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

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

Gregory Kenyota

INTRODUCTION

If asked to name a video game where players can drive a car and run over people, one’s likely response is a game from the Grand Theft Auto series. The Grand Theft Auto series is arguably one of the most controversial video games released in recent years. Critics such as Senator Joseph Lieberman (I-CT) and Senator Hillary Clinton (D-NY) have blasted the game for its depictions of sex and violence. Without seeing anything more than a short trailer video of the game, New York City officials condemned the unreleased Grand Theft Auto IV for looking too
much like New York City,⁴ even though the game will take place in a fictional city based on New York City called Liberty City.⁵

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

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

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

I. BACKGROUND

A. Early Video Game Controversies

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

8 See discussion infra Part II.
9 Mary Beth Schneider, Bill Aims to Enforce Age Limits on Games, INDIANAPOLIS STAR, Feb. 20, 2007, at Metro & State 1.
caused the next controversy in releasing Custer’s Revenge, a game where the object of the game was to “guide a naked, horny, General Custer across the screen while avoiding incoming arrow fire. Waiting at the other side is a naked Indian maiden, and you earn points by . . . scoring. The slogan of the game was something like ‘When you score, you score!’” Custer’s Revenge drew protests due to its nudity, “ethnic insensitivity,” and raping of a female Native American character. Despite the protests and furor over these two games, the controversy only led to retailers taking the two games partially off the market.

B. The Rise of the Entertainment Software Ratings Board

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

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14 Death Race was “eventually pulled off the market after moving 1000 machines.” Player 2 Stage 1: The Coin Eaters, DOT EATERS, http://www.thedoteaters.com/p2_stage1.php (last visited Nov. 17, 2007). Custer’s Revenge was “banned from being sold in many places, and most stores refused to carry it. The stores that did carry the game had to carry it behind the counter, out of sight.” Fragmaster, *supra* note 12.
16 Id.
18 See 140 CONG. REC. S788 (daily ed. Feb. 3, 1994). For a detailed account of the hearings including a heated rivalry between the then-executive vice president of Nintendo of America and the then-vice president of Sega of America, see Kent, *supra* note 10, at 467–78.
The Congressional hearings initially appeared to be leading up to government regulation of the video game industry. After the first hearing, Senator Lieberman and Senator Herb Kohl (D-WI) drafted the “Video Game Rating Act of 1994,” which established a Commission to assist the video game industry in developing a voluntary ratings system. If the industry failed to develop a voluntary ratings system that was satisfactory after one year, the Commission would “gain the power to review and rate video games, and to require video game companies to place a ratings [sic] on their games. The Commission would not have the power to ban games.” Senator Kohl made a bold statement to the video game industry in his statement on the Video Game Rating Act:

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

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

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20 Id.
21 Id.
23 KENT, supra note 10, at 480. The ESRB eventually developed a system to rate games based on self-reports of video game content by the video game maker, an independent review of the video game by at least three trained video game raters, and a review by the ESRB staff of the raters’ reports. ESRB: Ratings Process, http://www.esrb.org/ratings/ratings_process.jsp (last visited Nov. 17, 2007). The ESRB then assigns the video game one of six ratings symbols and attaches a brief description of
for taking voluntary steps to self-regulate and the video game industry enjoyed a short reprieve from controversy.24

C. Columbine Reawakens the Video Game Controversy

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

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


28 Gonzales, supra note 10, at 7.

29 Id.


said: “It’s going to be like fucking Doom!”

This connection between Doom and the school shooters led critics such as President Bill Clinton to denounce video games for their role in making “children more active participants in simulated violence.”

The backlash over violent video games as well as other forms of violent media came shortly after the revelations of their connection to the Columbine shootings. Congress held hearings about the marketing of violence to children at Senator Sam Brownback’s (R-KS) urging on May 4, 1999. At President Clinton’s behest, the Federal Trade Commission (“FTC”) and the Department of Justice (“DoJ”) conducted a study on the effects of violence in music, movies, and video games on children. The families of the Columbine victims also filed a wrongful death suit against video game companies and movie studios.

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

The wrongful death suit against the video game

32 Kent, supra note 10, at 545; see also Nancy Gibbs & Timothy Roche, The Columbine Tapes, Time, Dec. 20, 1999, at 40.
37 Kent, supra note 10, at 555.
38 FTC Report, supra note 35, at 44–52.
39 Id. at 51–52.
40 Id. at 37. The implications of this finding are discussed in Part III of this Note.
companies and movie studios ended when the defendants made a successful motion to dismiss.\textsuperscript{41}

It was within the backdrop of the post-Columbine controversy that lawmakers would begin to regulate the access of minors to violent video games despite the controversy’s few immediate impacts on video games. City governments led the way, as Indianapolis’ reaction to the controversy was to pass a general ordinance on July 10, 2000 that addressed the problem.\textsuperscript{42} The general ordinance forbade the operators of video game arcades in the city from allowing minors to use arcade machines deemed “harmful to minors” if they were unaccompanied by their parents.\textsuperscript{43} St. Louis also passed an ordinance on October 26, 2000 that made it unlawful “to sell, rent, or make available graphically violent video games to minors, or to ‘permit the free play of’ graphically violent video games by minors, without a parent or guardian’s consent.”\textsuperscript{44} State governments would follow the trend later, such as Washington in 2003.\textsuperscript{45} While the states slowly followed and passed laws on violent video games, it would only be a few years until an even greater call for regulating the sale of violent video games would occur.

\textbf{D. Hot Coffee Spills}

Rockstar Games, the publisher of the Grand Theft Auto series, released \textit{Grand Theft Auto III} in October 2001.\textsuperscript{46} The game received an ESRB rating of “M” for “mature”\textsuperscript{47} and created a wave of controversy as it allowed players to “run prostitutes, deliver

\textsuperscript{41} Sanders v. Acclaim Entm’t, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002).
\textsuperscript{42} Am. Amusement Mach. Ass’n v. Kendrick, 115 F. Supp. 2d 943 (S.D. Ind. 2000), rev’d, 244 F.3d 572 (7th Cir. 2001). The general ordinance specifically cites the 2000 Congressional Hearings in its text. See id. at 981–82.
\textsuperscript{43} Id. at 946–47.
\textsuperscript{44} Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954, 956 (8th Cir. 2003).
\textsuperscript{45} Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180, 1183 (W.D. Wash. 2004).
\textsuperscript{46} Steven Kent, \textit{Game Glorifies Life of Crime}, USA \textit{TODAY}, Dec. 20, 2001, at 3D.
\textsuperscript{47} “Titles rated M (Mature) have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content and/or strong language.” ESRB: Ratings Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Oct. 17, 2007).
drugs, make gangland hits and generally flout the law."

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

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

48 Kent, supra note 46.
49 Mike Snider, Car-theft Video Game Should See Big Sales—and Big Outcry, USA TODAY, Oct. 30, 2002, at 4D.
50 Kent, supra note 46.
51 In Australia, however, the government banned sales of Grand Theft Auto III. Kent, supra note 46.
53 Snider, supra note 49.
Florida attempting to pass ordinances restricting the sales of violent video games to minors. Florida Video Law, supra note 55. New York City Mayor Michael Bloomberg even threatened legal action if Rockstar Games did not remove the offending language. Florida Video Law, supra note 55. Rockstar Games agreed to remove the offending language from future versions of the game, but the controversy did not lead to any other long-lasting effects.

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

56 Florida Video Law, supra note 55.
58 Florida Video Law, supra note 55.
until California Assemblyman Leland Yee (D-San Francisco) criticized the ESRB on July 6, 2005 for failing to rate Grand Theft Auto: San Andreas as “AO” for “adults only” due to the content from the Hot Coffee Mod.63

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

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64 Brendan Sinclair, Spot On: Leland Yee Talks Hot Coffee, GAMESPOT, July 15, 2005, http://www.gamespot.com/news/6129209.html (noting that “Yee’s vocal criticism of the ESRB triggered a chain reaction . . . taking what could have been an overlooked novelty mod of a hit PC game and making it the flash point of a much larger debate”).
66 Steven Bodzin & Alex Pham, Modified Video Game Spurs Clinton Protest, L.A. TIMES, July 15, 2005, at A21.
Lieberman. The Act, however, never made it past the Senate Committee.

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

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71 Sinclair, supra note 64.
75 Entm’t Software Ass’n v. Foti, 451 F. Supp. 2d 823, 824 (M.D. La. 2006).
Indiana\textsuperscript{81} each considered enacting a statute regulating the sale of violent video games to minors.

\section*{II. First Amendment Issues in Violent Video Game Legislation}

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

\subsection*{A. Video Games as a Form of Speech}

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

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


\textsuperscript{82} U.S. \textit{CONST.} amp. I.

\textsuperscript{83} \textit{Near v. Minnesota,} 283 U.S. 697, 707 (1931).

\textsuperscript{84} Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954, 956–57 (8th Cir. 2003) (citing Interactive Digital Software Ass’n v. St. Louis County, 200 F. Supp. 2d 1126 (E.D. Mo. 2002) and referring to the lower court’s conclusion that video games were not a protected form of speech).
speech...’ and that a ‘particularized message’ is not required for speech to be constitutionally protected.” Video games also “contain original artwork, graphics, music, storylines, and characters similar to movies and television shows.” Accordingly, federal courts have since found that the First Amendment’s definition of speech extends to video games.

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

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

86 Entm’t Software Ass’n v. Granholm, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006). Some states have unsuccessfully tried to argue that video games are different than other forms of media because they are interactive and should not be compared. See Entm’t Software Ass’n v. Foti, 451 F. Supp. 2d 823, 830 (M.D. La. 2006). Courts’ responses have been that movies, television, and even photography have some level of interactive elements. Id. (citing American Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).
87 See, e.g., Granholm, 426 F. Supp. 2d at 651 (citing James v. Meow Media, Inc., 300 F.3d 683, 696 (6th Cir. 2002)).
89 Id. Rational basis applies to non-speech activities. Id. at 791. This Note also examines commercial speech, which has its own test, in considering the labeling requirements by some states. See infra Part II.C.1.
on its content are “presumptively invalid” and subject to strict scrutiny. One reason for this is that content-based restrictions “raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” This applies to any statute “that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government.” Laws that are unrelated to the content of speech are subject to intermediate scrutiny. This is because most content-neutral statutes “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” Since the laws at issue regulate video games based on its violent content, federal courts have held that such laws are content-based and subject to strict scrutiny.

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

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

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

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95 Clark, 468 U.S. at 293.
96 Turner Broad. Sys., 512 U.S. at 642.
97 See, e.g., Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).
99 Id.
101 See infra Part II.B.1.
speech harmful to minors, and speech that incites imminent lawless action. This section summarizes the arguments advanced for each exception and why they do not apply to violent video game legislation.

1. Obscenity

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

2. Harmful to Minors Language

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

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102 See infra Part II.B.2.
103 See infra Part II.B.3.
105 Miller, 413 U.S. at 24.
108 Id. at 634–43.
Supreme Court upheld the statute, finding that New York had a rational basis for limiting the access of sexual material to minors.\textsuperscript{109} Similar to the obscenity exception, however, the Supreme Court has never extended \textit{Ginsberg}’s holding to apply to violent content so other federal courts have declined to do so as well.\textsuperscript{110} Therefore, a claim that \textit{Ginsberg} should apply to violent video game laws is unavailing.\textsuperscript{111}

3. Imminent Lawless Action

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

\textsuperscript{109} \textit{Id.} at 643.
\textsuperscript{110} Video Software Dealers Ass’n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1045 (N.D. Cal. 2005).
\textsuperscript{111} The Northern District of Illinois has also found that Illinois’s separate statute prohibiting the sale of sexually explicit video games to children was also unconstitutional even under the \textit{Ginsberg} standard. \textit{Entm’t Software Ass’n v. Blagojevich}, 404 F. Supp. 2d 1051, 1077–81 (N.D. Ill. 2005). Other states have not yet considered the issue, as the statutes tend to focus on violent video games only.
\textsuperscript{112} See, e.g., \textit{Blagojevich}, 404 F. Supp. 2d at 1073 (citing \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969)).
\textsuperscript{113} \textit{Brandenburg}, 395 U.S. at 447.
\textsuperscript{114} See \textit{id}.
\textsuperscript{116} See \textit{Brandenburg}, 395 U.S. at 447.
The problem with claiming that violent video games fall under the Brandenburg exception is that studies have not shown that violent video games will either (1) direct or incite people to commit violent acts or (2) cause people to do so. Before ruling on a case regarding the constitutionality of a law regulating violent video games, the Northern District Court of Illinois held an evidentiary hearing to determine the effect of video games on youth. The court listened to testimony from psychologists on both sides who have studied the issue. Illinois’s witness, Dr. Craig Anderson, summarized research, including his own, and concluded that violent video games increase aggressive behavior and thinking. Dr. Jeffrey Goldstein and Dr. Dmitri Williams testified for the video game industry and found many problems with the studies cited by Dr. Anderson, which the court agreed with. Dr. Goldstein and Dr. Williams also pointed out that “Dr. Anderson not only had failed to cite any peer-reviewed studies that had shown a definitive causal link between violent video game play and aggression, but had also ignored research that reached conflicting conclusions.” Dr. Goldstein and Dr. Williams also testified that “several studies concluded that there was no relationship between [violent video game play and aggression].” In fact, according to Dr. Goldstein and Dr. Williams, “in certain instances, there was a negative relationship between violent video game play and aggressive thoughts and behavior” such as where the “initial increases in aggression wore off if the individual was allowed to play violent video game [sic] for longer period.”

118 Entm’t Software Ass’n v. Blagojevich, 404 F. Supp. 2d 1051, 1057 (N.D. Ill. 2005).
119 Id. at 1058–67.
120 Dr. Anderson summarized about five studies, noting that each showed minor differences between the groups exposed to violent video games and the groups exposed to nonviolent video games. Id. at 1059–62. In one study involving participants playing a video game and then administering noise blasts, one of the groups exposed to a violent video game administered the lowest intensity noise blasts, which the court felt contradicted Dr. Anderson’s conclusion. Id. at 1060–61.
121 Id. at 1059–62.
122 Id. at 1062–63.
123 Id. at 1062.
124 Id.
125 Id.
At the end of the hearing, the court found that that Dr. Anderson’s research could not “establish a solid causal link between violent video game exposure and aggressive thinking and behavior” and that the research Dr. Anderson cited did not “eliminate[] the most obvious alternative explanation: aggressive individuals may themselves be attracted to violent video games.”126 The district court also found that Dr. Anderson did not “provide[] evidence to show that the purported relationship between violent video game exposure and aggressive thoughts or behavior is any greater than with other types of media violence, such as television or movies, or other factors that contribute to aggression, such as poverty.”127 Other courts have made similar findings.128

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

C. Other First Amendment and Constitutional Issues

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

1. Labeling Requirements as Commercial Speech or Compelled Speech

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

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126 Id. at 1063.
127 Id.
games to minors. Commercial speech is “expression related solely to the economic interests of the speaker and its audience” and “assists consumers and furthers the societal interest in the fullest possible dissemination of information.”

Compelled speech, on the other hand, “penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda that they do not set.”

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

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

130 Blagojevich, 404 F. Supp. 2d at 1081.
135 Central Hudson, 447 U.S. at 566.
136 Id.
137 Entm’t Software Ass’n v. Blagojevich, 404 F. Supp. 2d 1051, 1081 (N.D. Ill. 2005).
interest in preventing deception of consumers.\textsuperscript{138} The problem with a labeling requirement under this view, however, is that video games already have ESRB ratings on them and adding an “18” sticker on the video games is not going to tell consumers something they do not already know. There is no need to prevent deception because the ESRB ratings properly inform consumers of what the video games contain.\textsuperscript{139}

Nevertheless, at least one court that addressed this issue has found that the labeling requirements fall under the definition of compelled speech.\textsuperscript{140} According to the court, attaching the “18” label “forces retailers to affix a label that may obscure their own message about the content of the game (i.e., the ESRB ratings) and contradict their own opinion about the content of the game (e.g., putting the ‘18’ label on an [sic] T-rated game\textsuperscript{141} considered appropriate for thirteen-year olds).”\textsuperscript{142} Therefore, the labeling requirement is a form of “compelled speech subject to strict scrutiny.”\textsuperscript{143} Whether the labeling requirements would survive strict scrutiny is unknown, as Illinois offered “no independent defense of the Act’s [labeling requirements] other than to argue that they are subject to the lower level of review for commercial speech requirements”\textsuperscript{144} and California did the same.\textsuperscript{145}

\begin{footnotes}
\item[139] See FTC REPORT, supra note 35, at 24 (finding that the ESRB “continues to set a high standard for the clear and prominent disclosure of rating information in television, print, and the Internet”).
\item[140] Blagojevich, 404 F. Supp. 2d at 1081–82. In California, the court ultimately found the entire statute unconstitutional and declined to address whether the labeling requirement was compelled speech or commercial speech. Video Software Dealers Ass’n v. Schwarzenegger, 2007 U.S. Dist. LEXIS 57472, at *33 (N.D. Cal. Aug. 6, 2007).
\item[141] “Titles rated T (Teen) have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language.” ESRB: Ratings Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Oct. 17, 2007).
\item[142] Blagojevich, 404 F. Supp. 2d at 1082.
\item[143] Id.
\item[144] Id.
\item[145] Video Software Dealers Ass’n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1047 (N.D. Cal. 2005). In a related issue, the District Court of Minnesota found that a signage requirement stating that “[a] person under the age of 17 is prohibited from renting or purchasing a video game rated AO or M,” with “[v]iolators . . . subject to a $25 penalty,” would have been constitutional because it was a plain recitation of the statute at issue.
\end{footnotes}
2. Vagueness

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

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

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

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146 See, e.g., Blagojevich, 404 F. Supp. 2d at 1076 (N.D. Ill. 2005).
149 Grayned, 408 U.S. at 108.
150 Id. at 110.
151 Id. at 109 (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).
153 720 ILL. COMP. STAT. ANN. 5/12A-10 (LexisNexis 2007).
constitutes “serious physical harm.”\textsuperscript{154} As the district court stated, video game characters can be humans, “aliens, zombies, mutants, and gods” and can “transform over the course of a game from humans into other creatures or vice versa.”\textsuperscript{155} For “serious physical harm,” some games depict injuries “that would be fatal to a normal human being,” but will not affect a character “due to super powers” while some characters “may appear to die but come back to life.”\textsuperscript{156}

An example of Illinois’s statute possibly applying to a video game not considered “violent” is with New Super Mario Bros., a game rated by the ESRB as “E” for “Everyone.”\textsuperscript{157} In the game, two players can play against each other as Mario and Luigi, two human plumbers, in a multiplayer mode where “you can hit your opponent with fireballs, jump on his head, and so on.”\textsuperscript{158} A law enforcement official enforcing the statute could construe the above definition of “violent video game” as including New Super Mario Bros. as it includes human-on-human violence that may be a realistic depiction of the player causing serious physical harm to another human when Mario jumps on Luigi’s head. However, since the game’s release, there have not been any controversies over the game’s violence even though the game has sold over ten million copies as of June 2007.\textsuperscript{159}

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

\textsuperscript{154} Entm’t Software Ass’n v. Blagojevich, 404 F. Supp. 2d 1051, 1077 (N.D. Ill. 2005).
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Nintendo.com, New Super Mario Bros., http://mario.nintendo.com/ (last visited Nov. 15, 2007). “Titles rated E (Everyone) have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.” ESRB: Ratings Guide, supra note 141.
This possible result makes vague statutes regulating the sales of violent video games to minors unconstitutional. However, states may be able to avoid problems of vagueness if they word their statutes very specifically. California passed a statute that originally survived a vagueness claim in a motion for a preliminary injunction, but the court later found in a summary judgment motion that some terms were “broad and not sufficiently narrow.”

III. SELF-REGULATION AS THE ONLY ACCEPTABLE SOLUTION

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

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

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

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

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

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

168 See supra Part II.B.3.
170 See supra Part I.D.
171 See supra Part II.B.3; see also Entertainment Software Association, supra note 169; Jenkins, supra note 169.
172 Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001).
175 Id.
The Eastern District Court of Michigan suggested that instead of regulation, the states could support advertising campaigns that inform parents about the ESRB rating system. The Entertainment Software Association (“ESA”) also has pointed out in at least one case that video game systems have parental controls that parents can use to determine which games their children play.

B. Effect on Other Media

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

C. The Efficacy of the ESRB

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

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177 Foti, 451 F. Supp. 2d at 833.
178 See generally FTC REPORT, supra note 35.
The ESRB’s rating system has consistently improved every year since the FTC started conducting studies on violent media in the wake of Columbine. \(^{180}\) According to the latest FTC study, “[n]early nine in ten parents (87%) and 75% of children said they are aware that the game rating system exists (compared to 61% of parents and 73% of children reported in 2000).”\(^{181}\) In addition, “[o]f parents familiar with the ESRB system, nearly three quarters (73%) use the video game’s rating most or all of the time when their child wants to buy, rent, or play a game for the first time. This result contrasts with the 2000 survey, in which that figure was only 39%.”\(^{182}\) The ESRB also recently took steps to improve its ratings system further by hiring full-time content raters rather than part-time raters.\(^{183}\)

An ESRB rating can also affect the conduct of the video game retailers and the video game system manufacturers. A video game receiving an ESRB rating of “AO” for “Adult’s Only” can have a strong impact. On June 19, 2007, the ESRB gave Rockstar Games’ newest title, Manhunt 2, an AO rating.\(^{184}\) Rockstar Games intended to release the game on the Sony PlayStation, the Sony PSP, and the Nintendo Wii on July 10, 2007.\(^{185}\) As they do with any AO rated game, video game retailers refused to stock the game when Rockstar Games released it.\(^{186}\) Sony, the manufacturer of the PlayStation 2 and the PSP,\(^{187}\) and Nintendo, the manufacturer of the Wii,\(^{188}\) also both refused to publish the game due to their policy not to publish AO rated games, thereby making it impossible for Rockstar Games to release the game.\(^{189}\) Rockstar Games had no

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\(^{180}\) FTC REPORT, supra note 35, at 27.

\(^{181}\) Id.

\(^{182}\) Id. (citation omitted).


\(^{185}\) Id.

\(^{186}\) Id.

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


\(^{189}\) Chris Remo, Publication of AO-Rated Manhunt 2 Disallowed by Sony, Nintendo, SHACKNEWS, June 20, 2007, http://www.shacknews.com/onearticle.x/47525. It is
choice but to put the game’s release on hold.\textsuperscript{190} On August 24, 2007, more than a month after Manhunt 2’s initial release date, Rockstar Games announced that it had modified the game and the ESRB gave the modified version an M rating.\textsuperscript{191} The effect on Manhunt 2’s release date and its content because of the ESRB’s AO rating is a solid example of how the video game industry is able to regulate itself without the interference of the states.

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

CONCLUSION

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

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


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

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

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

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

195 See supra Part I.C.
197 Id.
198 See id.
199 See supra Part II.B.2.
200 See supra Part III.
The exceptions to the First Amendment proffered by the states that video games should fall under such as obscenity, content harmful to minors, and incitement do not apply to violent video games. There is no need for these laws and passing them only ends up costing taxpayers money after the courts invalidate them. District Judge Brady of the Middle District Court of Louisiana admonished the Louisiana legislature for its violent video game legislation in stating:

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

See supra Part II.A.
See supra Part II.B.
Chris Faylor, Louisiana Pays ESA $91K for Illegal Game Law, SHACKNEWS.COM, Apr. 18, 2007, http://www.shacknews.com/onearticle.x/46603/ (reporting how Louisiana had to pay the ESA attorney’s fees in excess of $90,000).
Entm’t Software Ass’n v. Foti, No. 06-431-JJB-CN, slip op. at 14 (M.D. La. Apr. 10, 2007).
Self-regulation is the only acceptable solution to concerns about children playing violent video games. The Federal government in 1994 wanted the game industry to self-regulate and that is exactly what the video game industry has been doing with the ESRB.\textsuperscript{205} The FTC has consistently found that the ESRB has improved its ratings system and awareness ever since it first started investigating it.\textsuperscript{206} If a video game developer develops a game that the ESRB considers too violent, the video game retailers and the video game manufacturers will also take actions that will make sure the game does not even make it to publication.\textsuperscript{207} There is no evidence that the ESRB has failed as a ratings system in such a way that the government needs to step in and take over.

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

\textsuperscript{205} See supra Part I.B.

\textsuperscript{206} See supra Part II.C.

\textsuperscript{207} See supra Part II.C.