access to violent games. A reasonable person might think that the politicians would be called out by their constituents for wasting taxpayer dollars on unconstitutional laws or, at the very least, that the politicians would themselves call for a legislative ceasefire against the video game industry.

But if recent history provides any indication, this won't be the case, either in 2006 or for the foreseeable future. Why? Because each of the three decisions from 2005 cited above and the legislation that gave rise to it came closely on the heels of overwhelming precedent against the odds of anti-access video game legislation ever passing constitutional muster. In particular, similar measures were struck down in 2001 by the United States Court of Appeals for the Seventh Circuit,¹¹ in 2003 by the United States Court of Appeals for the Eighth Circuit¹² and in 2004 by a federal district court in the state of Washington.¹³ In a nutshell, courts today recognize that video games depicting violent images are speech products protected by

⁸ *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

⁹ *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

¹⁰ *Entertainment Software Ass'n v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 2005).

¹¹ *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

¹² *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003).

¹³ *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

the First Amendment¹⁴ and legislation targeting that content faces a steep, uphill battle.

Today, in 2006, the precedent against laws targeting violent content in video games is now seemingly insurmountable. As Douglas Lowenstein, president of the Entertainment Software Association, stated in a December 2005 press release after a federal judge in California issued an injunction that month against a new video game law in that state:

For the sixth time in five years, federal courts have now blocked or struck down these state and local laws seeking to regulate the sale of games to minors based on their content, and none have upheld such statutes. It is therefore time to look past legislation and litigation in favor of cooperative efforts to accomplish the common goal of ensuring that parents use the tools available to control the games their kids play.¹⁵

But as this article later illustrates, such a spirit of détente in the not-so-cold war between politicians and the video game industry will likely come to naught. The politicians, despite the wall of precedent facing them, simply will not relent. As Illinois Gov. Rod Blagojevich (D.) stated in December 2005 in an official press release after a federal judge issued a permanent injunction against the anti-access video game law he had vociferously supported:

This battle is not over. Parents should be able to expect that their kids will not have access to excessively violent and sexually explicit video games

¹⁴ See Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 154 (2005) (writing that “courts have properly begun to hold that video games fall within the protective scope of the First Amendment. These decisions incorporate two distinct findings: First, video games are a form of expression presumptively entitled to constitutional protection. Second, they do not fall into a category of unprotected speech such as obscenity or incitement.”) (footnotes omitted).

¹⁵ Press Release, Entertainment Software Association, California Judge Blocks Unconstitutional Video Game Law (Dec. 22, 2005), *available at* http://www.theesa.com/archives/2005/12/california_judg.php (last visited Dec. 23, 2005).

without their permission. We've already agreed as a society that children shouldn't be able to buy pornographic magazines. We don't allow them to have alcohol or tobacco. It only makes sense to keep videogames that are full of graphic violence and sex out of their hands as well.¹⁶

Likewise, California Gov. Arnold Schwarzenegger vowed not to give up the fight after the legislation he signed into law in October 2005 was struck down in December 2005. Schwarzenegger spokeswoman Julie Soderlund told the *San Francisco Chronicle* after the judicial defeat:

This is just the first step in what is certain to be a lengthy legal proceeding. Once the state is able to present evidence in the case, the courts will have the opportunity to understand why the governor and Legislature believe the state has a compelling interest in protecting children from potential harm from exposure to extremely violent video games.¹⁷

But it was not only in state legislatures where the video game industry found itself under siege in 2005. In the United States Congress, a bill known as the SAFE Rating Act – a tortured acronym for “Software Accuracy and Fraud Evaluation Rating Act” – was proposed in March to study the video game industry’s voluntary rating system¹⁸ and to assess whether its rating labeling practices are unfair or deceptive.¹⁹ In addition, both the U.S. Senate and House of Representatives issued resolutions in

¹⁶ Press Release, Illinois Governor Rod Blagojevich, Governor Blagojevich Reiterates Need for Common Sense Restrictions on Violent and Sexually Explicit Video Games; Vows to Appeal Federal Court Decision Enjoining Illinois Law (Dec. 2, 2005), *available at* <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=4520> (last visited Dec. 23, 2005).

¹⁷ Lynda Gledhill, *Judge Blocks Ban on Sale of Violent Video Games to Minors*, S.F. CHRON., Dec. 23, 2005, at A1.

¹⁸ *See generally* ESRB: Entertainment Software Rating Board, ESRB Game Ratings, *available at* <http://www.esrb.org/esrbratings.asp> (last visited Dec. 23, 2005) (describes in detail the voluntary rating system implemented and enforced by ESRB).

¹⁹ H.R. 1145 (109th Cong. 2005).

July 2005 calling for the Federal Trade Commission to investigate whether the makers of the controversial video game “Grand Theft Auto: San Andreas” intentionally engaged in deceptive acts to avoid receiving an AO (Adults Only) rating from the Entertainment Software Rating Board.²⁰ And the year closed in December 2005 with Senators Hillary Rodham Clinton (D. – N.Y.), Joe Lieberman (D. – Conn.) and Evan Bayh (D – Ind.) introducing legislation called the Family Entertainment Protection Act that Clinton claimed “will help empower parents by making sure their kids can’t walk into a store and buy a video game that has graphic, violent and pornographic content.”²¹ Lieberman added that the bill will impose “fines on those retailers that sell M-rated games to minors, putting purchasing power back in the hands of watchful parents.”²²

It apparently made no difference to the trio of senators that the bill they proposed would likely be held unconstitutional, especially if the precedent described in this article is any indication. So why go through the legislative charade? As David Lightman, the Washington bureau chief for the *Hartford Courant*, observed, the senators “knew that a Capitol Hill news conference, with lots of visuals and sound bites – not to mention the presence of a former first lady who is widely assumed to be the front-runner for the 2008 Democratic presidential nomination – would get attention.”²³ The carefully crafted press conference included the senators “surrounded by a noted physician, concerned parents and posters of violent scenes from video games.”²⁴

This article scrutinizes the legislative efforts from 2005 targeting the content of video games depicting images of violence

²⁰ S. Res. 212, 109th Cong. (2005); H.R. Res. 376, 109th Cong. (2005).

²¹ Press Release, Senator Hillary Rodham Clinton, *Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children From Inappropriate Video Games* (Dec. 16, 2005), available at <http://clinton.senate.gov/news/statements/details.cfm?id=249860&&> (last visited Dec. 23, 2005).

²² *Id.*

²³ David Lightman, *Lawmakers Go To The ‘Pulpit’ For Pet Issues*, HARTFORD COURANT (Conn.), Dec. 25, 2005, at A1.

²⁴ *Id.*

and/or featuring violent storylines. Part I traces and analyzes the 2005 legislation in Illinois, Michigan and California – from the initial proposal of the bills through their signage, to the filing of the lawsuits against them and, ultimately, to the judicial opinions enjoining them.²⁵ In the process, Part I also critiques the rhetorical devices and soundbites used by politicians in support of these measures, and it observes that the social science evidence that is offered in their support is repeatedly rejected by judges. The authors strongly believe that it is imperative to understand fully the back story and context behind the legislation – to understand the posturing, politics and rhetoric – that allows lawmakers to throw judicial precedent to the wind and to crank out flawed bills doomed for failure. Only by understanding this process now can it be recognized in the future and possibly stopped if enough members of the voting populace rise up against it.

Part II then examines the 2005 saber rattling at the federal level in the U.S. Congress.²⁶ Next, Part III digs deeper and goes beyond the legislative and court battles to examine how the fights were framed by, and played out upon, the editorial pages of major newspapers across the country.²⁷ This part is particularly important, both to the extent that newspaper editorials can influence political actions and to the extent that newspapers – like video games – are a form of media content protected by the First Amendment protection of free speech. If newspapers support video game legislation, they are essentially harming themselves by suggesting that some forms of intrusion on free speech are permissible.

Finally, the article concludes that as long as politicians seek to divert attention away from real-world criminal activity by focusing on virtual violence and engaging in rhetoric-rich soundbites, new laws will continue to crop up in 2006 and beyond.²⁸ It will only be when a new generation of politicians takes office – a generation that, in fact, grew up playing video

²⁵ *Infra* notes 29–245 and accompanying text.

²⁶ *Infra* notes 246–283 and accompanying text.

²⁷ *Infra* notes 284–340 and accompanying text.

²⁸ *Infra* notes 341–376 and accompanying text.

games as a regular part of the youth culture – that legislative efforts will wane. Every generation fears the effects of new technology, and the current generation of legislators fears the effects of video games. Time eventually will change that situation, but that day cannot come fast enough for the video game industry.

I. THE LEGISLATIVE LANDSCAPE OF 2005: THE BATTLES IN ILLINOIS, MICHIGAN AND CALIFORNIA OVER VIDEO GAME LAWS

This part of the article analyzes the legal battles – from initial proposal of legislation to enactment into law and on through judicial resolution – fought in 2005 in three states targeting violent video game content. In particular, Section A addresses the clash in Illinois, while Section B describes and critiques the fight in Michigan, and Section C covers the contested issue of video game legislation in California. Section D briefly synthesizes the results of the decisions from these three states.

A. *Illinois*

On December 2, 2005, U.S. District Court Judge Matthew F. Kennelly handed down a ruling in *Entertainment Software Association v. Blagojevich*²⁹ that permanently enjoined the state of Illinois from enforcing two new laws created under Public Act 94-0315³⁰ before they could take effect on January 1, 2006.³¹ That act, signed into law by Governor Rod Blagojevich on July 25, 2005,³² produced what Judge Kennelly observed were “two new

²⁹ 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

³⁰ H.B. 4023, 94th Gen. Assem. (Ill. 2005). A copy of the Illinois Public Act 94-0315, as enrolled and signed by Gov. Blagojevich, can be found online at <http://www.ilga.gov/legislation/94/HB/PDF/09400HB4023enr.pdf> (last visited Dec. 29, 2005).

³¹ *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d at 1082 (concluding that “[p]laintiffs are unquestionably entitled to a permanent injunction barring enforcement of both the VVGL and the SEVGL. They have succeeded on the merits, and they have proved the other requirements for a permanent injunction”).

³² See Misha Davenport & Dan Rozek, *Video Game Industry Blasts Law*

criminal statutes: the Violent Video Games Law (VVGL) and the Sexually Explicit Video Games Law (SEVGL).³³ The VVLG, which worked its way through the Illinois legislature as House Bill 4023 under the sponsorship of Rep. Linda Chapa LaVia,³⁴ made it a crime punishable by up to a \$1,000 fine to sell or rent to minors³⁵ – defined as people under eighteen years of age³⁶ – a “violent video game,”³⁷ and it required video game retailers to label all violent video games on the front face of the video game package with a solid white “18” outlined in black.³⁸ In addition to the access-limitation and compelled-labeling requirements, the law included a posted-signage provision, requiring retailers to “post a sign that notifies customers that a video game rating system, created by the Entertainment Software Ratings Board, is available to aid in the selection of a game”³⁹ and mandating that

Banning Some Sales to Minors, CHI. SUN-TIMES, July 26, 2005, at 16 (writing that “Gov. Blagojevich signed a new law Monday barring youngsters from obtaining violent and sexually explicit video games” and quoting the governor for the proposition that “[t]his law is all about empowering parents and giving them the tools they need to protect their kids”).

³³ *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d at 1057.

³⁴ H.B. 4023, 94th Gen. Assem. (Ill. 2005). Complete details of the entire legislative history of the bill can be found online at the Illinois General Assembly website at <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=4023&G AID=8&SessionID=50&LegID=20889> (last visited Dec. 29, 2005).

³⁵ 720 ILL. COMP. STAT. 5/12A-15 (a) (2005) (providing that “[a] person who sells, rents, or permits to be sold or rented, any violent video game to any minor, commits a petty offense for which a fine of \$1,000 may be imposed”).

³⁶ See 720 ILL. COMP. STAT. 5/12A-10 (c) (2005) (providing that a minor “means a person under 18 years of age”).

³⁷ See 720 ILL. COMP. STAT. 5/12A-10 (e) (2005) (defining violent video games to include “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”).

³⁸ See 720 ILL. COMP. STAT. 5/12A-25 (a) (2005) (providing in relevant part that “video game retailers shall label all violent video games as defined in this Article, with a solid white ‘18’ outlined in black. The ‘18’ shall have dimensions of no less than 2 inches by 2 inches. The ‘18’ shall be displayed on the front face of the video game package”).

³⁹ 720 ILL. COMP. STAT. 5/12B-30 (a) (2005).

the sign “be prominently posted in, or within 5 feet of, the area in which games are displayed for sale or rental, at the information desk if one exists, and at the point of purchase.”⁴⁰ In a nutshell, then, the VVGL had three major provisions targeting violent video games:

- Content-based access restrictions on the sale and rental of violent video games to minors;
- Compelled-speech based obligations on the video game industry consisting of labeling, with the “18” notation, all violent video games;
- Compelled-speech based obligations on video game retailers and renters requiring the posting of signs on the premises about the rating systems.

The SEVGL – a complete discussion of SEVGL is beyond the scope of this article, which focuses only on violent content in video games, not sexual imagery – imposed similar restrictions on the selling of sexually explicit video games to minors,⁴¹ defining these games to include:

those that the average person, applying contemporary community standards would find, with respect to minors, is designed to appeal or pander to the prurient interest and depict or represent in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast.⁴²

The decision of Judge Kennelly holding that “both statutes violate the First Amendment”⁴³ – specifically, Kennelly found that the VVGL not only failed the strict scrutiny standard of judicial analysis⁴⁴ reserved for content-based laws,⁴⁵ but also was

⁴⁰ *Id.*

⁴¹ See 720 ILL. COMP. STAT. 5/12B-15 (a) (2005) (providing that “[a] person who sells, rents, or permits to be sold or rented, any sexually explicit video game to any minor, commits a petty offense for which a fine of \$1,000 may be imposed”).

⁴² 720 ILL. COMP. STAT. 5/12B-10 (e) (2005).

⁴³ *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d at 1055.

⁴⁴ See *United States v. Playboy Entm’t. Group, Inc.*, 529 U.S. 803, 813

void for vagueness⁴⁶ – marked the culmination of a year-long battle that began in December 2004 when Governor Blagojevich first called for legislation. That battle, as well as the precedent against video game laws that made it a decidedly uphill one for Illinois lawmakers, is described below.

1. *The Initial Outrage, Rhetoric and Proposal*

“I watched that and felt a great deal of outrage and contempt and thought to myself, ‘Someone ought to do something about that.’ And then it dawned on me, ‘I’m the governor. I can do something about that.’”⁴⁷

Those words, spoken about the video game “JFK Reloaded” by Illinois Governor Rod Blagojevich in December 2004 to a largely friendly crowd of more than twenty-five mothers at a town hall-style meeting in Naperville, Ill.,⁴⁸ captured the early sense of righteous indignation and the spirit of censorship that would propel the governor’s efforts in 2005 to have Illinois become the first state in the country to prohibit the sale of violent video games to minors. It was also clear at that meeting that First Amendment concerns for free speech were something that Blagojevich believed took a backseat to protecting minors from images of virtual violence. “I don’t believe that my 8-year-old

(2000) (writing that “a content-based speech restriction” is constitutional “only if it satisfies strict scrutiny,” and defining this test to mean that a statute “must be narrowly tailored to promote a compelling Government interest”); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 903 (2d ed. 2002) (writing that “content-based discrimination must meet strict scrutiny”).

⁴⁵ *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d at 1076 (writing that “[e]ven were defendants able to establish a compelling interest in regulating violent video games, they have not demonstrated that the VVGL is narrowly tailored to serve such a purpose”).

⁴⁶ *Id.* at 1077 (writing that “the Court concludes that because the definition of ‘violent video games’ in the VVGL is unconstitutionally vague, the statute fails for this reason as well”). See CHEMERINSKY, *supra* note 44, at 910 (2d ed. 2002) (writing that “[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted”).

⁴⁷ John Chase, *Video Game Law Strikes a Chord; Blagojevich Pitch Finds a Receptive Room in Naperville*, CHI. TRIB., Dec. 17, 2004, at 10.

⁴⁸ *Id.*

daughter has a constitutional right to cut somebody's head off in a game that she plays,"⁴⁹ the governor stated.

The save-the-children-from-violent-images theme was one that Blagojevich would use repeatedly to try to gain support for his legislative initiative. As he said in a prepared statement in announcing his crusade against pictures of fictional and virtual violence, "[s]oldiers heading to Iraq use simulations like today's video games in order to prepare for war. That may all be OK if you're a mature adult or a soldier training to fight, but is that really necessary for a 10-year-old child?"⁵⁰ And in a commentary published in the *Chicago Defender*, Blagojevich stressed that "[c]hildren need to be taught right from wrong. And telling them they can purchase these video games – and spend their free time practicing the very things we teach them not to do – sends exactly the wrong message and reinforces the wrong values."⁵¹

The legislative findings set forth in the law, indeed, acknowledge that its primary purpose was to protect minors from a laundry list of supposed harms that they would suffer from after playing violent video games, including:

- violent, asocial and/or aggressive behavior;
- feelings of aggression; and
- a reduction of activity in the frontal lobes of the brain responsible for controlling behavior.⁵²

Attacking video games, protecting children and helping parents was a politically expedient formula for Blagojevich. As *Chicago Tribune* reporters John Chase and Grace Aduroja observed, the governor's video game initiative "fits a pattern the politically ambitious Democrat has established of trying to create a national buzz for himself by championing causes with surefire headline appeal."⁵³ Bob Sexter, the *Chicago Tribune's* state

⁴⁹ John Chase, *Video Game Law Strikes a Chord; Blagojevich Pitch Finds a Receptive Room in Naperville*, CHI. TRIB., Dec. 17, 2004, at 10.

⁵⁰ P.J. Huffstutter, *Illinois Seeks to Curb Explicit Video Games*, L.A. TIMES, Dec. 16, 2004, at A1.

⁵¹ Rod Blagojevich, *Violent Video Games are Hurtful to Our Children*, CHI. DEFENDER, Dec. 23, 2004, at 9.

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

⁵³ John Chase and Grace Aduroja, *Governor Targeting Violent Video*

political reporter, went so far as to call Blagojevich's video game initiative part of his "stunt-of-the-month-club style of government"⁵⁴ in which "[t]he act goes something like this: Blagojevich calls a news conference, often careful to make sure the national media as well as the local is tipped to its topic ahead of time, scrunches his face earnestly for the cameras and decries some foul scourge against which he will ride to the rescue." And Blagojevich certainly garnered national publicity with his initiative, even gaining a prominent mention and quotation in a January 2005 *Time* magazine article,⁵⁵ as well as time and quotation on the National Public Radio news program, "All Things Considered," in December 2004.⁵⁶

On the other hand, it's rather hard to blame Blagojevich for seizing the political moment. First, as Professor Kenneth L. Karst pointed out in a recent law journal article, "in the culture clashes of the last generation, political strategists have mobilized constituencies by sounding an emotion-laden theme: the use of regulatory law to influence the socialization of children."⁵⁷ To this extent, Blagojevich was playing within the confines of a well-established political paradigm. Second, and more specifically in this case, the video game industry essentially handed the Illinois governor a golden opportunity to capture the media spotlight when, with the winter holiday shopping season underway in late 2004, a Scottish firm called Traffic Games had the incredibly bad taste to release a game called "JFK Reloaded" on the forty-first anniversary of the assassination of President John F. Kennedy.⁵⁸

Games, CHI. TRIB., Dec. 16, 2004, at 1.

⁵⁴ Bob Sector, *Welcome to Blagojevich's Stunt of the Month Club*, CHI. TRIB., Jan. 2, 2005, at 1.

⁵⁵ See Anita Hamilton, *Video Vigilantes*, TIME, Jan. 10, 2005, at 60 (quoting Blagojevich and writing that "Blagojevich plans to propose two bills this month that would make it a misdemeanor, punishable by fines of \$5,000 or up to a year in jail, for retailers to sell or rent games with certain sexual or violent content to kids under 18").

⁵⁶ *All Things Considered* (National Public Radio broadcast, Dec. 16, 2004).

⁵⁷ Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CALIF. L. REV. 967, 969 (2003).

⁵⁸ See Ben Berkowitz, *Video Game Re-creates Slaying of Kennedy / Release is Timed to Coincide with 41st Anniversary of President's Death*, HOUSTON CHRON., Nov. 22, 2004, at 10 (describing the game "JFK Reloaded" and its public

The game “invites competitors to get behind Lee Harvey Oswald’s sniper rifle and recreate”⁵⁹ the assassination of Kennedy in Dallas, Texas. The authors of this article point out in the conclusion that a little bit of self-restraint on the part of some members of the video game industry, such as the makers of the game “JFK Reloaded,” might well help to keep some politicians’ attention away from the regulation of video games.⁶⁰

Despite the political appeal of Blagojevich’s proposal to prevent the sale of violent video games to minors,⁶¹ it was clear from the start that it was doomed to failure on First Amendment free-speech grounds should it ever become law. In fact, one of the authors of this law journal made this clear in a commentary

release).

⁵⁹ Tom Zeller, Jr., *A Sure-to-Be-Controversial Game Fulfills That Expectation Fully*, N.Y. TIMES, Nov. 29, 2004, at C7.

⁶⁰ *Infra* notes 355 - 362 and accompanying text.

⁶¹ The Illinois governor’s original proposal, as described in an official press release issued in December 2004, called for the introduction of:

two bills during the upcoming legislative session: one that bans the distribution, sale, rental and availability of violent video games to children younger than 18 and another that bans the distribution, sale, rental and availability of sexually explicit video games to children younger than 18. “Violent” games would be defined as those realistically depicting human-on-human violence in which the player kills, injures, or otherwise causes physical harm to another human, including but not limited to depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape. “Sexually explicit” games would be defined as those realistically depicting male or female genitalia and other nudity exposed in a way that, in accordance with contemporary community standards, predominantly appeals to the prurient interest of the player. Games in which the redeeming social value of the material outweighs its appeal to the prurient interest shall not be deemed “sexually explicit.” The likely penalty for violating the bans would be a Class A misdemeanor, punishable by up to one year in prison or a \$5,000 fine.

Press Release, Illinois Governor Rod Blagojevich, Gov. Blagojevich Proposes Bill to Make Illinois First State to Prohibit Sale or Distribution of Violent and Sexually Explicit Video Games to Minors (Dec. 16, 2004), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3586> (last visited Dec. 30, 2005).

published in December 2004 in the *Chicago Tribune*.⁶² The precedent then standing against Blagojevich's proposal is described below in the next section.

2. *The First Amendment, Precedent and Judicial Protection of Video Games*

The legal deck was stacked against Rod Blagojevich from the start. In March of 2001, the United States Court of Appeals for the Seventh Circuit – the same federal appellate circuit in which Illinois sits – issued a unanimous opinion in *American Amusement Machine Association v. Kendrick*⁶³ granting a preliminary injunction that prohibited enforcement by the City of Indianapolis, Ind., of a law that limited the access of minors to video games depicting violent images. In an opinion authored by the powerful Judge Richard Posner, the Seventh Circuit held that video games with violent storylines and themes are protected by the First Amendment, reasoning in part that:

Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware. To 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.⁶⁴

Among other things, the appellate court under Posner also: 1) observed that children have a First Amendment speech interest

⁶² See Clay Calvert, *Censorship of Video Games Wrongheaded; Laws Aimed at Restricting Access to Video Games Depicting Violence and Sex Destined for Failure*, CHI. TRIB., Dec. 28, 2004, at 21 (contending that Blagojevich's "angst and outrage may be well-intentioned, but it certainly gives short shrift to freedom of expression and the reality that legal precedent weighs strongly against the constitutionality of measures restricting the sale of violence").

⁶³ 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

⁶⁴ *Id.* at 577.

at stake when laws restrict their access to violent video games⁶⁵; 2) held that a government entity restricting the content of video games must show that the grounds are “compelling and not merely plausible”⁶⁶; 3) concluded that the social science evidence of Iowa State University Distinguished Professor Craig A. Anderson that was offered by Indianapolis failed to support the ordinance⁶⁷; and 4) refused to conflate the regulation of obscenity with the regulation of violent images, writing that forbidding “pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity.”⁶⁸ The appellate court concluded that the benefits that might come from implementation and enforcement of the anti-access video game ordinance to the people of Indianapolis were “entirely conjectural.”⁶⁹

In a law journal article published shortly after the *American Amusement Machine Association* opinion was handed down, one of the authors of this article argued that judges in other cases reviewing the constitutionality of content-based video game laws “should accept and embrace Judge Posner’s voice of reason in *American Amusement Machine* so as not to unjustifiably and unnecessarily shred the First Amendment rights of children based on speculative fears.”⁷⁰ That would soon prove to be the case when the United States Court of Appeals for the Eighth Circuit in June 2003 in *Interactive Digital Software Association v. St. Louis County*⁷¹ favorably cited and quoted Judge Posner’s

⁶⁵ See *id.* at 576-77 (writing that “children have First Amendment rights” and reasoning both that “the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either” and that “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble”).

⁶⁶ *Id.* at 576.

⁶⁷ *Id.* at 578-79.

⁶⁸ 244 F.3d 572, 575-76 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

⁶⁹ *Id.* at 580.

⁷⁰ Clay Calvert, *Violence, Video Games, and A Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 6 (2004).

⁷¹ 329 F.3d 954 (8th Cir. 2003).

opinion several times⁷² in declaring that a St. Louis County ordinance that made “it unlawful for any person knowingly 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”⁷³ failed to survive the strict scrutiny standard of judicial review.⁷⁴ The Eighth Circuit noted that under the strict scrutiny test, the government carries the “burden of demonstrating that the ordinance is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end.”⁷⁵ In issuing an injunction against the ordinance, the Eighth Circuit concluded that St. Louis County had failed to provide the substantial supporting evidence necessary to prove that it had a compelling interest in protecting minors from psychological harm that would be served by the anti-access law.⁷⁶ What’s more, the appellate court in *Interactive Digital Software Association* also rejected St. Louis County’s argument that its interest in helping parents be better guardians of their children’s well being was sufficient to support the law. The Eighth Circuit reasoned here that “to accept the County’s broadly-drawn interest as a compelling one would be to invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority.”⁷⁷

Just one year later, a federal judge, sitting in the state of Washington in the case of *Video Software Dealers Association v. Maleng*,⁷⁸ would strike down a law in that state that restricted minors’ access to 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

⁷² See *id.* at 957.

⁷³ *Id.* at 956.

⁷⁴ *Id.* at 960.

⁷⁵ *Id.* at 958.

⁷⁶ *Id.* at 959.

⁷⁷ 329 F.3d 954 (8th Cir. 2003) at 960.

⁷⁸ 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

recognizable symbols, as a public law enforcement officer.”⁷⁹ U.S. District Court Judge Robert Lasnik, just as the judges of the Seventh Circuit had done before him in *American Amusement Machine Association*, refused to accept the argument that violent content should be treated like sexual obscenity⁸⁰ and, applying the strict scrutiny standard of review, held that the state of Washington’s “belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence.”⁸¹ Parsed differently, the social science evidence was once again found lacking and insufficient to support a governmental entity’s attempt to regulate video game content.⁸² In addition to holding that the Washington law failed the compelling interest prong of the strict scrutiny test, Judge Lasnik also found that it failed the narrow-tailoring component, noting that “the limitations imposed by the Act impact more constitutionally protected speech than is necessary to achieve the identified ends and are not the least restrictive alternative available.”⁸³ What’s more, Lasnik held the Washington law also was “unconstitutionally vague.”⁸⁴

Following as it did in the footsteps of the *American Amusement Machine Association* and *Interactive Digital Software Association*, the opinion in *Maleng* was anything but surprising and it appeared, at least on the surface, to be the third and final nail in the coffin against content-based laws targeting violent video games. But as the authors of this article predicted in another law journal article analyzing the *Maleng* decision, “failed legislation will continue to be drafted and passed in the near future and . . . the obsession with controlling fictional images of

⁷⁹ WASH. REV. CODE § 9.91.180 (2004).

⁸⁰ *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 at 1185.

⁸¹ *Id.* at 1189.

⁸² *See id.* at 1188 (reasoning, in relevant part, that “the current state of the research cannot support the legislative determinations that underlie the Act because there has been no showing that exposure to video games that ‘trivialize violence against law enforcement officers’ is likely to lead to actual violence against such officers. Most of the studies on which defendants rely have nothing to do with video games”).

⁸³ *Id.* at 1189.

⁸⁴ *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 at 1191.

violence will wax rather than wane.”⁸⁵ As if on cue, Blagojevich stepped forward to make that prediction a reality with his anti-access video game measure in Illinois, complete with a web site calling attention to the initiative and replete with an online press room and links providing information about video game ratings and statistics.⁸⁶ He also created a special task force on video games, comprised of “parents from across Illinois as well as community leaders, clergy, teachers, medical experts and child advocates from across the nation.”⁸⁷ These special actions indicate that the video game measure for Blagojevich was not merely another bill or typical issue crossing his desk; he was taking special steps to call attention to and, in the opinion of the authors of this article, staking much of his political reputation upon, the ultimately unconstitutional video game legislation. The next section describes the legal battle that would unfold as the governor’s legislation, after amendments, became law in the summer of 2005.

3. Legislation, Litigation and Judicial Resolution in Illinois

Rod Blagojevich needed a legislator to take up and sponsor his video game initiative in the Illinois General Assembly. He found the person he was looking for in Rep. Linda Chapa LaVia (D. – Aurora).⁸⁸ On February 28, 2005, she introduced and filed with the General Assembly clerk the first iteration of House Bill 4023.⁸⁹ When the bill passed the Illinois House of

⁸⁵ Clay Calvert & Robert D. Richards, *Mediated Images of Violence and the First Amendment: From Video Games to the Evening News*, 57 ME. L. REV. 91, 95 (2005).

⁸⁶ See SafeGamesIllinois.Org, available at <http://www.safegamesillinois.org/> (last visited Dec. 30, 2005).

⁸⁷ Press Release, Illinois Governor Rod Blagojevich, Governor’s Safe Games Illinois Task Force Holds First Meeting (Feb. 1, 2005), available at <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3662> (last visited Dec. 31, 2005).

⁸⁸ See The Illinois General Assembly website, available at <http://www.ilga.gov/house/rep.asp?GA=94&MemberID=1022> (last visited Dec. 31, 2005) (for official background on Rep. Linda Chapa LaVia).

⁸⁹ See The Illinois General Assembly Website, available at

Representatives in March 2005 by an overwhelming vote of 91-19, LaVia remarked “[i]t’s the right thing to do. Now there’s become such a heightened awareness of the video games and what it actually does to children, and how people have been committing murders, rapes, the children are committing suicide and all the things that are connected with video games.”⁹⁰ By trotting out such a parade of horrors as murders, rapes and suicides that allegedly are attributable to the playing of violent video games, Chapa LaVia proved adept at the art of the hyperbolic soundbite. Like Blagojevich, Chapa LaVia demonstrated a penchant for children-centric soundbites, such as her comment after the March 2005 House vote that as “a parent myself, I know how difficult it can be to control what your children see on a daily basis. It’s troubling to think that a 14-year old can legally buy a video game where gang members, prostitutes, and criminals are the main characters. We can’t always control the world outside, but we can control the images our children see at home.”⁹¹

Even at that early stage of the legislative process, however, some lawmakers in Illinois clearly recognized both the constitutional flaws with the measure and the political machinations taking place behind the soundbites. Chiding legislators who harbored constitutional concerns about House Bill 4023 violating the First Amendment but who nonetheless voted for it, Rep. Bill Black (R-Danville) quipped, “[t]hat’s the game we’ve played for years. We vote for something to be tough on this or that, and we hope the Supreme Court will bail us out.”⁹² Demonstrating that some legislators are willing to put aside

<http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=4023&GAID=8&SessionID=50&LegID=20889> (last visited Dec. 31, 2005) (for all details of the official legislative history of the bill).

⁹⁰ Ben Fischer, *House Approves Controlling Video Game Sales*, CHI. SUN-TIMES, Mar. 17, 2005, at 21.

⁹¹ Press Release, Illinois Governor Rod Blagojevich, *Gov. Blagojevich Commends House for Passing Landmark Video Game Legislation; Encourages Senate to Follow Suit* (Mar. 16, 2005), available at <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3763> (last visited Jan. 1, 2006).

⁹² Fischer, *supra* note 90, at 21.

acknowledged constitutional concerns and vote for politically popular video game bills, Rep. Lou Lang (D-Skokie) voted in favor of House Bill 4023 in March 2005 despite making the following statement during debate: “The truth of the matter is [the bill] is unconstitutional as drafted. The truth of the matter is that it is vague. The standards are vague. The penalties are vague. The interpretations of the statute are vague. And because of that, courts all over this country have held bills that look just like this unconstitutional.”⁹³ As the editorial board of one Illinois-based newspaper would later summarize the situation, some lawmakers “voted yes for political reasons, not because they thought it was a good law.”⁹⁴

The political hypocrisy among some legislators in Illinois manifested itself in other forms. In particular, a majority of lawmakers in that state supported House Bill 4023 despite the fact that many law enforcement officials had made it very clear that, were the bill ever to become law, its enforcement would not be a high priority.⁹⁵ As one police chief in Illinois told a reporter for the *Chicago Tribune*, “unless the parents are outside our police department, like a scene in *Frankenstein* with pitchforks and signs, telling us that the stores are selling them, I don’t see us doing the sting operations.”⁹⁶ Another police chief remarked that “[i]t’s hypocritical. You’re censoring a video game and you can have the same effect by movies. I have a 16-year-old kid and . . . we’re telling the police that they have to monitor what’s being sold in stores, yet we have a society that lets him walk right into a movie theater without being ID’d. This goes back to parental responsibility.”⁹⁷

But despite both First Amendment concerns about

⁹³ Ray Long & Erika Slife, *Debate on Violent Video Games; Kids, Get This Straight: Aliens Bad, People Good*, CHI. TRIB., Mar. 17, 2005, at 1.

⁹⁴ *It’s Game Over, Governor*, PANTAGRAPH (Bloomington, Ill.), Dec. 9, 2005, at A7.

⁹⁵ See Erika Slife, *Police Unlikely to Stake Out Video-Game Law Violators*, CHI. TRIB., Apr. 5, 2005, at 1 (writing that “[p]olice throughout Illinois say enforcing a proposed law to criminalize the sale of violent video games to minors will be low on their priority lists”).

⁹⁶ *Id.*

⁹⁷ *Id.*

constitutionality and law enforcement unease about enforceability, the Illinois State Senate passed by a whopping 52-5 margin a revised version of House Bill 4023 in May 2005,⁹⁸ netting the governor and his legislation national publicity in the *New York Times*.⁹⁹ And when the Illinois House came back later that month and approved the Senate's version of the legislation, thus sending the measure to Blagojevich for signage, it garnered the governor a mention in the *Washington Post*.¹⁰⁰ It was clear that Blagojevich had struck upon an issue ripe for national media coverage.

When Blagojevich signed the law in July 2005, he employed the standard, in not hackneyed, help-parents, protect-children rhetoric and boasted:

This law makes Illinois the first state in the nation to ban the sale and rental to children of violent and sexually explicit video games. This law is all about empowering parents and giving them the tools they need to protect their kids. And giving them the ability to make decisions on the kinds of games their kids can play.¹⁰¹

And while the governor's signage once again made for national media coverage for Blagojevich,¹⁰² his gloating would not last for

⁹⁸ See Press Release, Illinois Governor Rod Blagojevich, Gov. Blagojevich Applauds Senate for Passing His Landmark Video Game Legislation (May 19, 2005), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3977> (last visited Jan. 1, 2006) (providing the terms of Senate-revised version of House Bill 4023 and setting forth quotations about it by Blagojevich).

⁹⁹ Gretchen Ruethling, *National Briefing Midwest: Illinois: Video Game Legislation Passes In Senate*, N.Y. TIMES, May 20, 2005, at A19.

¹⁰⁰ *Nation in Brief*, WASH. POST, May 29, 2005, at A15.

¹⁰¹ Press Release, Illinois Governor Rod Blagojevich, Gov. Blagojevich Signs Law Making Illinois the Only State in the Nation to Protect Children from Violent and Sexually Explicit Video Games (July 25, 2005), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=4170> (last visited Jan. 1, 2006).

¹⁰² See, e.g., Ann Oldenburg, *Ratings System Runs Adrift; Confusion Reigns on Guides to Media Content*, USA TODAY, July 28, 2005, at D1 (writing that "[o]n Monday, Gov. Rod Blagojevich signed the Safe Games Illinois Act, making Illinois the only state in the nation to ban the sale and rental of violent and

too long; in reality, he should have seen the bad news bearing down on him. In fact, the month before Blagojevich signed the measure into law, Eric Krol of the *Chicago Daily Herald* wrote that “[t]he governor got his coveted ban on violent video game sales to minors. But if the courts follow every precedent, the measure will be declared unconstitutional by Christmas.”¹⁰³ Krol’s words proved to be quite prophetic. Members of the video game industry filed a federal lawsuit against the Blagojevich-backed law immediately after he signed it in late July 2005,¹⁰⁴ and then, less than one month before Christmas, the decision from Judge Kennelly came down in the case of *Entertainment Software Association v. Blagojevich*,¹⁰⁵ declared Illinois’s Violent Video Games Law and its Sexually Explicit Video Games Law in violation of the First Amendment, and issued a permanent injunction against their enforcement.

The three plaintiffs in the successful lawsuit against Blagojevich were the Entertainment Software Association (ESA), the Video Software Dealers Association (VSDA) and the Illinois Retail Merchants Association (IRMA). The ESA, as the organization states on its Web site, “is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for

sexually explicit video games to children. Retailers in violation commit a petty offense and face a fine of \$1,000.”); Gretchen Ruethling, *National Briefing Midwest: Illinois: Limits on Video Game Sales*, N.Y. TIMES, July 26, 2005, at A14 (reporting that “Blagojevich signed legislation making Illinois the only state to ban the sale or rental of violent and sexually explicit video games to minors.”); *Metropolitan Area Digest*, ST. LOUIS POST-DISPATCH, July 26, 2005, at B2 (reporting that “Blagojevich signed a bill into law Monday meant to keep adult video games away from minors, although similar measures in other states have been rejected by the courts”).

¹⁰³ Eric Krol, *Governor at Odds With Even Democratic Lawmakers*, CHI. DAILY HERALD, June 3, 2005, at 18.

¹⁰⁴ See Misha Davenport & Dan Rozek, *Video Game Industry Blasts Law Banning Some Sales to Minors*, CHI. SUN-TIMES, July 26, 2005, at 16 (writing that “Gov. Blagojevich signed a new law Monday barring youngsters from obtaining violent and sexually explicit video games, but industry groups fired back immediately with a federal suit challenging the measure”).

¹⁰⁵ 404 F.Supp. 2d 1051, 2005 U.S. Dist. LEXIS 31100 (N.D. Ill. 2005).

video game consoles, personal computers, and the Internet.”¹⁰⁶ The VSDA, in turn, “is the not-for-profit international trade association for the \$24 billion home entertainment industry,”¹⁰⁷ representing “more than 1,000 companies throughout the United States, Canada, and other nations”¹⁰⁸ with members operating “more than 12,500 retail outlets in the U.S. that sell and/or rent DVDs, VHS cassettes, and console video games.”¹⁰⁹ Finally, IRMA “is one of the largest state retail organizations in the United States”¹¹⁰ representing “more than 23,000 stores of all sizes and merchandise lines.”¹¹¹

In their complaint, the trio of plaintiffs argued, among other things, that the new Illinois law (dubbed by the plaintiffs in their initial pleading as the Act):

- “significantly infringes upon constitutionally protected rights of free expression”¹¹² by restricting “the freedom of creators, distributors, and publishers of games, as well as purchasers, renters and other players of such games, to communicate and receive expression that is not constitutionally subject to regulation based upon its content”¹¹³;
- includes “numerous vague terms”¹¹⁴ that create “a chilling effect on a great deal of speech, as game creators and retailers

¹⁰⁶ About the Entertainment Software Association, Entertainment Software Association Web site, *available at* <http://www.theesa.com/about/index.php> (last visited Jan. 1, 2006).

¹⁰⁷ What is the Video Software Dealers Association (VSDA)?, Video Software Dealers Association Web site, *available at* <http://www.idealink.org/Resource.phx/public/aboutvsda.htx> (last visited Jan. 1, 2006).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ What is IRMA?, Illinois Retail Merchants Association Web site, *available at* <http://www.irma.org/about> (last visited Jan. 1, 2006).

¹¹¹ *Id.*

¹¹² Complaint of the Entertainment Software Association at 1, *Entertainment Software Ass’n v. Blagojevich*, 2005 U.S. Dist. LEXIS 31100 (N.D. Ill. 2005) (No. 05 C 4625).

¹¹³ *Id.* at 17.

¹¹⁴ Complaint of the Entertainment Software Association at 2, *Entertainment Software Ass’n v. Blagojevich*, 2005 U.S. Dist. LEXIS 31100 (N.D. Ill. 2005) (No. 05 C 4625).

will respond to the Act's uncertainty by self-censoring and depriving adults and children of access to undeniably protected expression"¹¹⁵;

- is unconstitutional "under binding Seventh Circuit precedent"¹¹⁶ set forth in *American Amusement Machine Association v. Kendrick*;

- is subject, as a content-based law, "to the most exacting scrutiny under the First Amendment,"¹¹⁷ and fails that test both because "[n]o compelling state interest exists that justifies the broad suppression of speech imposed by the Act"¹¹⁸ and because "[t]he Act is not the least restrictive means of achieving any of the Assembly's asserted goals"¹¹⁹;

- "imposes additional burdens on retailers that violate the First Amendment,"¹²⁰ with the mandatory labeling and sign-posting provisions amounting to unconstitutional compelled-speech requirements;¹²¹ and

- is "not supported by credible factual support"¹²² such that the "purported legislative 'findings' therefore are not based on reasonable inferences drawn from substantial evidence."¹²³

What were the purported legislative findings and interests asserted by the state of Illinois? In the official legislative findings codified in the now-enjoined law, the Illinois legislature asserted that it had multiple compelling interests sufficient to justify a law restricting minors' access to violent video games.¹²⁴ In particular, the legislative findings provide that the state of Illinois has five separate compelling interests in:

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 13.

¹¹⁸ *Id.*

¹¹⁹ Complaint of the Entertainment Software Association at 13, *Entertainment Software Ass'n v. Blagojevich*, 2005 U.S. Dist. LEXIS 31100 (N.D. Ill. 2005) (No. 05 C 4625).

¹²⁰ *Id.* at 3.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 720 ILCS 5/12 A-5 (2005)

- assisting parents in protecting their minor children from violent video games;
- preventing violent, aggressive, and asocial behavior;
- preventing psychological harm to minors who play violent video games;
- eliminating any societal factors that may inhibit the physiological and neurological development of its youth; and
- facilitating the maturation of Illinois' children into law abiding, productive adults.¹²⁵

With the interests and arguments in favor of and against Blagojevich's law before U.S. District Court Judge Kennelly, the opinion in *Entertainment Software Association v. Blagojevich* came down on December 2, 2005.¹²⁶ In it, Kennelly initially engaged in detailed scrutiny of the social science evidence and expert witness testimony offered by the state of Illinois in a futile attempt to prove that playing violent video games causes an increase in aggressive thoughts, aggressive affect, and aggressive behavior in minors and results in a decline in brain activity in the region of the brain that controls behavior.¹²⁷ As did the city of Indianapolis in *American Amusement Machine Association*, the state of Illinois relied largely on the research and testimony of Professor Craig A. Anderson.¹²⁸ Anderson, a distinguished professor of psychology at Iowa State University,¹²⁹ had no better luck with his social science research before Judge Kennelly than he did in front of Judge Posner and the Seventh Circuit.¹³⁰ In particular, Kennelly agreed with the expert witnesses for the video game industry – not Anderson – and he concluded that “neither Dr. Anderson's testimony nor his research establish[es] a

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

¹²⁶ 404 F.Supp. 2d 1051 (N.D. Ill. 2005).

¹²⁷ *Id.* at 1059-1067.

¹²⁸ *See id.* at **1059-1063 (examining Anderson's research and testimony offered on behalf of the state of Illinois).

¹²⁹ *See* Craig A. Anderson Web site, *available at* <http://www.psychology.iastate.edu/faculty/caa> (last visited Jan. 2, 2006) (listing Anderson's research and publications on video games, as well as his media commentary on the issue).

¹³⁰ *See supra* note 65 and accompanying text (stating how Anderson's work was rejected in *American Amusement Machine Association*).

solid causal link between violent video game exposure and aggressive thinking and behavior.”¹³¹

By this point, Anderson should be used to having his research rejected by courts. Not only did Judge Posner find his research findings insufficient to support the Indianapolis ordinance in *American Amusement Machine Association*, but less than one month before Judge Kennelly ruled against Illinois’s law, Anderson’s research was found insufficient to support Michigan’s video game law by U.S. District Court Judge George Caram Steeh in *Entertainment Software Association v. Granholm*.¹³² That opinion is described in the next section of this article, but for now it is important to note that Anderson is much like the grim reaper for the video game industry, always trotted out by governmental entities to support their restrictive measures.¹³³

But Illinois did not just hang its legislative hat on Anderson’s research about the alleged effects of video games on aggressive thoughts and behavior. It also claimed another injury caused by video games: “negative effects on adolescent brain activity.”¹³⁴ To support this supposedly deleterious effect of video games, Illinois relied primarily on the research of Dr. William Kronenberger, “a clinical psychologist at the Indiana University School of Medicine who focuses on working with and studying children and adolescents with behavior disorders.”¹³⁵ As with Anderson’s research, Kronenberger’s studies and testimony were also rejected, in part because Kronenberger “conceded that his studies

¹³¹ *Entertainment Software Ass’n*, 404 F.Supp. 2d at 1063.

¹³² 404 F.Supp. 2d 978, 982 (E.D. Mich. 2005) (writing that “Dr. Anderson’s work has been rejected as a basis for restricting expression by other courts considering similar laws” and observing that “many experts disagree with the claims asserted by Dr. Anderson and others”).

¹³³ This is similar to the role played by attorney Bruce Taylor when it comes to legislative measures targeting and restricting the adult entertainment industry. As adult-entertainment attorney Paul Cambria has observed, Taylor “shows up like the grim reaper at all of our trials.” Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry’s Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147, 168 (2004).

¹³⁴ *Entertainment Software Ass’n*, 404 F.Supp. 2d at 1063.

¹³⁵ *Id.* at 1063.

only demonstrate a correlative, not a causal, relationship between high media violence exposure and children who experience behavioral disorders, [and] decreased brain activity.”¹³⁶ In addition to the failure of Kronenberger to demonstrate a causal relationship, the judge wrote that “the legislature was simply incorrect in concluding that the frontal lobes of the brain are responsible for controlling behavior; no such one-to-one relationship exists.”¹³⁷ In rejecting Kronenberger’s research, Judge Kennelly concluded:

Dr. Kronenberger’s studies cannot support the weight he attempts to put on them via his conclusions. The defendants have offered no basis to permit a reasonable conclusion that, as the legislature found, minors who play violent video games are more likely to “experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior.”¹³⁸

The rejection of the social science evidence of both Professor Anderson and Dr. Kronenberger was crucial in this case. In particular, it will be recalled that Illinois claimed it had compelling interests in preventing violent, aggressive, and asocial behavior in minors; preventing psychological harm to minors who play violent video games; and eliminating any societal factors that may inhibit the physiological and neurological development of its youth.¹³⁹ In essence, the judicial rejection of the social science evidence gutted these allegedly compelling interests and exposed them as being conjectural injuries unsupported and unsubstantiated by research.

Of particular significance here is Judge Kennelly’s recognition of the crucial difference in the field of social science research between the concepts of correlation and causation. Correlation is merely a measure of association, expressing “the degree to which two variables change in relation to each other.”¹⁴⁰ Correlation,

¹³⁶ *Id.* at 1065.

¹³⁷ *Id.* at 1074.

¹³⁸ *Entertainment Software Ass’n*, 404 F.Supp. 2d. at 1067.

¹³⁹ *See supra* note 124 and accompanying text.

¹⁴⁰ ROGER D. WIMMER & JOSEPH R. DOMINICK, *MASS MEDIA RESEARCH: AN INTRODUCTION* 292 (7th ed. 2003).

however, “does not in itself imply causation”¹⁴¹ and, instead, “is just one factor in determining causality.”¹⁴² As the author of one mass communication research textbook observes, “it is important to recognize that correlation is not the same as causation. In other words, if two variables are correlated, it does not necessarily follow that one causes any change in the other.”¹⁴³ With this in mind, Kennelly concluded:

At most, researchers have been able to show a correlation between playing violent video games and a slightly increased level of aggressive thoughts and behavior. With these limited findings, it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games.¹⁴⁴

Turning to the constitutional analysis of the Illinois Violent Video Games Law (VVGL), Kennelly initially made clear that the VVGL is “a content-based regulation subject to the strictest scrutiny under the First Amendment”¹⁴⁵ and that Illinois “may impose a content-based restriction on speech only if it has a compelling interest and has chosen the least restrictive means to further this interest.”¹⁴⁶ He also held that Judge Posner’s 2001 opinion in *American Amusement Machine Association v. Kendrick* governed the Entertainment Software Association’s challenge to the VVGL.¹⁴⁷ As noted above, Kennelly’s rejection of the social science evidence offered by Illinois largely shredded the

¹⁴¹ *Id.* at 294.

¹⁴² *Id.* In order to prove actual causation, three conditions must be present:

The first is time order. Causation is present if and only if the cause precedes the effect. Second, causation can occur only if some tendency for change in A results in change in B. In other words, there is an association between the two variables. Third, before effects are attributed to causes, all other alternative causes must be ruled out.

Id. at 211.

¹⁴³ MICHAEL SINGLETARY, MASS COMMUNICATION RESEARCH: CONTEMPORARY METHODS AND APPLICATIONS 227 (1994).

¹⁴⁴ *Entm’t Software Ass’n*, 404 F.Supp. 2d at 1074.

¹⁴⁵ *Id.* at 1072.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

arguments in favor of the compelling interests asserted by the state. Not only did Kennelly find that there was not sufficient evidence to support a single compelling interest necessary to justify the VVGL's provisions affecting the sale and rental to minors of violent video games, he also held that:

- the law, by singling out violent images in video games for attention and failing to address the effect of such images in other media such as movies, was underinclusive, "given that violent images appear more accessible to unaccompanied minors in other media"¹⁴⁸;

- "the fact that the VVGL facially restricts only minors' access to violent video games is not sufficient to demonstrate that the statute is narrowly tailored to achieve a compelling interest"¹⁴⁹;

- the law's definition of the term "violent video games" was unconstitutionally vague, reasoning that "the vagueness of the VVGL's definition of violent video games makes it highly probable that game makers and sellers will self-censor or otherwise restrict access to games that have any hint of violence, thus impairing the First Amendment rights of both adults and minors."¹⁵⁰

Judge Kennelly also addressed the new law's labeling and signage requirements, agreeing with the plaintiffs in the case that "these requirements are compelled speech subject to strict scrutiny."¹⁵¹ He found both the labeling requirement and the signage requirement to be "unduly burdensome,"¹⁵² reasoning that "[t]he labeling provision requires retailers to play thousands of hours of video games in order to determine whether they must be labeled"¹⁵³ and that "[t]he signage provisions requires all video game retailers – even those who do not sell violent or sexually explicit games – to post large signs in multiple places about the ESRB rating system."¹⁵⁴ In an important victory for the

¹⁴⁸ *Entm't Software Ass'n*, 404 F.Supp. 2d at 1064.

¹⁴⁹ *Id.* at 66.

¹⁵⁰ *Entm't Software Ass'n*, 404 F.Supp. 2d at 1076.

¹⁵¹ *Id.* at 1082.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

voluntary rating system enforced by the Entertainment Software Rating Board (ESRB), Judge Kennelly wrote that the “defendants have offered no evidence that there is any actual confusion or deception of parents or children about the ESRB rating system or the content of the games necessitating these measures.”¹⁵⁵

Based upon this reasoning, Kennelly issued a permanent injunction¹⁵⁶ in favor of the video game industry that prohibited the state of Illinois from enforcing all aspects – the limitation on sales and rentals of violent video games to minors; the compelled-labeling requirements of those games; and the posted-signage requirements in stores about ratings – of Governor Blagojevich’s highly prized video game laws. At the district court level, then, it was “game over” for Blagojevich, but as noted above, he vowed to appeal Kennelly’s decision,¹⁵⁷ thus assuring that the tax dollars of Illinois’ citizens surely will be misspent by the state in what will almost certainly be a futile appellate process. The next section turns from the legislation in Illinois to that adopted in nearby Michigan in 2005 that would meet a similar unconstitutional fate in federal court.

B. Michigan

Following in the political footsteps of her gubernatorial neighbor, Michigan Governor Jennifer Granholm (D.) in September 2005 offered her state’s constituents a legislative – albeit similarly unconstitutional – solution to the alleged quagmire posed by violent video games.¹⁵⁸ The governor had labeled such a measure a priority just two months earlier in written correspondence to the Michigan legislature.¹⁵⁹ In that

¹⁵⁵ *Entm’t Software Ass’n*, 404 F.Supp. 2d at 1081.

¹⁵⁶ *Id.* at 1083.

¹⁵⁷ See *supra* note 16 and accompanying text (quoting Blagojevich).

¹⁵⁸ *Granholm Signs Final Bills Protecting Children from Violent and Sexually-Explicit Video Games*, STATES NEWS SERVICE, Sept. 14, 2005 (quoting Granholm describing the measure as a “common-sense law that provides parents with the tools they need to protect their children from the effects of violence and graphic adult content”).

¹⁵⁹ Letter from Jennifer Granholm, Governor, Michigan, to Members of the Legislature 1 (July 5, 2005) (on file with the authors).

letter, Granholm lamented that “no significant legislation to . . . protect children . . . has reached my desk.”¹⁶⁰ Consequently, she asked the state’s lawmakers to share her priorities and to “place legislation on [her] desk that protects Michigan’s children from violent and sexually explicit video games.”¹⁶¹

Earlier in the year, Governor Granholm had embarked on a campaign designed to shore up public support and to demonstrate an urgent need for video game restrictions. In March 2005, an Associated Press story noted that Granholm had “not been shy about mentioning her Catholic faith or quoting Bible verses to make her case,” including her “ongoing crusade against violent video games. . . and other ‘cultural garbage.’”¹⁶² For Granholm, then, it would prove to be a bizarre mixture of politics, religion and violence that would triangulate and coalesce into legislation.

During a press conference in the Capitol that same month, she called violent and sexually explicit video games “sickening.”¹⁶³ Standing alongside fellow Democrat, Sen. Hanson Clarke (Detroit) the pair played video clips from a game called “The Guy Game,” which rewards correct answers to trivia questions with footage of topless women.¹⁶⁴ The game carries an ESRB rating of “M,” for mature audiences,¹⁶⁵ but the senator contended that the current law does not prevent the rental or purchase of the game by minors.¹⁶⁶

In May, the governor set out to prove that minors, indeed,

¹⁶⁰ *Id.* (on file with the authors).

¹⁶¹ *Id. at 2.* (on file with the authors).

¹⁶² Kathy Barks Hoffman, *Granholm's Faith Often on Display on Cultural Issues*, ASSOCIATED PRESS STATE & LOCAL WIRE, Mar. 25, 2005 (noting that Republican strategists in Michigan were intending to attack Granholm “on the same moral issues that helped President Bush defeat Democratic presidential candidate John Kerry last year”).

¹⁶³ Amy F. Bailey, *Governor, Senator Push Restrictions on Violent, Explicit Games*, ASSOCIATED PRESS STATE & LOCAL WIRE, Mar. 25, 2005.

¹⁶⁴ *Id.*

¹⁶⁵ Entertainment Software Rating Board *Game Rating and Descriptor Guide*, available at http://www.esrb.org/esrbratings_guide.asp (noting that “[t]itles 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”) (last visited Dec. 28, 2005).

¹⁶⁶ Bailey, *supra* note 161.

were getting their hands on such games and that laws were needed in Michigan to stem the flow of harmful games. At the request of her administration, a series of undercover investigations took place in a half-dozen counties: Cass, Genesee, Ingham, Lenawee, Monroe and Wayne.¹⁶⁷ Investigators learned “that 26 of 58 stores in the six participating counties sold to minors.”¹⁶⁸ Granholm seized the opportunity to bolster her position, observing that “[t]hese investigations show that children have access to inappropriate material, and relying on a voluntary system to restrict sales to minors is not enough if we want to protect our children.”¹⁶⁹

Underscoring the political nature of championing video game legislation, Granholm repeatedly framed the issue along party lines, observing in her weekly newsletter that “Senate Democrats and I called for a ban on the sale or rental of ultra violent or sexually explicit video games to children.”¹⁷⁰ Yet, Michigan Republicans were quick to introduce similar legislation¹⁷¹ in the weeks following the Democratic version, all the while denying that politics were at play.¹⁷²

A spokesperson for Republican House Speaker Craig DeRoche (R. – Novi) said, “I think this is an issue that doesn’t necessarily play on the political side of things. This is something that parents are concerned about. We want to make sure these violent games are not in the hands of young children.”¹⁷³

While Democrats were angling for quick passage, the Republicans were attempting to be more cautious in creating legislation, ever mindful that “federal courts have struck down similar laws and ordinances in other states and

¹⁶⁷ *Supra* note 158.

¹⁶⁸ *Id.*

¹⁶⁹ David Eggert, *Granholm: Investigation Shows Children Bought Adult Video Games*, ASSOCIATED PRESS STATE & LOCAL WIRE, May 4, 2005.

¹⁷⁰ *Weekly Report by Gov. Granholm*, U.S. FED NEWS, Mar. 28, 2005.

¹⁷¹ H.B. 4702 and H.B. 4703, 93rd Leg. Reg. Sess. (Mich. 2005).

¹⁷² *GOP Also Making Push to Restrictions on Violent, Explicit Games*, ASSOCIATED PRESS STATE & LOCAL WIRE, Apr. 12, 2005 (noting that the Republican-controlled Senate would soon “hold hearings to study the effect of adult-rated video games on children”).

¹⁷³ *Id.*

municipalities.”¹⁷⁴ Sen. Alan Cropsey (R. DeWitt), whose committee was considering the video game legislation, noted that “[t]his is an area where we want to lay the groundwork very carefully. It will be challenged (in court).”¹⁷⁵

On May 12, 2005, the Michigan Senate overwhelmingly passed legislation that would “prohibit the dissemination, exhibition, or display of certain sexually explicit matter, ultra-violent explicit matter, and ultra-violent explicit video games to minors.”¹⁷⁶ Taking full advantage of the media coverage that accompanies such measures, Sen. Cropsey, one of the bill’s sponsors, remarked upon passage that “[v]iolent media and violent video games have a harmful effect on minors.”¹⁷⁷ To establish his point, Cropsey cited anecdotal evidence that Washington, D.C. teenage sniper, Lee Boyd Malvo, and Columbine shooters, Eric Harris and Dylan Klebold, all played violent video games.¹⁷⁸

The media foreplay did not end with the Senate’s vote. In fact, the political rhetoric heated up again in mid-summer after Granholm sent a letter to 60 retailers in the state asking them to remove “Grand Theft Auto: San Andreas” from their shelves once it was learned that sexual content could be viewed with the aid of an Internet download.¹⁷⁹ Once again, Democratic lawmakers criticized their Republican counterparts for holding up the passage of video game legislation in the House. They used the “Grand Theft Auto” modification as evidence that “the industry cannot effectively police itself” and argued that it fell upon the state to ensure youngsters did not view the verboten content.¹⁸⁰ Moreover, to rally public support, the Democratic senators announced the creation of a Web site for the public to sign a

¹⁷⁴ Eggert, *supra* note 169.

¹⁷⁵ *Id.*

¹⁷⁶ S.B. 416, 93rd Leg. Reg. Sess. (Mich. 2005).

¹⁷⁷ David Eggert, *State Senate Passes Ban on Violent Video Games to Minors*, ASSOCIATED PRESS STATE & LOCAL WIRE, May 12, 2005.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

petition in support of the video game measures.¹⁸¹

The House Republican leadership countered with its cautionary message that such legislation needed to be carefully crafted to avoid dismantling by the courts. The spokesperson for Speaker DeRoche observed, “We agree we need to get these games out of the hands of young kids. But we want to make sure anything we do is in line with the U.S. Constitution.”¹⁸²

By the end of the summer, lawmakers apparently were satisfied that they had ironed out any potentially unconstitutional wrinkles in the bills. On August 31, 2005, the House passed the legislation,¹⁸³ along with companion measures that, among other things, would add video games, as an outlet for sexually explicit material, to the state’s obscenity law.¹⁸⁴

Governor Granholm signed the measures into law during the second week of September. She did so with made-for-television-coverage visual props – a table littered with “M”-rated video games in front of her – and emotionally charged rhetoric in which she proclaimed: “As a mother I certainly am always looking out for my children. As governor, I’m looking out for all the children of Michigan.”¹⁸⁵

Shortly after the legislation was signed into law, the Entertainment Software Association announced it would launch a court challenge to the measure. ESA President Douglass Lowenstein labeled the law “unconstitutionally vague” and said it “limits residents’ First Amendment rights.”¹⁸⁶

The section of the law that targeted “ultra-violent explicit

¹⁸¹ *Id.*

¹⁸² David Eggert, *Democrats Call for Removal of Video Game from Shelves*, ASSOCIATED PRESS STATE & LOCAL WIRE, July 27, 2005.

¹⁸³ House Substitute for S.B. 416, 93rd Leg. Reg. Sess. (Mich. 2005).

¹⁸⁴ S.B. 463, 93rd Leg. Reg. Sess. (Mich. 2005).

¹⁸⁵ Olivia Munoz, *Granholm Signs Laws Restricting Minors’ Access to Explicit Video Games*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 12, 2005 (predicting confidently that the Michigan law would stand up to a court challenge, Gov. Granholm said, “We are adopting the entertainment software’s standards”).

¹⁸⁶ *Video Game Industry Will Sue to Block Michigan Law*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 14, 2005 (noting that, in July 2005, the industry filed suit in Illinois and that similar laws in Washington state, Indianapolis and St. Louis County have been struck down on First Amendment grounds).

matter” was particularly troublesome for the video game industry. Specifically, it barred retailers from “knowingly [disseminating] to a minor an ultra-violent explicit video game that is harmful to minors.”¹⁸⁷ In that sentence fragment alone, Lowenstein’s argument for vagueness found several points of support. Unpacking the definitions that the legislature ascribed to terms in this section provided even greater force to the notion that people of “common intelligence must necessarily guess at its meaning and differ as to its application.”¹⁸⁸

The legislature defined “ultra violent explicit video game” to mean “a video game that continually and repetitively depicts extreme and loathsome violence.”¹⁸⁹ Further, it found “extreme and loathsome violence” to be “real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings, including actions causing death, inflicting cruelty, dismemberment, decapitation, maiming, disfigurement, or other mutilation of body parts, murder, criminal sexual conduct, or torture.”¹⁹⁰

Under the law, retailers would be forced to guess at which games would fall under such a definition, which was further complicated by the provision in the Act that required the game to be “harmful to minors.” Deconstructing that provision, as defined by the legislature, opened up a plethora of ambiguity. Specifically, the law defined “harmful to minors” as content that:

- (i) Considered as a whole, appeals to the morbid interest in asocial, aggressive behavior of minors as determined by contemporary local community standards.
- (ii) Is patently offensive to contemporary local community standards of adults as to what is suitable for minors.

¹⁸⁷ MICH. COMP. LAWS § 722.687 (2005).

¹⁸⁸ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (containing the oft-quoted language that describes when a law will be void for vagueness for failing to provide adequate notice of the proscribed conduct).

¹⁸⁹ MICH. COMP. LAWS § 722.686 (2005).

¹⁹⁰ *Id.*

(iii) Considered as a whole, lacks serious literary, artistic, political, educational, or scientific value for minors.¹⁹¹

In short, the state's retailers would be expected to know, for instance, whether fictitious characters in a particular video game had participated in "inflicting cruelty" on other fictitious characters and whether that fictional behavior appealed to the morbid interest in asocial, aggressive behavior in minors – arguably a tall order for the average video store manager.

The lawsuit filed on behalf of the ESA, the Video Software Dealers Association and the Michigan Retailers Association requested that the court issue a preliminary injunction to stop the enforcement of the video game law that was slated to go into effect on December 1, 2005.¹⁹² The challenge was directed only at the section of the Act that related to ultra-violent video games. The industry did not contest the constitutionality of the section that related to sexually explicit games.¹⁹³

The complaint and motion raised four distinct bases upon which the Act should be enjoined:

(i) the Act violates freedom of speech under the First Amendment, because video games are fully protected speech; (ii) the Act violates the Fourteenth Amendment's Equal Protection Clause, because the Act restricts video games, but not other forms of media violence; (iii) the Act is unconstitutionally vague in that it fails to provide a standard to distinguish video games which are covered under the Act; and (iv) the Legislature's reliance of the industry's rating system is an unconstitutional delegation of powers by the Michigan legislature.¹⁹⁴

Because of settled law that video games constitute expression

¹⁹¹ MICH. COMP. LAWS § 722.686 (2005).

¹⁹² Entertainment Software Ass'n v. Granholm, 404 F.Supp.2d 978 (E.D. Mich. 2005).

¹⁹³ *Id.* at *2.

¹⁹⁴ *Id.* at 981.

deserving of First Amendment protection,¹⁹⁵ and because the Michigan law regulated “video games based on their content, specifically those games that depict ‘extreme and loathsome violence,’” U.S. District Judge George Caram Steeh found the applicable constitutional standard to be strict scrutiny.¹⁹⁶

To establish a compelling interest, the Michigan legislature had considered studies by Dr. William Kronenberger, the same psychiatry professor at the Indiana University School of Medicine whose research would later be rejected by a federal district court in Illinois, that purported to show “exposure to media violence is related to poorer executive functioning in adolescents.”¹⁹⁷ Kronenberger’s studies, however, tied together exposure to both violent video games and violent television programs. Without a parsing out of the negative effects attributed solely to exposure to violent video games, the state could not prove any causal connection to harmful consequences from playing games. Moreover, the court was not impressed by the Kronenberger team’s finding that “allegedly suggests that media violence exposure may be associated with alterations in brain functioning.”¹⁹⁸

The other social science evidence the state relied upon was resoundingly dismissed by the court. This evidence purports to show a relationship between playing violent video games and experiencing aggressive feelings and behavior. The court observed that this line of research relies “largely on the work of Dr. Craig Anderson.”¹⁹⁹ More importantly, the court noted that “Dr. Anderson’s work has been rejected as a basis for restricting expression by other courts considering similar laws.”²⁰⁰ Specifically, the court observed that Anderson’s findings do not establish any causal link between playing violent video games

¹⁹⁵ *Supra* note 63 and accompanying text.

¹⁹⁶ *Entertainment Software Ass’n*, 404 F.Supp. 2d at 982 (noting that “[a] content-based restriction on speech is presumptively invalid, so defendants have the burden of demonstrating that the Act is necessary to serve a compelling state interest and it is narrowly tailored to achieve that end”) (citation omitted).

¹⁹⁷ *Entm’t Software Ass’n*, 404 F.Supp. 2d at 982.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

and committing violent acts, nor do they show that video game violence uniquely threatens public safety in a way that is different from other forms of entertainment.²⁰¹ Consequently, the state failed to meet its burden to demonstrate a compelling interest sufficient to justify the law.

Judge Steeh likewise found that the Michigan law was not narrowly tailored.²⁰² While the state maintained the Act did not ban adult speech and thus was narrowly tailored, the court pointed out that it “will likely have a chilling effect on adults’ expression, as well as expression that is fully protected as to minors.”²⁰³

Moreover, the judge was persuaded that the creators of violent content in video games and retailers would self-censor because of the threat of criminal penalties contained in the Act.²⁰⁴ The Act provides for “civil fines ranging from \$5,000 to \$40,000” and “criminal penalties of up to 93 days in prison, a fine of \$25,000, or both,”²⁰⁵ against retailers.

The Act also suffered from definitional problems. Judge Steeh found a “serious problem in determining which games are prohibited to be sold or displayed to minors under the Act.”²⁰⁶ In fact, the only way for a seller to safely avoid prosecution would be to refuse to sell *any* games to minors. An off-handed remark by the state’s attorney perhaps sealed the vagueness argument for the court.²⁰⁷

The judge noted that, “[a]t oral argument, when asked by the court how a retailer could avoid criminal penalties under the Act, the attorney for the state suggested that a video retailer could call plaintiff’s attorney to determine if a particular video game has ultra-violent content.”²⁰⁸ He further found this remark by the state’s attorney to be “all but a direct concession that a retailer

²⁰¹ *Id.*

²⁰² *Entm’t Software Ass’n*, 404 F.Supp. 2d at 982-83.

²⁰³ *Id.*

²⁰⁴ *Id.* at 983.

²⁰⁵ *Entm’t Software Ass’n*, 404 F.Supp. 2d. at 980.

²⁰⁶ *Id.* at 983.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

cannot reasonably, economically, or easily make a determination whether the content of a particular video game is prohibited under the Act as to minors.”²⁰⁹

Concluding that the video game industry would likely succeed on the merits – given that the Act is not likely to survive strict scrutiny – and that the loss of First Amendment freedoms constitutes irreparable harm, the court issued the preliminary injunction.²¹⁰

ESA President Douglas Lowenstein reacted to the court’s decision in a written statement:

We are gratified that Judge Steeh has issued this preliminary injunction and in so doing has suggested that the arguments and research relied on by Governor Granholm and the Legislature are weak and unpersuasive. Rather than continuing to play politics and pursuing this case to its inevitable defeat, further wasting Michigan taxpayers’ dollars along the way, we hope the state will start to join us in a common effort to take steps that actually help parents raise their kids in a healthy and safe way.²¹¹

Given the proclivity on the part of lawmakers and governors to make political hay out of violent video game legislation, it would appear that Lowenstein’s call for cooperation in Michigan and elsewhere will fall on deaf ears.

C. *California*

Perhaps the biggest irony in the video game legislation spree of 2005 came in Sacramento, Calif., in October. That’s when Gov. Arnold Schwarzenegger (R.) – a politician who once made quite a handsome living as an actor from the box office receipts and video

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Press Release, Statement from Douglas Lowenstein, President of the Entertainment Software Association, Michigan Judge Stops Game Law from Taking Effect, *available at* http://www.theesa.com/archives/2005/11/michigan_judge.php (last visited Dec. 29, 2005).

rentals of violent movies and who “is featured in video games based on his ‘Terminator’ movies”²¹² – signed into law Assembly Bill 1179 restricting the access of minors to violent video games.²¹³ Apparently hoping to shore up sagging poll numbers before what would prove to be an ill-fated November 2005 ballot initiative in the governor’s year-of-reform campaign,²¹⁴ and not one to miss a made-for-media moment, he signed the bill “surrounded by Sacramento Girl Scouts.”²¹⁵ Schwarzenegger blithely dismissed free speech concerns about the bill at the time with the quip, “I myself didn’t have a worry about that. My staff did. There’s a difference.”²¹⁶

Less than three months later, however, a federal court would express grave First Amendment concerns about the new law – so grave, in fact, that U.S. District Court Judge Ronald M. Whyte would issue a preliminary injunction against it before it even could go into effect on January 1, 2006, in the case of *Video Software Dealers Association v. Schwarzenegger*.²¹⁷ The new and now enjoined law in California provides that “[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor.”²¹⁸ It defines a violent video game to be:

a video game in which the range of options available to a

²¹² Lynda Gledhill, *Industry to Fight New Restrictions on Ultraviolent Titles*, S.F. CHRON., Oct. 8, 2005, at A1.

²¹³ Assembly Bill 1179 was codified in part as California Civil Code § 1746.1, providing in pertinent part that “[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor.” CAL. CIV. CODE § 1746.1 (Deering 2005).

²¹⁴ See Carla Marinucci & John Wildermuth, *Governor’s Bill-Signing Seen as Savvy Move*, S.F. CHRON., Oct. 9, 2005, at A4 (writing that Schwarzenegger’s signage of the video game bill “comes as a new poll this week . . . shows the governor’s approval ratings in free fall. The governor’s approval rating among California voters is at 36 percent, while his disapproval rating now stands at 53 percent. And among those who disapprove of Schwarzenegger, more than 83 percent say they would vote against him in the next election, the poll showed”).

²¹⁵ Gary Delsohn, *Governor: New Laws to Help Kids; He Signs Supplement, Video Bills But Vetoes Health Care Expansion*, SACRAMENTO BEE, Oct. 8, 2005, at A1.

²¹⁶ *Id.*

²¹⁷ 401 F.Supp. 2d 1034 (N.D. Cal. 2005).

²¹⁸ CAL. CIV. CODE § 1746.1 (Deering 2005).

player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.²¹⁹

²¹⁹ CAL. CIV. CODE § 1746 (Deering 2005). The law also included definitions for some of the terms used in this language, providing that the following definitions apply:

(A) “Cruel” means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) “Depraved” means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

(C) “Heinous” means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) “Serious physical abuse” means a significant or considerable amount of injury or damage to the victim’s body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the

In addition to limiting the access of minors to violent video games, the California law, like the one held unconstitutional in Illinois in *Entertainment Software Association v. Blagojevich* and described earlier in this article,²²⁰ imposes a video game package labeling mandate that requires that:

Each violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white '18' outlined in black. The '18' shall have dimensions of no less than 2 inches by 2 inches. The '18' shall be displayed on the front face of the video game package.²²¹

It is worth noting that California already had in place a signposting requirement that Schwarzenegger had signed into law the previous year.²²² This provision was not challenged in the lawsuit filed by the Video Software Dealers Association and fellow plaintiff, the Entertainment Software Association.

The California law was sponsored by Assembly Speaker pro Tem Leland Yee (D. – San Francisco) who, like the politicians in Illinois and Michigan, focused his rhetoric on the supposed harms that violent video games cause to minors. As Yee told a reporter from the *San Francisco Chronicle* when proposing an early version of the bill that was originally numbered Assembly Bill 450, “[t]hese ultraviolent video games teach our children how to kill, how to maim and how to desecrate human beings. It teaches young boys how to abuse women, and it teaches young boys how to kill and maim police officers.”²²³ Yee wisely assembled a broad coalition of supporters for the bill, including the Girl Scouts of

player must specifically intend the abuse apart from the killing.

(E) “Torture” includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

Id.

²²⁰ See *supra* notes – and accompanying text (describing the labeling requirement in Illinois).

²²¹ CAL. CIV. CODE § 1746.2 (Deering 2005).

²²² CAL. BUS. & PROF. CODE § 20650 (Deering 2005).

²²³ Matthew Yi, *Sale of Violent Videos to Minors Under Fire*, S.F. CHRON., Feb. 16, 2005, at C3.

America, the California Parent Teachers Association and the American Academy of Pediatrics.²²⁴ By getting the Girl Scouts on board, Yee was able to cloak his bill in an all-American organization while demonstrating that even some children – not just older adults who don't play or understand violent video games – are against them. Yee even managed to get several Girl Scouts to attend committee hearings to advocate for the measure.²²⁵ At an April 2005 California Assembly Judiciary Committee, for instance, about forty uniform-wearing Girl Scouts from around the state testified in favor of the bill, including one 13-year-old girl who lamented that “[v]iolent video games create a harmful atmosphere for young children. They are not age-appropriate and they can scar the minds of these young children forever.”²²⁶ The Girl Scouts, of course, embody everything that is red, white and blue, and they've long held the perfect recipe for Thin Mint and Caramel deLites. In 2005, however, they were part of a very different recipe – a recipe for censorship in the California state capitol.

And despite the fact that the video game industry already had a voluntary rating system in place, Yee stuck to the tried-and-true, protect-the-children soundbite formula, proclaiming that “clearly the video game industry is not concerned with the welfare of our children, and thus it is imperative that we step in to prevent the sale of these harmful games to our children.”²²⁷

That statement begs the question of how these games are “harmful.” The California legislature asserted in its official findings in Assembly Bill 1179 that:

- (a) Exposing minors to depictions of violence in video games, including sexual and heinous violence,

²²⁴ Alexa H. Bluth, *No Mercy for Cruel Games; Lawmaker Wants Strict Control on Ultraviolent Video Contests - No Sale, Rental Till Age 17*, SACRAMENTO BEE, Apr. 9, 2005, at A3.

²²⁵ See Dan Morain & Nancy Vogel, *Wrap Party Won't Be to His Liking*, L.A. TIMES, Sept. 9, 2005, at B1 (writing that “[t]he measure got a boost when several Girl Scouts came to the Capitol to advocate for its passage”).

²²⁶ Harrison Sheppard, *Violent Video Games Targeted in New Bill*, DAILY NEWS L.A., Apr. 20, 2005, at B1.

²²⁷ *Assembly Committee Votes to Ban Sales of Violent Videos to Youth*, ASSOCIATED PRESS STATE & LOCAL WIRE, Apr. 19, 2005, at Business News.

makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.

(b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

(c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.²²⁸

In an interesting show of a unified front against video game violence cutting across political party lines, Illinois Gov. Rod Blagojevich sent a letter in support of Yee's assembly bill to Gov. Arnold Schwarzenegger, stating in part:

As a parent, I'm sure you recognize the struggle so many other busy parents face in trying to protect their children from harmful influences, and in monitoring every video game their child brings home. By putting limits in place at retail and rental counters, you will give parents a valuable tool in their effort to make sure the games their kids play meet up to the standards and values of their own households.²²⁹

Following the unconstitutional lead of Democrat Blagojevich, Republican Schwarzenegger signed Yee's bill into law on October 7, 2005, and immediately drew the wrath of the video game industry. Doug Lowenstein, president of the Entertainment Software Association (ESA), expressed his organization's disappointment "that politicians of both parties chose to toss overboard the 1st Amendment and free artistic and creative

²²⁸ A.B. 1179, 2005 Reg. Sess. (Cal. 2005).

²²⁹ Press Release, California State Assembly Speaker pro Tempore Leland Yee, *Illinois Governor Calls on Schwarzenegger to Sign Yee's Violent Video Game Bill* (Sept. 15, 2005), available at <http://democrats.assembly.ca.gov/members/a12/press/p122005086.htm> (last visited Jan. 3, 2006).

expression in favor of political expediency.”²³⁰ And less than two weeks later, the Video Software Dealers Association (VSDA) joined forces with the ESA and filed a complaint for declaratory and injunctive relief in federal court in the northern district of California against Schwarzenegger.²³¹ The VSDA and ESA contended that the California law:

violates the First Amendment and other provisions of the United States Constitution by creating penalties for the sale and rental of video games based solely on a game’s purported “violent” content. The First Amendment prohibits such content-based censorship. Not only does the Act directly restrict the dissemination and receipt of a considerable amount of fully protected expression, but, because of its numerous vague terms, the Act also creates a chilling effect on a great deal of speech, as video game creators, publishers, manufacturers, distributors, importers, and retailers will respond to the Act’s uncertainty by self-censoring, depriving adults and children of access to undeniably protected expression.²³²

The plaintiffs also challenged the labeling requirement imposed under the California law, contending that it “conflicts with the voluntary labeling system already employed by the video game industry”²³³ and “unconstitutionally compels speech by forcing Plaintiffs’ members to relay a government message with which they may disagree, and for which there is no legitimate, much less substantial, underlying purpose.”²³⁴ And as it did in the other states, the video game industry plaintiffs contested the social science evidence that supported the legislative findings of supposed violent, anti-social and aggressive behavior attributable

²³⁰ Julie Tamaki, *Game Industry Vows Fight Over Age Limit*, L.A. TIMES, Oct. 8, 2005, at C1.

²³¹ Complaint for Declaratory and Injunctive Relief, *Video Software Dealers Ass’n v. Schwarzenegger* (N.D. Cal. Oct. 17, 2005) (No. CV05-04188).

²³² *Id.* at 2-3.

²³³ *Id.* at 3.

²³⁴ *Id.*

to playing the games, as well as brain damage.²³⁵

On December 21, Judge Ronald Whyte handed the video game industry an early Christmas present when he ruled that the VSDA and ESA “have shown at least that serious questions are raised concerning the States’ ability to restrict minors’ First Amendment rights in connection with exposure to violent video games, including the question of whether there is a causal connection between access to such games and psychological or other harm to children,”²³⁶ and he issued a preliminary injunction against its enforcement.²³⁷

In reaching this conclusion, Whyte found that:

- video games, “even though mere entertainment, are nonetheless protected by the First Amendment;”²³⁸
- “limitations on a minor’s access to violent expression are subject to strict scrutiny;”²³⁹
- “It is uncertain that even if a causal link exists between violent video games and violent behavior, the First Amendment allows a state interest to restrict access to violent video games, even for those under eighteen years of age”²⁴⁰; and
- the plaintiffs raised serious questions about whether the law’s “labeling provision violates the First Amendment.”²⁴¹

Importantly, Judge Whyte cited and used against the California law the opinions rendered just weeks earlier in both *Entertainment Software Association v. Blagojevich* and

²³⁵ *Id.* at 10 (writing that “those claims, which ignore conflicting evidence, are not supported by credible evidence”).

²³⁶ *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F.Supp. 2d 1034, 1048 (N.D. Cal. 2005).

²³⁷ *Id.* at 1048.

²³⁸ *Id.* at 1044.

²³⁹ *Id.* at 1045.

²⁴⁰ *Id.* at 1046.

²⁴¹ *Id.* at 1047.

Entertainment Software Association v. Granholm.²⁴² For instance, Whyte cited the *Blagojevich* opinion's questioning of the research of Professor Craig Anderson – California had submitted to the court a bibliography listing “two pages of articles by Craig Anderson dealing with the relationship between violence and video games”²⁴³ – and noted how the court in *Blagojevich* had “found Anderson’s studies unpersuasive”²⁴⁴ and “insufficient”²⁴⁵ to show a compelling interest under the strict scrutiny standard of judicial review. Whyte found that California “may face similar problems”²⁴⁶ in proving a causal link between violent video games and the harms Anderson attributes to them. Whyte also held that because the statutes and ordinances at issue in *Blagojevich* and *Granholm* “are not materially distinguishable from the Act, the court finds that the plaintiffs are likely to succeed on the merits or at least that serious questions are raised”²⁴⁷ regarding First Amendment concerns surrounding the California law.

In what was a Pyrrhic victory for the state of California, Judge Whyte rejected the arguments of the plaintiffs that the law was “unconstitutional because it is impermissibly vague”²⁴⁸ and that the law’s definition of terms defining what is violent “are ill-suited to a medium divorced from everyday reality.”²⁴⁹ This decision thus provides some hope for states in the future that it may be possible to craft a constitutionally permissible definition of violent video games sufficient to fend off a facial challenge for vagueness, but this still does nothing to resolve or eliminate the problems these laws face under the separate and independent strict scrutiny standard of review for content-based laws. It is likely, in the opinion of the authors of this article, that other

²⁴² See *id.* at 1039-40, 1043-44, 1046-47 (citing the *Blagojevich* and/or *Granholm* opinions).

²⁴³ *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F.Supp. 2d 1034, 1046 (N.D. Cal. 2005).

²⁴⁴ *Id.* at 1044.

²⁴⁵ *Id.* at 1046.

²⁴⁶ *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F.Supp. 2d 1034, 1046 (N.D. Cal. 2005).

²⁴⁷ *Id.* at 1043.

²⁴⁸ *Id.* at 1040.

²⁴⁹ *Id.*

states will look to California's definition of violent video games in order to ward off vagueness challenges.

D. Summary

The big picture that emerges across the trio of 2005 cases described above is that of uniformly unconstitutional legislation that targets First Amendment-protected content of video games, fails to be supported by social science evidence and fails to survive the strict scrutiny standard of judicial review. In addition, in both Illinois and Michigan, although not in California, the legislation was found to have suffered from problems of vagueness in defining precisely what constitutes a violent video game.

The legislation in Illinois, Michigan and California approaches and addresses the supposed problems caused by violent video games in any combination of three possible ways by:

- restricting the ability of minors to purchase or rent violent video games;
 - imposing labeling requirements on video game packages;
- and
- requiring retailers to post signs about video game ratings.

As for the supposed injuries and harms allegedly caused by the games that allegedly justify the statutes against them, legislative bodies in 2005 asserted several different forms of injury to players, including:

- violent, asocial or aggressive behavior;
 - brain damage in the form of reduced frontal lobe activity;
- and
- psychological harm.

The rhetoric behind all of the legislation is decidedly child-centric, focusing on the need to protect innocent children from alleged harms while simultaneously providing parents with the tools and ability to do so. That rhetoric, as the next part of this article makes clear, is found at the federal level as well as the state level.

II. Making a Federal Case Out of Violent Video Games

On December 16, 2005, amid the traditional flourishes that ordinarily accompany the holiday shopping season, a trio of Democratic U.S. senators announced that they had introduced legislation designed to curb sales of violent video games to minors. The bill would accomplish this objective by imposing fines on retailers who sell or rent games with a rating of “Mature,” “Adults Only,” or “Ratings Pending” to anyone under age 17.²⁵⁰ Introduced by Sen. Hillary Rodham Clinton (D. – N.Y.) and co-sponsored by Sen. Joseph Lieberman (D. – Conn.) and Evan Bayh (D. – Ind.), the Family Entertainment Protection Act²⁵¹ was launched in concert with the holiday season, which Clinton observed was “a particularly important time to raise awareness of this issue.”²⁵²

That is perhaps why the three senators were joined at a press conference “by parents, advocates and experts” supporting the legislation that the lawmakers claim “will put teeth in the enforcement of video game ratings, helping parents protect their children from inappropriate content.”²⁵³ Two weeks earlier, Clinton and Lieberman had telegraphed the introduction of the measure through a press release and news conference explaining that Clinton became “motivated to take action on this issue when it was revealed in July that Rockstar Games had embedded illicit sexual content in the video game *Grand Theft Auto: San Andreas* (hereinafter *GTA*).”²⁵⁴

²⁵⁰ Seth Schiesel, *Video-Game Bill Introduced*, N.Y. TIMES, Dec. 17, 2005, at B10.

²⁵¹ Family Entertainment Protection Act, S. 2126, 109th Cong. (2005).

²⁵² Press Release, Senator Hillary Rodham Clinton, Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children from Inappropriate Video Games (Dec. 16, 2005), *on file with* <http://clinton.senate.gov/news/statements/details.cfm?id=249860&&> (last visited Jan. 3, 2006).

²⁵³ Press Release, Senator Hillary Rodham Clinton, Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children from Inappropriate Video Games (Dec. 16, 2005), *on file with* <http://clinton.senate.gov/news/statements/details.cfm?id=249860&&> (last visited Jan. 3, 2006).

²⁵⁴ *Id.*

At that time in the summer, Clinton also called on the Federal Trade Commission to investigate “the source of graphic pornographic and violent content appearing” in GTA.²⁵⁵ In a letter to Deborah Platt Majoris, chair of the FTC, Clinton lamented, “[w]e should all be deeply disturbed that a game which now permits the simulation of lewd sexual acts in an interactive format with highly realistic graphics has fallen into the hands of young people across the country.”²⁵⁶ She also asked the FTC to “conduct a careful examination of the adequacy of retailers’ rating enforcement policies” because parents have a difficult time passing “their own values onto their children in a world where this type of material is readily accessible.”²⁵⁷

In late July, resolutions were introduced in both the House²⁵⁸ and Senate²⁵⁹ asking the FTC to investigate Grand Theft Auto: San Andreas.

Although the heat on this issue was turned up during the summer of 2005, Sen. Clinton had it on her mind even earlier. In March, she was part of a contingent of four senators²⁶⁰ who introduced legislation authorizing \$90 million in federal funds to establish “a coherent research program to examine the role of all forms of electronic media on children’s cognitive, social, physical and psychological development.”²⁶¹ The measure, known as the CAMRA – Children and Media Research Advancement Act (CAMRA Act),²⁶² was introduced on March 9, 2005. Clinton spoke that same day at a forum sponsored by the Kaiser Family Foundation where she “cited studies indicating that children who are exposed to graphic images of violence display more aggressive

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ H. Res. 376, 109th Cong. (2005).

²⁵⁹ S. Res. 212, 109th Cong. (2005).

²⁶⁰ The others were Sen. Joseph Lieberman (D. Conn.), Sen. Sam Brownback (R. Kan.) and Sen. Rick Santorum (R. Pa.).

²⁶¹ Press Release, Lieberman, Brownback, Clinton, Santorum Call for Research into Effects of Media on Children (Mar. 9, 2005), *on file with* <http://clinton.senate.gov/news/statements/details.cfm?id=233795> (last visited July 16, 2005).

²⁶² CAMRA Act, S. 579, 109th Cong. (2005).

behavior.”²⁶³ She also used the occasion to call for greater scrutiny of the entertainment forms used by children.

Framing the issue in terms of a “silent epidemic,” Clinton told the gathering that “[i]f you think of this from a public health perspective, what we are doing today, exposing our children to so much of this unchecked media, is a kind of contagion.”²⁶⁴ While placing some of the responsibility on parents, she added that “we also need to be sure that parents have the tools that they need to keep up with this multidimensional problem.”²⁶⁵

Calling the timing of the senator’s remarks “noteworthy,”²⁶⁶ a *New York Times* story about the event described how Clinton “continued to strike themes that may have resonance at a time when polls indicate that voters are concerned about the nation’s moral climate.”²⁶⁷

Arguably, the splash of media attention that accompanies staged events and inflammatory rhetoric is more meaningful than the actual measures. Despite the critical need for further research into potential harms to children that apparently existed in March 2005, no further action was taken on the CAMRA Act for the remainder of the year.²⁶⁸

Similar hype accompanied the introduction of the Family Entertainment Protection Act (FEPA) in the waning weeks of 2005. A press conference including Senators Clinton, Lieberman and Bayh, at which worn-out rhetoric about the evils of video games wafted through the air of the Indian Affairs Room on Capitol Hill, yielded this poignant exchange between a reporter from the *Hartford Courant* and the junior senator from Connecticut: “Can you talk about the use of the bully pulpit? Senator Lieberman, you’ve been holding these press conferences

²⁶³ Raymond Hernandez, *Clinton Seeks Uniform Ratings in Entertainment for Children*, N.Y. TIMES, Mar. 10, 2005, at B5.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ The Library of Congress, THOMAS Web site, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00579:@@L&summ2=m&> (last visited Jan. 4, 2006) (listing the legislative history of S. 579).

for 10 years. . . . How effective is this?”²⁶⁹

As this article has made clear, however, the effectiveness of the political posturing surrounding violent video games is not found in the enactment of legislation, which eventually is struck down on First Amendment grounds. Rather, it is the momentary chance to grab headlines about a topic that plays well with constituents and that yields the payoff for the glib politician who gets to bask briefly in the rewarding hues of the media spotlight. It is a rare instance when a reporter, such as the one who challenged Sen. Lieberman at the press conference, actually lays out the case for his readers. David Lightman, Washington bureau chief of the *Hartford Courant*, did just that in a story appearing on Christmas Day 2005.

With Congress about to end its 2005 session, they knew they had no chance of passage, let alone a hearing, for their bill to ban the sale of “inappropriate” video games.

But they also knew that a Capitol Hill news conference, with lots of visuals and sound bites – not to mention the presence of a former first lady who is widely assumed to be the front-runner for the 2008 Democratic presidential nomination – would get attention.

The senators were using Congress’ time-honored bully pulpit to influence debate and trumpet their case, a strategy some believe is more effective in influencing public opinion than the cumbersome legislative process.²⁷⁰

Indeed, the FEPA, which will wind its way through that “cumbersome legislative process,” faces the same uphill battle and likely eventual demise experienced by its counterparts on the state level.

In fact, the legislation suffers from several of the defects that

²⁶⁹ Jose Antonio Vargas, *On Capitol Hill: Blame Games; Lieberman Wants a Crackdown on Violent Video Games*, WASH. POST, Dec. 17, 2005, at C5.

²⁷⁰ David Lightman, *Lawmakers Go to the ‘Pulpit’ for Pet Issues*, HARTFORD COURANT, Dec. 25, 2005, at A1. Lightman goes on to note that “Lieberman and his allies keep holding press conferences and threatening congressional action. They did so again this year just before the holidays, accompanied by experts who painted the effort as a public health issue, not a bid to compromise the First Amendment”. *Id.*

befell the state violent video game laws, beginning with its legislative findings.²⁷¹ The federal lawmakers set out a number of findings that will be difficult, if not impossible, to prove and thus establish as a compelling governmental interest for the legislation. A major thrust of the findings is that decades' worth of research shows that exposure to higher levels of violence on television, in movies, and in other forms of media in adolescence causes people in the short-term and, after repeated exposure, even years later to exhibit higher levels of violent thoughts, anti-social and aggressive behavior, fear, anxiety, and hostility, and desensitization to the pain and suffering of others.²⁷²

The problem with this finding is that the alleged harmful effects result from exposure to violence in a *combination* of media formats. Yet the bill seeks to restrict only violent video games. This is precisely the type of evidence that troubled U.S. District Judge George Caram Steeh in *Entertainment Software Association v. Granholm*.²⁷³ In this case the Michigan legislature relied on studies that combined effects from video game and television violence leading the court to dismiss the findings because the “research did not evaluate the independent effect of violent video games and thus provides no support for the FEPA’s singling out of video games from other media.”²⁷⁴ Similarly, in *Video Software Dealers Association v. Maleng*,²⁷⁵ Judge Robert Lasnik found Washington State’s law to be under-inclusive because “FEPA is too narrow in that it will have no effect on the many other channels through which violent representations are presented to children.”²⁷⁶ By relying on evidence that purports to show harmful consequences from exposure to an array of media venues – at the same time regulating only one of those forms – Congress has opened up the law, if passed, to fatal constitutional challenges.

²⁷¹ Family Entertainment Protection Act, S. 2126, 109th Cong. § 2 (2005).

²⁷² Family Entertainment Protection Act, S. 2126, 109th Cong. § 2 (2)(2005).

²⁷³ 404 F. Supp. 2d at 982.

²⁷⁴ *Id.*

²⁷⁵ *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004).

²⁷⁶ *Id.* at 1189.

Indeed, the only finding that truly deals specifically with the adverse effects of video games asserts “that exposure to violent video games cause[s] . . . increased levels of aggression in both the short-term and long-term”²⁷⁷ Without the benefit of hearings on the bill or documentary legislative history, it is difficult to know precisely to which research Congress is alluding, but the finding appears to refer to the same data that every state legislature has relied upon as support, namely the aggression studies of Dr. Craig Anderson. As this article already pointed out, Anderson’s research has been soundly rejected as a basis for regulating violent video games by courts considering it.²⁷⁸

Another problematic section of the FEPA is the law’s adoption of the voluntary rating system administered by the Entertainment Software Ratings Board. Under the measure, “[n]o business shall sell or rent, or permit the sale or rental of any video game with a Mature, Adults-Only, or Ratings Pending rating to any individual who has not attained the age of 17 years.”²⁷⁹ First, it is curious that Congress would delegate powers to set ratings that will have the force of law to a non-governmental, industry-related entity. Second, the bill calls for independent oversight of that non-governmental board “to prevent ratings slippage.”²⁸⁰ The measure requires the FTC to

contract with an organization with expertise in evaluating video game content and that has no financial or personal interest, connection, or tie with the video game industry, to determine, in a written report, on an annual basis, whether the ratings established by the Entertainment Software Ratings Board remain consistent and reliable over time.²⁸¹

This provision further leads the government into an unnecessary – if not unconstitutional – entanglement in a web

²⁷⁷ S. 2126, 109th Cong. § 2 (4) (2006).

²⁷⁸ See, e.g., *Entertainment Software Ass’n v. Granholm*, 404 F. Supp. 2d at 982. (observing that “Dr. Anderson’s work has been rejected as a basis for restricting expression by other courts considering similar laws”).

²⁷⁹ S. 2126, supra note 272.

²⁸⁰ *Id.* at § 5.

²⁸¹ *Id.* at § 5(a).

that enables a private, industry-related board to set policy and ultimately answer to a governmental agency that gathers its evidence about the ratings policy from still another private, yet independent, organization.

Third, the bill would empower the FTC to investigate any “embedded content” in video games and determine whether “the content of the video game, either immediately accessible or embedded but accessible through a keystroke combination, passcode, or other technological means, is inconsistent with the ratings given to such a game.”²⁸² If the FTC finds a discrepancy in the assigned ratings – how the Commission would know, given that ratings are assigned by a private board operating under its own guidelines, is unclear – then it is empowered to take action to regulate unfair or deceptive acts or practices.²⁸³

The Family Entertainment Protection Act, however, is not the first bill to enlist the FTC’s help in ferreting out deceptive ratings practices. On March 8, 2005, Rep. Joe Baca (D. – Cal.) introduced a measure that would require the Commission “to study the rating system of the video game industry and assess their [sic] labeling practices to determine if such practices are unfair or deceptive.”²⁸⁴ He used the occasion to join forces with other elected officials at a middle school in San Bernardino where he was “[f]lanked by the California Cadet Corps and a large screen shot of the game “Grand Theft Auto III.”²⁸⁵ Baca told the gathering of approximately 100 people that “[t]his material must stop infiltrating the minds of our children.”²⁸⁶ The Software Accuracy and Fraud Evaluation Rating Act (SAFE) shares something in common with the other tortured-acronym legislation, the CAMRA Act²⁸⁷: No major action was taken on the measure after it was introduced in 2005.²⁸⁸

²⁸² S. 2126, *supra* note 272, at § 7.

²⁸³ S. 2126, *supra* note 272, at § 7(b).

²⁸⁴ H.R. 1145, 109th Cong. (2005).

²⁸⁵ Redmond Carolipio, *Lawmakers Target Video-game Violence*, INLAND VALLEY DAILY BULLETIN (Ontario, Calif.), March 23, 2005.

²⁸⁶ *Id.*

²⁸⁷ *Supra* note 258.

²⁸⁸ The Library of Congress, THOMAS Web site, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01145:@@L&summ2=m&> (last

It is impossible to predict how diligent the interested members of Congress will be in the months ahead in attempting to move forward federal legislation designed to regulate violent video games. One thing, however, is certain: The mounting precedent against the constitutionality of any such measures ensures that federal legislation – like the similar state laws preceding it – will be challenged on First Amendment grounds. Moreover, the fact that earlier federal bills affecting the video game industry have laid dormant following their introduction may provide a glimpse into how seriously lawmakers view the measures once the initial ripples of publicity have calmed. One variable with the potential ability to influence how long and how far those ripples of publicity spread is editorial analysis of the legislation. That factor is addressed in the next part of this article.

III. It's Just Our Opinion: Newspapers Weigh in on Violent Video Games

As nationally known columnist Dan Gillmor wrote in the opening chapter of his recent book, *We the Media*, “[n]ewspapers have provoked public opinion for as long as they have been around.”²⁸⁹ The editorial pages of the nation’s newspapers are uniquely suited for that task, for they are the place where journalists can cast aside objectivity and, instead, set forth an opinion on issues affecting the lives of their readers.²⁹⁰ Newspapers typically place great stock in their editorial pages and take seriously the privilege of helping to frame public debate. At the *New York Times*, for example, an editorial board consisting of sixteen members, overseen by an editorial page editor, “prepare[s] the paper’s editorials.”²⁹¹ The board meets regularly

visited Jan. 5, 2006).

²⁸⁹ DAN GILLMOR, *WE THE MEDIA* 3 (2004). *available at* www.authorama.com/we-the-media-3.html

²⁹⁰ *See* JAMES W. KERSHNER, *THE ELEMENTS OF NEWS WRITING* 116 (2005) (cautioning that “[i]n good newspapers, opinion is clearly labeled and separated from news, although it also comes from the editorial department”).

²⁹¹ The New York Times Editorial Board description, *available at* <http://www.nytimes.com/ref/opinion/editorial-board.html> (last visited Dec. 30, 2005).

“to discuss current issues” and “editorials are written by individual board members in consultation with their colleagues.”²⁹²

Based upon the sheer number of editorials on violent video games appearing in newspapers across the country in 2005,²⁹³ the topic most certainly was widely debated in the nation’s editorial boardrooms. If newspapers help to keep legislative initiatives high on the public agenda,²⁹⁴ then it is useful to examine what newspapers are saying about the issue. The editorials in 2005 focused primarily on one of two areas: (1) state efforts to regulate violent video games, and (2) national debate over video game usage and calls for a federal response. It might be considered surprising that some newspapers would call for

²⁹² *Id.*

²⁹³ See e.g., Editorial, *No One’s Watching Game Sales*, CHI. SUN-TIMES, Jan. 4, 2005, at 33; Editorial, *Taming Video: There is No Substitute for Parental Responsibility*, PITT. POST-GAZETTE, Jan. 5, 2005, at A18; Editorial, *Playing Games*, WASH. TIMES, Feb. 7, 2005, at A18; Editorial, *Gory Games and Free Speech*, L.A. TIMES, May 20, 2005, at B12; Editorial, *Misstep on Video Violence*, USA TODAY, June 6, 2005, at 12A; Editorial, *Bad Joke on Parents; Wanted: Real Rating System for Video Games*, THE RECORD (Bergen County, N.J.), July 18, 2005, at L06; Editorial, *It’s Not Child’s Play*, S.F. CHRON., July 22, 2005, at B8; Editorial, *Grand Theft Adult*, N.Y. TIMES, July 22, 2005, at A18; Editorial, *A Revealing Incident*, L.A. TIMES, July 24, 2005, at M4; Editorial, *Grand Theft: Absent Porn, Still Not for Teens*, STAR TRIB., July 25, 2005, at 10A; Editorial, *On the Fault Line: Need for Accurate Ratings Mandates Federal Scrutiny of Raunchy Video Game*, COLUMBUS DISPATCH, Aug. 1, 2005, at 8A; Editorial, *Foul Computer Game Hides Worse*, TAMPA TRIB., Aug. 2, 2005, at 12; Editorial, *Why Thugs and Babes: Among Other Ills, Video Games Stereotype Women and Minorities All Too Often*, OMAHA WORLD-HERALD, Aug. 11, 2005, at 8B; Editorial, *Game Over*, PRESS ENTER. (Riverside, Cal.), Aug. 13, 2005, at B8; Editorial, *Bad Behavior: Parents are First Line of Defense in Keeping Kids from Overexposure to Violent Video Games*, L.A. DAILY NEWS, Aug. 19, 2005, at N16; Editorial, *Blast Video Game Violence*, DESERET MORNING NEWS (Salt Lake City, Utah); Editorial, *Video Wars*, TULSA WORLD, Aug. 25, 2005; Editorial, *Governor, Please Sign Here*, S.F. CHRON., Sept. 16, 2005, at B10; Editorial, *Terminator? Not Even Close*, S.F. CHRON., Oct. 10, 2005, at B4; and Editorial, *Harmful Imagery: New Law Limits Video Game Sales to Minors*, SAN DIEGO UNION-TRIB., Oct. 15, 2005, at B8.

²⁹⁴ Cf. KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, THE INTERPLAY OF INFLUENCE 319 (6th ed. 2006) (writing that “[a]genda-setting theory suggests that the public’s sense of what problems need attention is affected as much by media coverage as by personal experience” and noting that “[n]ews focus can also drive policy”).

video game restrictions, especially given that games are protected – just as newspapers are – by the First Amendment.²⁹⁵ It would be more reasonable to expect that one medium of communication would close ranks with another in order to present a united front for free expression. This part of this article thus examines editorial-page framing²⁹⁶ and coverage of the debate about video game legislation.

A. *Restricting Violent Video Games on the State Level*

1. *California*

In May 2005, just as the video game industry was wrapping up the E3 Expo,²⁹⁷ a carnival-like exhibition of the latest video games and consoles debuting that year, the *Los Angeles Times* reminded readers in an editorial that the California General Assembly was considering legislation to curb access by minors to violent games.²⁹⁸ The newspaper noted that parents were “understandably frustrated by games that encourage their children to shoot, maim and degrade interestingly realistic and movie-like characters.”²⁹⁹ The editorial also expressed relief that parents did not attend the annual convention that caters to the

²⁹⁵ *But see* Clay Calvert & Robert D. Richards, *The Irony of News Coverage: How the Media Harm Their Own First Amendment Rights*, 24 HASTINGS COMM. & ENT. L.J. 215 (2002) (suggesting that the mainstream news media harm themselves – and their First Amendment rights – by saturating attention on controversial issues, which results in “lawsuits and/or legislative initiatives that jeopardize not only the rights of the news media, but also other media products such as movies, video games, and music”).

²⁹⁶ *See generally* Thomas Patterson & Philip Seib, *Informing the Public*, in *THE PRESS* 189, 193 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (writing that “[f]raming is the process by which journalists give interpretation or definition to an event or development in order to provide an explanation or judgment about it” and contending that “it is the frame, as much as the event or development itself, which affects how the citizen will interpret and respond to news events”).

²⁹⁷ *See* Electronic Entertainment Expo (E3) Web site, available at <http://www.e3expo.com> (last visited Jan. 3, 2006).

²⁹⁸ *Gory Games and Free Speech*, L.A. TIMES, May 20, 2005, at B12.

²⁹⁹ *Id.*

video game industry because they were spared from “the rivers of virtual gore about to splash over their children.”³⁰⁰

That said, the newspaper nonetheless took the position that legislation, such as the bill supported by Assemblyman Leland Yee, was not the most prudent way to keep violent video games away from children. In fact, the editorial board recognized that determining what constitutes an ultra-violent video game would prove a frustrating exercise – one that “leaves the door open to never-ending court challenges from gamers, parents, retailers and public interest groups that, naturally, will have their own opinions on what is too violent.”³⁰¹ Fearing a “free-speech mess,” the *Times* urged Gov. Arnold Schwarzenegger to “keep his veto pen ready.”³⁰² In brief, the *Times*’ editorial attempted to show and balance both sides of the issue, but ultimately came down on the First Amendment side of the equation with the conclusion that improved self-regulation was the solution.³⁰³

Meanwhile, the *Times*’s journalistic peer in northern California saw the issue through a dramatically different lens. The *San Francisco Chronicle* editorial board took the position that such legislation was needed, particular after the incident with “Grand Theft Auto: San Andreas,” in which “aficionados quickly discovered a way to add animated sex scenes to the game’s brew of violence and debauchery.”³⁰⁴ The *Chronicle* viewed the episode an Internet-downloaded “mod” as proof of “inability of the industry to police itself” and offered support to Yee who continued to push for the bill’s passage. Accordingly, it was not surprising that, after the measure eventually was passed, the *Chronicle* saw AB 1179³⁰⁵ as one “of the other bills on Schwarzenegger’s desk that merit[ed] his signature.”³⁰⁶ After the

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *See id.* (writing that “[t]he easy answer is better ratings and sales clerks who reliably turn away younger customers who don’t have proper ID -- the same system employed by the movie industry”).

³⁰⁴ Editorial, *It’s Not Child’s Play*, S.F. CHRON., July 22, 2005, at B8.

³⁰⁵ *Supra* note 224.

³⁰⁶ Editorial, *Governor – Please Sign Here*, S.F. CHRON., Sept. 16, 2005, at B10.

governor signed the measure, the *Chronicle* opined that his approval was “[o]ne of the bigger and more welcome surprises” of the week.³⁰⁷

Another major California newspaper, the *San Diego Union-Tribune*, similarly lauded the new law.³⁰⁸ In fact, the newspaper railed against the video game industry’s claim that these bills amount to government censorship and thus trample First Amendment rights.³⁰⁹ Calling that claim “absurd,” the *Union-Tribune* added, “[a]bsolutely no one is trying to gag this industry, only to regulate the sale of its products to some of the most impressionable members of our society people under eighteen.”³¹⁰ It will be recalled that the *Los Angeles Times*, in stark contrast, gave the free speech interest much greater weight and deference in its framing of the issue, writing that the law would result in a possible “free-speech mess.”³¹¹

2. Illinois

In Illinois, the state’s two major newspapers – the *Chicago Tribune* and the *Chicago Sun-Times* – split on the issue. The *Chicago Tribune*’s editorial board seemed almost bemused at “some unusual discussions” that took place during the legislative debate over Gov. Rod Blagojevich’s initiative to keep violent games away from the state’s youngsters.³¹² In an editorial published after the U.S. District Court struck down the law, the newspaper recounted an exchange between two lawmakers about the bill:

Noting that the measure barred images of human-on-human

³⁰⁷ Editorial, *Terminator? Not Even Close*, S.F. CHRON., Oct. 10, 2005, at B4 (observing, “[a]s Schwarzenegger so aptly noted, these games are not intended for children”).

³⁰⁸ Editorial, *Harmful Imagery: New Law Limits Video Game Sales to Minors*, SAN DIEGO UNION-TRIB., Oct. 15, 2005, at B-8.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Supra* note 293.

³¹² Editorial, *A Video Game Law Gets Zapped*, CHI. TRIB., Dec. 6, 2005, available at <http://www.chicagotribune.com/news/opinion/chi-0512060224dec06,1,5971615.story> (last visited Jan. 2, 2006).

violence, one lawmaker asked if human-on-space-creature mayhem was OK.

Killing an alien wouldn't fall under the bill," Rep. Linda Chapa LaVia (D-Aurora) replied. But on further questioning, she said, "If it was an alien that pretended to be a human, I guess then it's human. Then it would fall under the bill because, it's human against human."³¹³

The *Tribune* suggested that the state's resources would be better spent "helping parents get the information they need to make their own judgments" rather than pursuing a crusade for more video game legislation.³¹⁴ The newspaper concluded that "the state can't do a better job than parents of deciding what is good for their kids, and it shouldn't try."³¹⁵

While the *Chicago Sun-Times* did not devote much editorial space to the video game issue, it did step into the fray early on to note evidence of a problem with "Illinois teens being sold ultra-violent and sex-drenched video games by retailers."³¹⁶ After learning that an investigation by the Illinois State Crime Commission turned up evidence of a 15 year old who was able to purchase the games at several suburban stores, the newspaper argued that "it is up to retailers to prove that the law shouldn't step in to fix a situation they claim they have taken care of themselves."³¹⁷

The most stinging rebuke of the violent video game initiative came from the newspaper that serves the community in which the Illinois governor and legislature sit, the *State Journal Register* in the capital city of Springfield. In particular, it framed the issue by focusing on the self-serving, personal political motivations behind the proposal. When the issue was triggered by Blagojevich's call to arms in December 2004, the newspaper

³¹³ Editorial, *A Video Game Law Gets Zapped*, CHI. TRIB., Dec. 6, 2005, available at <http://www.chicagotribune.com/news/opinion/chi-0512060224dec06,1,5971615.story> (last visited Jan. 2, 2006).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ Editorial, *No One's Watching Game Sales*, CHI. SUN-TIMES, Jan. 4, 2005, at 33.

³¹⁷ *Id.*

opined that this move was another example of the governor's "insatiable desire for national publicity" and that "[a] lot of people are getting tired of Gov. Blagojevich's pandering."³¹⁸ The newspaper criticized the governor's plan to keep the games away from minors by criminally penalizing retailers. It concluded that "[e]ven if it passed constitutional muster, this ban would be as porous as a sieve."³¹⁹ The *Journal-Register* also believed that the parents ultimately are the solution to the problem.³²⁰

The newspaper repeated that mantra a year later after the U.S. District Court ruled that the law was unconstitutionally vague.³²¹ While the governor spearheaded the initiative, the *Journal-Register* nonetheless noted that "not all the blame for this useless law can be laid at the feet of Blagojevich."³²² It also should be placed squarely on the members of the General Assembly who most likely "felt that voting against such a law would be like painting a target on themselves for the next election."³²³

But it is the governor who has vowed, "This battle is not over."³²⁴ The *Journal-Register* found that any appeal of the court's ruling would be "a waste of time and state resources," especially "given that such a law has questionable efficacy in the first place."³²⁵

B. Violent Video Games: A National Crisis?

In August 2005, the American Psychological Association

³¹⁸ Editorial, *Video Game Plan Misguided*, ST. J.-REG., Dec. 17, 2004, at 8 (noting that "[w]ith court challenges to his massive fee hikes threatening to blow an even bigger hole in the already ailing state budget, and a bad taste still in everyone's mouth over the governor's excessive use of bodyguards, it was time for Team Blagojevich to make a big, positive news splash").

³¹⁹ Editorial, *Video Game Plan Misguided*, ST. J.-REG., Dec. 17, 2004, at 8.

³²⁰ *Id.*

³²¹ Editorial, *Parents Key to Control of Video Games*, ST. J.-REG., Dec. 12, 2005, at 4.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

(APA) released a report calling for a reduction in the amount of violence in all video games.³²⁶ The APA's call was heard by a handful of newspapers across the country that found sufficient ballast in the issue to warrant an editorial.³²⁷ The *Los Angeles Daily News*, for instance, concluded that "we don't need more research to tell us what seems inherently true: youngsters might get ideas after watching graphic violence, particularly when it's glorified and the perpetrators aren't punished."³²⁸ Nonetheless, the newspaper criticized the APA's appeal to the video game industry, saying "the group is looking at the wrong culprit."³²⁹ Instead, it is parents who must monitor their children's playing habits. The only way to decrease the market for violent games is for "a movement of parents to not allow their kids to play the games."³³⁰

Placing the onus on parents also was the conclusion of the editorial appearing in the *Deseret Morning News*, although that newspaper took the video game industry to task for keeping "a straight face" while maintaining "that no study proves violent video games affect children in a negative way."³³¹ The main point of the editorial was that "common sense education" – teaching children about personal accountability, media influence, and the consequences for harming others – will continue to fall on parents, schools and churches, not the entertainment industry.³³²

The *Tulsa World* editorial board was more ambivalent about

³²⁶ Anahad O'Connor, *Violent Video Games Make Young People Aggressive*, N.Y. TIMES, Aug. 30, 2005, at F5 (noting that psychologist Kevin M. Kieffer found that "in general, children exposed to virtual bloodshed showed greater 'short-term' increases in hostility toward peers and authority figures than those exposed to more benign games").

³²⁷ See, e.g., Editorial, *Bad Behavior: Parents Are the First Line of Defense in Keeping Kids from Overexposure to Violent Video Games*, L.A. DAILY NEWS, Aug. 19, 2005, at N16; Editorial, *Blast Video Game Violence*, DESERET MORNING NEWS (Salt Lake City), Aug. 24 2005, at A12; and Editorial, *Video Wars*, TULSA WORLD, Aug. 25, 2005, at A12.

³²⁸ *Bad Behavior: Parents Are the First Line of Defense in Keeping Kids from Overexposure to Violent Video Games*, supra note 326.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Blast Video Game Violence*, supra note 326.

³³² *Id.*

the APA's research findings. The editorial suggested that "research at this point isn't altogether convincing one way or the other, though most Americans likely would be inclined to give more weight to the APA's claims."³³³ The *World's* editorial also gave credence – where the previous two did not – to the First Amendment concerns of the video game industry, though it hastened to note that "few freedoms were absolute."³³⁴ The newspaper encouraged some reasonable restraints and concluded that "[c]ommon sense dictates that this stuff just isn't appropriate for young children."³³⁵

While the APA report triggered a smattering of national attention to the video game issue, the real journalistic fireworks of 2005 can be summed up in just three words: "Grand Theft Auto." After learning about an Internet download – the "Hot Coffee Mod" – that would unlock an explicit sexual scene in the "San Andreas" version of the game, newspapers felt the urge to opine about this product and the larger issue of the unregulated video game industry.³³⁶

The *New York Times* editorial wondered aloud why "in America, sex and nudity create the scandals, not systematic violence."³³⁷ As soon as the mod became apparent, the rating for the game changed from "Mature" to "Adults Only" and it was "pulled from the shelves of nearly all major retailers."³³⁸ Yet, without the mod, players could still "engage in explicitly sociopathic – not to say psychopathic – criminality." The *Times*

³³³ *Video Wars*, *supra* note 326.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ See, e.g., Editorial, *Bad Joke on Parents; Wanted: Real Rating System for Video Games*, THE REC. (Bergen County, N.J.), July 18, 2005, at L06; Editorial, *Grand Theft Adult*, N.Y. TIMES, July 22, 2005, at A18; Editorial, *A Revealing Incident*, L.A. TIMES, July 24, 2005, at M4; Editorial, *Grand Theft: Absent Porn, Still Not for Teens*, STAR TRIB., July 25, 2005, at 10A; Editorial, *On the Fault Line: Need for Accurate Ratings Mandates Federal Scrutiny of Raunchy Video Game*, COLUMBUS DISPATCH, Aug. 1, 2005, at 8A; Editorial, *Foul Computer Game Hides Worse*, TAMPA TRIB., Aug. 2, 2005, at 12; and Editorial, *Why Thugs and Babes: Among Other Ills, Video Games Stereotype Women and Minorities All Too Often*, OMAHA WORLD-HERALD, Aug. 11, 2005, at 8B.

³³⁷ Editorial, *Grand Theft Adult*, N.Y. TIMES, July 22, 2005, at A18.

³³⁸ *Id.*

found it troubling that the game caused a major stir only after the addition of “a little virtual sex.”³³⁹

The *Los Angeles Times* similarly was struck by the public outcry over the hidden sex scene given that the main thrust of the game encourages players to “buy drugs, shoot cops, destroy property, beat up assorted passersby and hire prostitutes (killing them afterward so players don’t have to pay).”³⁴⁰ The editorial writers asked readers “to forgive us if we fail to share in the indignation over the news that the game also includes a single explicit sex scene.”³⁴¹ The *Times* used the opportunity to laud politicians and interest groups that have spoken out against violent games but, in the end, concluded that their value is mostly in the “bully pulpit” – drawing attention to the violent nature of the games. Concluding that “[f]ederal regulation of video games is probably pointless,” the *Times* nonetheless noted that proponents of such measures, like Sen. Joseph Lieberman (D. – Conn.) deserve credit for “philosophical consistency.”³⁴²

The *Star Tribune* in Minneapolis, Minnesota used the “Grand Theft Auto” incident as an opportunity to argue that the video game “industry has repeatedly shown it can’t be trusted to monitor itself.”³⁴³ The newspaper suggested that an independent oversight body is needed to evaluate games and “arm parents with the information they need to ensure the video games their children are playing are age-appropriate.”³⁴⁴

In Bergen County, New Jersey, the *Record* editorial labeled the ESRB ratings “largely a joke.”³⁴⁵ The newspaper opined that “Grand Theft Auto: San Andreas” should have been “rated AO, even without the graphic sex scenes.”³⁴⁶ The *Record* also encouraged parents to find out what is in these games by

³³⁹ *Id.*

³⁴⁰ Editorial, *A Revealing Incident*, L.A. TIMES, July 24, 2005, at M4.

³⁴¹ *Id.*

³⁴² Editorial, *A Revealing Incident*, L.A. TIMES, July 24, 2005, at M4.

³⁴³ Editorial, *Grand Theft: Absent Porn, Still Not for Teens*, STAR TRIB., July 25, 2005, at 10A.

³⁴⁴ *Id.*

³⁴⁵ Editorial, *Bad Joke on Parents; Wanted: Real Rating System for Video Games*, RECORD (Bergen County, N.J.), July 18, 2005, at L06.

³⁴⁶ *Id.*

conducting their own research, via the Internet, into the content. In a final swipe at video game manufacturers, the newspapers reminded parents that “the industry is counting on your ignorance.”³⁴⁷

From a First Amendment perspective, it is the ignorance of several journalism outlets that is most astounding. The mere notion of news organizations calling for oversight boards, endorsing state and federal regulation of a speech product, and lauding politicians who trumpet blatantly unconstitutional legislative measures is hardly imaginable, yet it occurred in 2005 with increasing frequency in the editorial pages of some of the nation’s leading newspapers. It is difficult to envision similar zeal on the part of journalists if the offending speech product were newspapers rather than video games.

IV. CONCLUSION

This article has demonstrated the existence of a consistent pattern of politicians ignoring legal precedent when it comes to proposing unconstitutional laws targeting the content of video games depicting images of violence. Likewise, the social science studies that purportedly justify these laws are consistently rejected, time and time again, by courts, yet legislators continue to cite it favorably when offering up new bills. What will it take to break this chain of fruitless lawmaking efforts that drain taxpayer coffers when the laws wind up in court?

The answer to that question may, in part, simply be a matter of time. In particular, it will take time – perhaps just another five to ten years – for a new generation of politicians weaned on playing video games to take office and to replace the current generation that largely finds the games alien and incomprehensible. Jose Antonio Vargas of the *Washington Post* observed in December 2005, upon the announcement by Senators Lieberman, Clinton and Bayh described earlier in this article,³⁴⁸ that “[i]t’s a battle of the generations yet again, the young against the old, a recurring theme in pop culture dating to the early days

³⁴⁷ *Id.*

³⁴⁸ *See supra* note 264 and accompanying text.

of comics, to Elvis's gyrating hips, to the ruckus of rock- and-roll."³⁴⁹

Vargas noted that "Lieberman doesn't play video games"³⁵⁰ and "is of the pre-Pong, pre-Atari, pre-PlayStation generation."³⁵¹ He added that neither Senator Clinton nor Senator Bayh plays video games.³⁵²

Steve Chapman, a member of the editorial board of the *Chicago Tribune*, made a similar observation in a commentary examining the politics of House Bill 4023 in Illinois, noting that older generations have always feared younger generations' forms of popular media:

Bills like this seek to restore the cultural environment of teens to an Edenic era of wholesome innocence. But when was that? Video games are just the latest form of entertainment accused of warping young people beyond repair – such as rap music lyrics in the 1980s, and bloody movies and TV shows in the 1960s and 1970s.

Back in the 1950s, the root of all evil was comic books – yes, comic books. They were denounced in terms eerily similar to those being used today against video games. Some cities passed ordinances banning the sale of violent comic books to minors, as did the State of New York.³⁵³

It's an observation that is seconded by Karen Sternheimer, who teaches sociology at the University of Southern California. She has noted that:

With just about any new medium, there has been concern about the negative effects it might have on young people. From movies to television to comic books to music and now video games, society tends to project its fears onto newer forms of pop culture. There's a generational divide that makes people on

³⁴⁹ Vargas, *supra* note 264, at C5.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ Steve Chapman, *Violent Video Games and Illinois' Loopy Legislators*, CHI. TRIB., Mar. 20, 2005, at 9.

the other side nervous.³⁵⁴

This is a point that has not escaped Douglas Lowenstein, president of the Entertainment Software Association. As he told the authors of this article in an in-depth personal interview in early 2005:

Video games are new media, so it's partly generational. We have people in the political power structure in this country today who typically are in their 40s, 50s and 60s. They're just outside the video game generation and are, instead, part of the passive media generation. As has been the case in past eras, the generation in power tends to react with hostility to the media of the younger generation coming behind them. So, I think that's part of it—it's just a visceral reaction to something new that is not of their world.³⁵⁵

While the passage of time and process of waiting for a new generation of politicians to take office provides part of the answer for ending the current wave of attacks on the video game industry, there are other variables that also could reduce the quantity of legislation targeting games. In particular, a little bit of self restraint exercised by some members of the video game industry would go a long way in keeping politicians' attention away from the games. There's plenty of evidence now for the video game industry to know what pushes the political buttons of lawmakers. For instance, the discovery in July 2005 of hidden sex scenes in "Grand Theft Auto: San Andreas" stirred up "broader scrutiny of the inner workings of top-selling games."³⁵⁶ More importantly, the incident caught the attention of Congress, as the U.S. House of Representatives overwhelmingly passed a resolution calling for the Federal Trade Commission to

³⁵⁴ Alex Pham, *Debate Flares Anew Over Violence in Video Games*, L.A. TIMES, Oct. 5, 2005, at C1.

³⁵⁵ Clay Calvert & Robert D. Richards, *Free Speech and the Entertainment Software Association: An Inside Look at the Censorship Assault on the Video Game Industry*, 32 J. LEGIS. 22, 32 (2005).

³⁵⁶ Nick Wingfield, *Guess What's Hiding in Your Game?*, WALL ST. J., July 26, 2005, at D5.

investigate the “Grand Theft Auto: San Andreas” and the FTC, in turn, launched an investigation into how the game was marketed.³⁵⁷ Claudia Bourne Farrell, a spokesperson for the FTC observed at the time that “[t]he agency takes the ‘Grand Theft Auto’ situation very seriously as it does the House resolution.”³⁵⁸ Senator Clinton, who would later propose federal legislation described earlier in this article, was “particularly incensed after the discovery of hidden sex in the popular game Grand Theft Auto: San Andreas.”³⁵⁹ As she stated in an official press release, “[t]he disturbing material in Grand Theft Auto and other games like it is stealing the innocence of our children and it’s making the difficult job of being a parent even harder.”³⁶⁰

Beyond the “Grand Theft Auto: San Andreas” modification controversy, it was the release of the game “JFK Reloaded” in November 2004 that largely motivated – at least, *publicly* motivated – Illinois Gov. Rod Blagojevich to call for the legislation in his state described earlier in Part I, Section A of this article.³⁶¹ As Blagojevich wrote in a commentary published in *USA Today*, it “re-enacts the assassination of the late president. As a parent, this is the last thing I want my 8-year-old exposed to.”³⁶² Both games also caught the attention of California

³⁵⁷ Brian D. Crecente, *Gaming Industry Braces For Backlash After Raunchy Discovery in ‘San Andreas,’* ROCKY MOUNTAIN NEWS, July 29, 2005, at 26D. See Hiawatha Bray, *FTC Targets Grand Theft Auto Maker*, BOSTON GLOBE, July 27, 2005, at D1 (writing that “[t]he publisher of the popular computer game Grand Theft Auto: San Andreas said yesterday it is the subject of a federal investigation because of a sexually explicit video hidden inside the software”).

³⁵⁸ Alex Pham, *FTC Probes Take-Two*, L.A. TIMES, July 27, 2005, at C3.

³⁵⁹ Brian D. Crecente, *Video-Game Execs Playing Up to Clinton*, ROCKY MOUNTAIN NEWS, Aug. 9, 2005, at 26A.

³⁶⁰ Press Release, Senator Hillary Rodham Clinton, *Senator Clinton Announces Legislation to Keep Inappropriate Video Games Out of the Hands Of Children* (July 14, 2005), available at <http://clinton.senate.gov/news/statements/details.cfm?id=240603&&> (last visited Dec. 28, 2005).

³⁶¹ See Dave McKinney, *Gov Targets Violent Video Games*, CHI. SUN-TIMES, Dec. 16, 2004, at 3 (writing that the release of “JFK Reloaded” was “what really motivated” Blagojevich to call for legislation restricting minors’ access to violent video games, and quoting Blagojevich for the proposition that he was “outraged” by the game).

³⁶² Rod Blagojevich, *Parents Need Our Help*, USA TODAY, June 6, 2005, at

Assembly Speaker pro Tem Leland Yee, the leader of the successful fight in 2005 for video game legislation in that state. He proclaimed in a press release after the “Grand Theft Auto: San Andreas” scandal broke that “[w]hether it is JFK: Reloaded, Manhunt, 25 to Life, or now Grand Theft Auto: San Andreas, the video game industry continues to demonstrate a sense of arrogance towards public opinion and a lack of responsibility in protecting our children.”³⁶³

Had “JFK Reloaded” never been released and had the hidden sex scenes in “Grand Theft Auto: San Andreas” never been put there by developers in the first place, one wonders just how much anti-video game legislation ever would have been proposed and adopted in 2005. Such controversies put the subject of video games on the radar screens of politicians looking for easy scapegoats to blame for real-life violence. Simply put, the “JFK Reloaded” and “Grand Theft Auto: San Andreas” games provided fodder for further legislation. A modicum of common sense and a tad of self-restraint by segments of the video game industry thus may help to quell and quiet the calls of politicians for legislative action.

Another factor that surely could reduce the amount of anti-video game legislation is a dramatic reduction in the sheer amount of news media coverage given to the politicians who propose such measures. As it stands today, the news media fan the flames of legislation by giving headline-grabbing coverage to politicians who pontificate in both carefully crafted press releases and staged press conferences against violent video games.³⁶⁴ It is axiomatic that “elected officials need the press in order to reach

12A.

³⁶³ Press Release, California State Assembly Speaker pro Tempore Leland Yee, *Speaker pro Tem Yee Blasts ESRB for Failing to Appropriately Rate Grand Theft Auto: San Andreas* (July 6, 2005), available at <http://democrats.assembly.ca.gov/members/a12/press/p122005060.htm> (last visited Jan. 3, 2005).

³⁶⁴ Much news content today actually stems for such politically staged events. As Professor Robert Entman writes, “[m]any stories cover media events, photo ops, and other manifestations of managed news or public relations.” Robert N. Entman, *The Nature and Sources of News*, in *THE PRESS* 48, 61 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

the publics upon whom they depend for electoral support”³⁶⁵ and, in turn, that “[n]ews organizations have an impact on what happens to legislation through the assessments they make of the prospects of a proposed bill becoming law.”³⁶⁶

When Rod Blagojevich first went on the war path against video games in late 2004, his call for legislation in his own state was picked up by major news publications across the country, thus giving both the governor and the issue national exposure and attention. For instance, the *Washington Post* ran a Section A article in December 2004 about the Illinois governor’s quest for legislation that quoted him from a prepared “written statement.”³⁶⁷ *The New York Times* also gave the Illinois governor coverage that same month on the identical issue,³⁶⁸ as did *USA Today*,³⁶⁹ the *Wall Street Journal*,³⁷⁰ the *Christian Science Monitor*,³⁷¹ *Seattle Times*,³⁷² and the *Houston Chronicle*.³⁷³ In the opinion of the authors of this law journal article, there is little question that politicians like Blagojevich will continue to propose measures attacking video games when they know that such bills will garner national press coverage and massive media attention while providing them with an enormous bully pulpit. Because “[t]he power of the news media results from their capacity to select what is reported and to shape the content

³⁶⁵ Martha Joynt Kumar & Alex Jones, *Government and the Press: Issues and Trends*, in *THE PRESS* 226, 226 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

³⁶⁶ Martha Joynt Kumar & Alex Jones, *Government and the Press: Issues and Trends*, in *THE PRESS* 226, 232 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

³⁶⁷ Peter Slevin, *A Push to Restrict Sales of Video Games*, *WASH. POST*, Dec. 16, 2004, at A8.

³⁶⁸ Gretchen Ruethling, *Technology Briefing Software: Illinois: Regulating Videos For Minors*, *N.Y. TIMES*, Dec. 17, 2004, at C3.

³⁶⁹ Mike Snider, *Video Games*, *USA TODAY*, Dec. 28, 2004, at 2D.

³⁷⁰ Nick Wingfield, *State May Restrict Game Sales*, *WALL ST. J.*, Dec. 16, 2004, at B8.

³⁷¹ Amanda Paulson, *A Battle Over Sale of Violent Video Games*, *CHRISTIAN SCI. MONITOR*, Dec. 31, 2004, at 1.

³⁷² *Across the nation*, *SEATTLE TIMES*, Dec. 17, 2004, at A4.

³⁷³ *Around the Nation*, *HOUSTON CHRON.*, Dec. 17, 2004, at Business 3.

of news stories,”³⁷⁴ the news media possess great power over video game legislation if they choose *not* to select it for coverage, thereby keeping it off of the public’s agenda and reducing the incentive for politicians to propose further measures.

In addition, as described above in Part III, it would help the free-speech cause against video game legislation if the editorial staffs of all newspapers presented a unified front on their editorial pages criticizing the measures. When some newspapers, like the *San Francisco Chronicle* with its September 2005 editorial stating that Leland Yee’s Assembly Bill 1179 merits signage by California Governor Arnold Schwarzenegger,³⁷⁵ break ranks and support such legislation, they ultimately harm the very blanket of First Amendment protection under which all media products – newspapers included – rest.

In summary, then, there are least four core variables that may lead to a reduction in legislation targeting video game content:

- Passage of time until a new generation of politicians weaned on video games takes office;
- Self-restraint on the part of some members of the video game industry to avoid creating games and/or hidden scenes in games that attract undue media attention;
- Reduction of news media coverage given to politicians proposing laws targeting violent storylines and images in video games; and
- A unified front on the editorial pages of major newspapers across the country against measures targeting violent content in video games.

As this article has made clear along the way, one variable that should be included on this list but, sadly, is absent is judicial precedent. The wall of judicial precedent that now stands against content-based video game legislation is extremely high, yet politicians either pretend, for purposes of political expediency, as if it was not there or they acknowledge its presence and, nonetheless, attempt to scale it. The blatant disregard for

³⁷⁴ KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE* 119 (6th ed. 2006).

³⁷⁵ *Governor – Please Sign Here*, S.F. CHRON., Sept. 16, 2005, at B10.

precedent makes it highly probable that video game legislation will continue to proliferate in the near future.

Just as kids surely will continue to play video games in the near future, politicians surely will continue to play political games with this incredibly popular form of new media that they neither play nor understand. What the politicians do appear to understand, however, is the political hay and headlines that can be made by promoting legislative initiatives targeting video game content. To the old aphorism, then, that the only things one can count on in life as inevitable are death and taxes, the authors propose the addition of video game legislation.

It is worth noting, however, that the short-term headlines and sensational sound bites generated by trumpeting laws that target violent video games do not necessarily translate or lead to long-term political stability and popularity among voters for the politicians who espouse them. This point was evident in the three states – Illinois, Michigan and California – that adopted the video laws that have been the focus of this article. In particular, when 2006 began, the *Washington Post* reported, based on survey data, that Arnold Schwarzenegger was among the five least popular governors in the United States, and that “judging from the numbers some blue-state Democrats may face trouble this year, including Illinois’s Rod Blagojevich and Michigan’s Jennifer M. Granholm.”³⁷⁶ This might give some pause to Hillary Rodham Clinton as she bangs the drums of censorship against violent video games while simultaneously testing the waters for a run for the office of president of the United States. Perhaps video games might not be the best hook for Clinton on which to hang her political aspirations.

And perhaps the final irony for the politicians who seem obsessed with passing laws targeting video games is that, were those laws ever to be declared constitutional and somehow pass judicial analysis, they likely would be ineffective and prove, when put into practice, to be an exercise in futility. Take it from the kids who play the games. As a 16-year-old boy named Bryan Logarta told a reporter for the *San Francisco Chronicle* shortly

³⁷⁶ Dan Balz & Thomas B. Edsall, *Sunday Politics: Smaller States Are Bigger on Their Governors*, WASH. POST, Jan. 1, 2006, at A5.

after the California law was held unconstitutional, “[t]he law wouldn’t have really mattered. Kids are going to play them anyway. They’ll just find someone else to buy it for them.”³⁷⁷ This reality, unfortunately, goes unheeded by many politicians. For Leland Yee, the sponsor of the bill behind the California law, the judge’s decision enjoining it was, as Yee put it, “simply a temporary pause.”³⁷⁸

Perhaps Yee should take a look at the statement of then-U.S. Senator Slade Gorton back in 1999, shortly after the tragedy at Columbine High School when politicians across the country were up in arms about violent media content, including that in video games: “We all know that there is no effective legislation we could pass.”³⁷⁹ Although Gorton no longer plays the role of lawmaker, his words are worthy of consideration by the breed and generation of politicians now in public office. And if Gorton’s words don’t convince them, then maybe the fact that “more and more studies are showing that [video] games are good for you”³⁸⁰ and may “therapeutic uses.”³⁸¹ As an article in the December 10, 2005, United States edition of *The Economist* magazine concluded, “[c]ritics denounce video games for promoting violence and destruction, despite the lack of solid evidence to support such claims. The evidence for gaming’s curative and therapeutic benefits, by contrast, is rather more convincing.”³⁸²

³⁷⁷ Steve Rubenstein, *Shoppers Call Judge’s Video Ruling Irrelevant; Minors Say They’ll Get the Games They Want, Legal or Not*, S.F. CHRON., Dec. 23, 2005, at A12. Related to this irony is the fact that some parents actually complain to video game retailers when the retailers stop their children from purchasing certain violent video games. See Carlos Villatoro, *Rated ‘M’ For Mature*, NAPA VALLEY REGISTER, Dec. 25, 2005, at 1, 2 (reporting that the manager of one Napa, Calif., store that specializes in video games “often gets parents complaining to him as well for not selling the games”).

³⁷⁸ Claire Cooper, *Judge Blocks Video Game Limits*, SACRAMENTO BEE, Dec. 23, 2005, at A6.

³⁷⁹ Ann Scott Tyson, *The Role of Washington in Curbing Youth Violence*, CHRISTIAN SCI. MONITOR, May 6, 1999, at 2.

³⁸⁰ Kenneth Terrell, *Bone Up at Video Game U*, U.S. NEWS & WORLD REP., Jan. 2, 2006, at 68.

³⁸¹ *Odd Bedfellows, Striking Results*, ECONOMIST, Dec. 10, 2005, at Technology Quarterly.

³⁸² *Id.*

Ultimately and, viewed collectively, the three cases from 2005 that are at the heart of this law journal article represent a triumph for parental rights. The opinions, in the aggregate, reinforce the right of parents to make choices regarding their children's lives, free from government-imposed intermeddling. When states and governmental entities impose and mandate their own ratings on video games and determine what is appropriate entertainment for minors, they have plunged deeply and headlong into the quicksand of culture wars and interfered with decisions affecting the First Amendment freedom of speech. We should trust parents to make their own decisions about what games their children should or shouldn't be allowed to play. As the ESA's Doug Lowenstein observes, "[i]t's not up to any industry or the government to set standards for what kids can see or do; that is the role of parents."³⁸³

³⁸³ Villatoro, *supra* note 370, at 2.