

Comment

The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?

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“Common sense is sometimes [just] another word for prejudice”¹

I. INTRODUCTION

Picking up prostitutes, joining street gangs, killing police officers, and assassinating President Kennedy.² According to Illinois Governor Rod R. Blagojevich, those are just a few of the crimes today’s video games teach children, in a uniquely effective manner.³ By placing the player in the role of participant, rather than spectator, violent video games allow children to engage in “realistic depictions” of mutilation, rape, theft, drug use, and, most significantly, murder.⁴ To some

* J.D., Loyola University Chicago, expected January 2007. To my father, Joseph Mockus, whose strength of character, enduring love and tireless hard work made my legal studies possible. I hope to reflect in my work a small fraction of the integrity and purpose unfailingly demonstrated in his.

1. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001).

2. Rod R. Blagojevich, Governor, State of the State Address (Feb. 3, 2005), in *Ill. H.R. Jour.*, 2005 Reg. Sess. No. 9, Feb. 3, 2005, at 18, [hereinafter *IL State of the State*] (proposing ban on “video games that teach them [children] to do the very things we put people in jail for—pick up prostitutes, join street gangs, kill police officers, even assassinate President Kennedy”). References to “assassinating President Kennedy” refer to “JFK Reloaded,” a Scottish-produced game that recreates the assassination, and in which the player electronically replicates firing shots from the Texas School Book Depository window, and is awarded points based on accuracy. *JFK Shooting Game Provokes Anger*, BBC NEWS, available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/scotland/4031571.stm (last updated Nov. 22, 2004) (describing the game’s release on the forty-first anniversary of the assassination).

3. *IL State of the State*, *supra* note 2, at 18. Rod R. Blagojevich, Democrat, was sworn in as Governor of the State of Illinois on January 13, 2003. *Governor’s Bio*, available at <http://www.illinois.gov/gov/bio.cfm>.

4. Press Release, Office of the Governor, Gov. Blagojevich Signs Law Making Illinois the

observers, violent video games have become the equivalent of a killing simulator, using technology akin to that used to teach productive skills like driving.⁵

The tremendous impact of video gaming upon children and youth culture is undeniable, with Americans spending \$7.3 billion on video games during 2004,⁶ and statistics indicating the average American child spends nine hours a week playing video games.⁷ Of growing concern to some parents and legislators is that most video games, particularly those aimed at teen audiences, are violent in nature,⁸ with the most popular, highest-selling games being those rated “Mature.”⁹

On July 25, 2005, Governor Blagojevich signed the Safe Games Illinois Act (SGIA) into law.¹⁰ The new law was promoted as making Illinois “the only state in the nation to ban the sale and rental of violent and sexually explicit video games to children.”¹¹ Following Illinois’

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/ShowPressRelease.cfm?SubjectID=3&RecNum=4170> [hereinafter Gov. Blagojevich Signature Announcement] (stating that when playing a violent video game, the child is “the one who takes crack cocaine . . . the one who engages in simulated sex . . . cuts someone’s head off and makes blood spurt from the neck . . . is the killer who laughs at the victim and makes crude sexual comments after being with a prostitute”).

5. E.g., Chris Fusco, *Boy, 15, Has no Trouble Buying M-rated Video Games*, CHI. SUN-TIMES, Jan. 3, 2005, at 12 (quoting Crime Commission Executive Director Jerry Eisner who stated that “[w]hen we teach kids to drive, we use a driving simulator,” and similarly that a video game can become a “killing simulator”). See Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case for First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 141 (2004) (describing some violent video games as “murder simulators”).

6. *Top 10 Industry Facts*, ELECTRONIC SOFTWARE ASSOCIATION, available at http://www.theesa.com/facts/top_10_facts.php (last visited Mar. 24, 2006) (noting U.S. sales of computer and video game software grew by four percent in 2004).

7. David Walsh et. al., *Ninth Annual Mediawise Video Game Report Card*, NATIONAL INSTITUTE OF MEDIA AND THE FAMILY, Nov. 23, 2004, at 8 (citing the average time for video-game playing for all American school-age children is nine hours per week, with significant sex differences). Girls average five hours per week, while boys average thirteen hours per week. *Id.*

8. Kevin Haninger & Kimberly M. Thompson, *Content and Ratings of Teen-Rated Video Games*, 291 JAMA 856, 856 (Feb. 18, 2004) (noting that violence is included in ninety-four percent of all video games rated for teens).

9. *Video Game Sales—M-Rated Games, Top Sellers*, SAFEGAMESILLINOIS.ORG, http://www.safegamesillinois.org/game_stats.php (last visited Mar. 24, 2006) (noting that in October 2004, the violent video game “Grand Theft Auto: San Andreas” sold more copies in America than any other video game). See also *infra* note 56 (describing “M=Mature” video game rating).

10. Safe Games Illinois (Violent/Sexually Explicit Video Games) Act, Pub. Act. No. 94-315, 2005 Ill. Leg. Serv. 2147 (West) (codified at 720 ILL. COMP. STAT. 5/11-21), 720 ILL. COMP. STAT. 5 [hereinafter SGIA]. See also Gov. Blagojevich Signature Announcement, *supra* note 4 (announcing signature of new law).

11. See Gov. Blagojevich Signature Announcement, *supra* note 4 (describing the new law as “landmark” legislation, resulting from more than eight months of effort by Gov. Blagojevich,

move, Michigan¹² and California¹³ passed equivalent laws and numerous other states have similar measures under consideration.¹⁴

What the celebratory press releases and legislative enthusiasm do not reveal, however, is that federal courts previously struck down three similar laws as violative of the Constitution's First Amendment guarantee of free speech,¹⁵ demonstrating that although popular politically and often described as examples of common sense lawmaking, the new statutes are problematic from a constitutional perspective.¹⁶ On the very day the Governor signed the SGIA into law, industry groups filed suit against the new law,¹⁷ and soon after a federal

including creation of a website and the Safe Games Illinois Task Force).

12. Press Release, Office of the Governor, Gov. Granholm Signs New Laws to Protect Children from Violent, and Sexually-Explicit Video Games (Sept. 12, 2005), *available at* http://www.michigan.gov/gov/0,1607,7-168-23442_21974-126002—M_2005_9,00.html (describing Michigan Governor Jennifer Granholm's signature of legislation making illegal the sale or rental of mature or adult-rated video games to children age seventeen or younger).

13. Press Release, Office of the Governor, Gov. Schwarzenegger Takes Steps to Protect Children (Oct. 7, 2005), *available at* http://www.governor.ca.gov/state/govsite/gov_homepage.jsp (follow "Press Room" hyperlink; then follow "Press Releases" hyperlink; then follow "October 2005" hyperlink). *See also* John M. Broder, *Bill is Signed to Restrict Video Games in California*, N.Y. TIMES, Oct. 8, 2005, at A8 (describing California Governor Arnold Schwarzenegger's signature of legislation making it illegal to sell or rent to minors under age eighteen any video games which "depict serious injury to human beings in a manner that is especially heinous, atrocious or cruel").

14. Christopher Conkey, *Courts Lift Curbs on Kids Buying Violent Games*, WALL ST. J., Dec. 17, 2005, at A1 (stating "[a]bout half of the 50 states are considering proposals that would restrict sales of violent games to minors or levy fines on businesses that sell the games to children").

15. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001) (holding unconstitutional an Indianapolis, Indiana ordinance limiting access of minors to violent video games); Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir.), *reh'g en banc denied*, No. 02-3010, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003) (holding unconstitutional St. Louis County, Missouri ordinance making unlawful the sale or rental of violent video games to minors); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (holding unconstitutional Washington state law penalizing distribution of video games which depict acts of violence against law enforcement officers). *See also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

16. *See* Press Release, Office of the Governor, 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), at 3, *available at* http://www.safegamesillinois.org/media/releases/12_16_2004_release.pdf [hereinafter Blagojevich Proposal Release] ("There's a reason why we don't let kids smoke or drink alcohol or drive a car until they reach a certain age and level of maturity. That's just common sense. And that same common sense should be applied to excessively violent and sexually explicit video games."). *But see supra* note 15 (listing federal court decisions striking down laws that attempted to restrict the distribution of video games).

17. *See* Press Release, Illinois Retail Merchants Ass'n, IRMA, Others File Suit to Stop Video Game Law (July 25, 2005), *available at* <http://www.irma.org/news/contentview.asp?c=27394> (announcing plans for the retail merchants and two video game industry associations to file suit against the SGIA).

judge issued a permanent injunction preventing the planned implementation of the SGIA, holding it violative of the First Amendment.¹⁸ Likewise, federal judges granted preliminary injunctions against similar laws in Michigan¹⁹ and California.²⁰

Nevertheless, these judicial defeats have not dampened legislative enthusiasm for the introduction of new, and notably similar, statutory proposals.²¹ Within two weeks of the Illinois law being struck down, Congress introduced legislation closely replicating the SGIA.²² Like the bills previously passed by state legislatures, the newly-introduced Federal Family Entertainment Protection Act prohibits the sale or rental of violent video games to minors seventeen years and younger.²³

This Comment examines whether statutory curbs on the availability of violent video games to minors can survive constitutional challenge, focusing primarily upon the Illinois SGIA.²⁴ First, Part II will describe the background leading to the passage of the SGIA, including the status of scientific inquiry into the potential impacts of violent video games upon children, past jurisprudence finding similar legislation unconstitutional, and historical efforts to curb youth culture.²⁵ Part III

18. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005). *See also infra* Part III.B (discussing details of the permanent injunction). Governor Blagojevich immediately vowed to appeal. *See infra* note 28 (noting the Governor's pledge to appeal the federal court ruling). The state's appeal was timely filed with the Seventh Circuit Court of Appeals. Notice of Appeal, No. 05-C-4265 (Jan. 3, 2006). On February 15, 2006, the Seventh Circuit Court of Appeals consolidated the docket and established a briefing schedule. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *appeal docketed*, No. 06-1012 (7th Cir. Feb. 15, 2006).

19. *Entm't Software Ass'n v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 2005).

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

21. *See infra* notes 22–23 (discussing introduction of federal legislation).

22. Press Release, Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children from Inappropriate Video Games (Dec. 16, 2005), at 1, *available at* <http://clinton.senate.gov/news/statements/details.cfm?id=249860&&> [hereinafter *Federal Bill Announcement*] (announcing the December 16, 2005 introduction of legislation, sponsored by Senators Hillary Clinton (D-New York), Joe Lieberman (D-Connecticut), and Evan Bayh (D-Indiana), providing fines for retailers who sell or rent inappropriate video games to minors).

23. *Id.* at 2 (including fines of \$1,000 for the first offense, and \$5,000 for each subsequent offense). The December 16, 2005 press release announcing introduction of federal legislation notes the passage by Illinois, Michigan and California of similar laws, but does not mention that the Illinois and Michigan laws had been found unconstitutional by federal judges in previous weeks. *Id.* (stating "Illinois, Michigan, and California have all passed state laws to prohibit the sale of violent video games to minors").

24. *See infra* Part V (discussing the possibility of the SGIA surviving constitutional challenge in federal court).

25. *See infra* Part II (reviewing past legislation, scientific studies, and jurisprudence of previous legislation restricting minors' access to video games).

will discuss in more detail the legislative history and provisions of the SGIA, and the federal district court case holding it unconstitutional.²⁶

Next, Part IV will analyze the federal district court's appropriate adherence to precedent and the SGIA as an example of politically-irresistible legislation, despite its well-recognized constitutional problems.²⁷ Part V predicts that, despite the Governor's plan to aggressively defend the Act's constitutionality on appeal,²⁸ the Seventh Circuit Court of Appeals will uphold the district court's injunction against the SGIA.²⁹ In conclusion, Part V will suggest a blueprint for more narrowly tailored future legislation, which may better withstand judicial scrutiny.³⁰

II. BACKGROUND

This Part provides a review of the background culminating in passage of the SGIA, and the cultural, scientific and judicial developments preceding it.³¹ First, this Part reviews the video gaming phenomenon in the United States, with particular emphasis on the manner in which the gaming industry rates its products.³² Next, it discusses the status of scientific inquiry both supporting and disputing a link between video games and violent behavior.³³ Third, it briefly summarizes First Amendment jurisprudence and the three primary federal cases regarding previous legislative efforts to curb minors' access to violent video games, which are likely to influence the outcome of the current litigation regarding the constitutionality of the SGIA and similar laws.³⁴ Finally, this Part reviews historical efforts to squelch supposedly

26. *See infra* Part III (detailing the legislative history of the SGIA, the provisions of the Act, and the district court's injunction).

27. *See infra* Part IV (discussing the ways the SGIA reflects historical patterns).

28. Press Release, Office of the Governor, Governor Blagojevich Reiterates Need for Common Sense Restrictions on Violent and Sexually Explicit Video Games; Vows to Appeal Federal Court Enjoining Illinois Law (Dec. 2, 2005), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=38&RecNum=4520> [hereinafter Blagojevich Appeal Announcement] (announcing Illinois Governor Rod Blagojevich's plans to appeal the federal court's injunction, and stating "the battle is not over").

29. *See infra* Part V (predicting the Seventh Circuit will affirm the injunction).

30. *See infra* Part V (suggesting, in light of guidance offered by federal courts in their previous decisions, ways in which legislatures might more effectively craft statutory curbs on minors' access to violent video games).

31. *See infra* Part II (providing the backdrop to the passage of the SGIA).

32. *See infra* Part II.A (describing the video game industry's history).

33. *See infra* Part II.B (reviewing the scientific data related to the possible connection between violence and video game usage).

34. *See infra* Part II.C (summarizing past jurisprudence regarding video game restrictions).

harmful youth culture.³⁵

A. The Video Gaming Industry and ESRB Ratings System

The first commercially released video game, Pong, was a simple and by today's standards almost-unimaginably quaint on-screen version of table tennis.³⁶ Since that time, the video-gaming industry has grown into a multi-billion dollar segment of the entertainment business.³⁷ In the decades since baby-boomers wielded Pong's rudimentary on-screen paddles or chomped aliens with Pac-Man's simple but voracious mouth,³⁸ the state of the video game art has made astounding strides, and now features motion-picture quality graphics and effects so compelling that ninety-two percent of children and adolescents ages two to seventeen play them.³⁹ The widespread success of video games has resulted in the industry enjoying extraordinary market penetration among youth.⁴⁰ Americans now spend more money on video games each year than on going to movies and more time at home playing video games than watching rented videos.⁴¹ Video games, in fact, have been used as the basis of major feature films.⁴²

Since the earliest days of television, people have expressed concern over the potential effects of violent programming on children.⁴³ The

35. See *infra* Part II.D (discussing comic bans of the mid-twentieth century).

36. See THE HENRY K. KAISER FAMILY FOUNDATION, *Key Facts: Children and Video Games* (Fall 2002), at 1, available at <http://www.kff.org/entmedia/3271-index.cfm> (noting the introduction of the first video game in 1972). See also PONG-Story, <http://www.pong-story.com/intro.htm> (last visited Mar. 24, 2006) (providing a brief history of Pong as well as the development of the first video games).

37. See *supra* note 6 (describing sales figures for video games for 2004).

38. See Eric Gwinn, *A Wave of Nostalgia Games*, CHI. TRIB., Dec. 6, 2005, Section 5 at 7 (describing the 1970's and 1980's as the "Stone Age of gaming"). See also Malcolm Gladwell, *Brain Candy*, THE NEW YORKER, May 16, 2005, at 88 (describing early video games like Pac-Man as "simple exercises in motor coordination and pattern recognition").

39. David Walsh et. al., *Sixth Annual Video and Computer Game Report Card*, NATIONAL INSTITUTE OF MEDIA AND THE FAMILY, Dec. 13, 2001, at 2, available at http://www.mediaandthefamily.org/research/report_vgrc_2001.pdf.

40. JUSTINE CASSELL & HENRY JENKINS, *Chess for Girls? Feminism and Computer Games*, in FROM BARBIE TO MORTAL KOMBAT: GENDER AND COMPUTER GAMES 2, 14 (Justine Cassell & Henry Jenkins eds., 1998) (stating that video games have achieved "almost total market penetration," especially among boys).

41. JOHN C. BECK & MITCHELL WADE, GOT GAME: HOW THE GAMER GENERATION IS RESHAPING BUSINESS FOREVER 3 (Harvard Business School Press 2004) (citing annual worldwide sales of video games at \$28 billion).

42. *Video Game Movies or Movie Video Games*, ABOUT.COM, available at <http://actionadventure.about.com/od/videogames1/> (last visited Mar. 24, 2006) (identifying successful video games later made into feature films, including "Resident Evil" and "Tomb Raider").

43. Notice of Inquiry, *In The Matter of Violent Television Programming and Its Impact on*

depth of this concern was demonstrated by the 1998 introduction of federal rules requiring the installation of V-Chip technology in all new televisions of thirteen inches or greater manufactured after January 1, 2000.⁴⁴ The V-Chip permits individuals to block the display of television programming based upon its rating, as established by the “TV Parental Guidelines,” a ratings system created and maintained by the National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America.⁴⁵

Evidence indicates that V-Chip usage rates are extremely low.⁴⁶ A study conducted by the Annenberg Public Policy Center indicated that seventy percent of families with small children who owned V-Chip-equipped televisions did *not* use them, citing lack of understanding of the ratings system or the technology, difficulty of programming, and a general feeling that they do not need the V-Chip to supervise their children’s viewing.⁴⁷

As with television programming, similar concerns exist regarding violence in video games.⁴⁸ In response to those concerns, the video game industry created a rating system designed to help facilitate choices by consumers.⁴⁹ The Federal Trade Commission describes this as a self-regulatory program,⁵⁰ developed and maintained by the industry itself, through the independent, non-profit Electronic Software Ratings

Children, Fed. Commc’ns Comm’n, MB Docket No. 04-261, FCC 04-175 (released July 28, 2004), at 1 [hereinafter FCC Notice of Inquiry] (noting “violent television programming content has been a matter of private and governmental concern and discussion from at least the early 1950’s”).

44. General Action, *Commission Finds Industry Video Programming Rating System Unacceptable; Adopts Technical Requirements to Enable Blocking of Video Programming (The “V-Chip”)*, Fed. Commc’ns Comm’n, CS Docket No. 97-55, CS Docket No. 97-321, ET Docket 97-206 (released March 12, 1998), at 1 (announcing Commission’s adoption of V-Chip regulations).

45. *V-Chip: Viewing Television Responsibly*, FED. COMMC’NS COMM’N, available at <http://www.fcc.gov/vchip> (describing how the V-Chip reads information encoded in the rated program and blocks programs based upon the rating selected by the parent.).

46. See *infra* note 47 (noting independent research regarding V-Chip usage levels).

47. Amy Jordan & Emory Woodward, *Parents’ Use of the V-Chip to Supervise Children’s Television Use*, THE ANNENBERG PUBLIC POLICY CENTER, available at http://annenbergpublicpolicycenter.org/05_media_developing_child/childrensprogramming/2003_Parentsuseofvchip.pdf (summarizing results of study conducted 1999–2001).

48. See *supra* notes 10–14 and accompanying text (describing nationwide legislative efforts to restrict minors’ access to video games).

49. *ESRB Game Ratings: Game Rating & Descriptor Guide*, ENTERTAINMENT SOFTWARE RATINGS BOARD, available at http://www.esrb.org/esrbratings_guide.asp (last visited Mar. 24, 2006) [hereinafter Game Rating Guide] (describing the goal and details of the rating system).

50. Fed. Trade Comm’n, *Marketing Violent Entertainment to Children: A Fourth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, July 2004, at 20 [hereinafter FTC Report].

Board (ESRB).⁵¹

The ESRB ratings system uses seven categories for rating video games: EC (Early Childhood),⁵² E (Everyone),⁵³ E10+ (Everyone 10+),⁵⁴ T (Teen),⁵⁵ M (Mature),⁵⁶ AO (Adults Only),⁵⁷ and RP (Rating Pending).⁵⁸ These rating symbols appear on the front of the video game box.⁵⁹ In addition, the ESRB system features “content descriptors,” which appear on the back of the box and alert consumers to particular content.⁶⁰ Some content descriptors include “animated blood,”⁶¹ “blood,”⁶² “blood and gore,”⁶³ “cartoon violence,”⁶⁴ “fantasy violence,”⁶⁵ “mild violence,”⁶⁶ “violence,”⁶⁷ “intense violence,”⁶⁸ and

51. See Game Rating Guide, *supra* note 49 (noting the ratings are maintained by ESRB). The ESRB is an association of publishers of video games and interactive entertainment, with its membership accounting for ninety percent of the entertainment software sold in the U.S. *About the Entertainment Software Association*, ENTERTAINMENT SOFTWARE ASSOCIATION, available at <http://www.theesa.com/about/index.php> (last visited Mar. 24, 2006).

52. See Game Ratings Guide, *supra* note 49 (“Titles rated EC-Early Childhood have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.”).

53. *Id.* (“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.”).

54. *Id.* (“Titles rated E10+ (Everyone 10 and older) have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.”).

55. *Id.* (“Titles rated T (Teen) have content that may be suitable for ages 13 and older. Titles in this category may contain suggestive themes, crude humor, minimal blood, and infrequent use of strong language.”).

56. *Id.* (“Titles rated M (Mature) have content that may be suitable for persons aged 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content, and/or strong language.”).

57. *Id.* (“Titles rated AO (Adults Only) have content that should only be played by persons 18 years and older. Titles may include prolonged scenes of intense violence, graphic sexual content and nudity.”).

58. *Id.* (“Titles rated RP (Rating Pending) have been submitted to the ESRB and are awaiting final rating.”).

59. *Id.* (“To take full advantage of the ESRB rating system, it’s important to check both the rating symbol (on the front of the box) and the content descriptors (on the back of the box).”).

60. *Id.* (describing content descriptors, which provide additional information).

61. *Id.* (“discolored and/or unrealistic depictions of blood”).

62. *Id.* (“depictions of blood”).

63. *Id.* (“depictions of blood or the mutilation of body parts”).

64. *Id.* (“violent actions involving cartoon-like situations and characters. May include violence where a character is unharmed after the action has been inflicted”).

65. *Id.* (“violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from reality”).

66. *Id.* (“mild scenes depicting characters in unsafe and/or violent situations”).

67. *Id.* (“scenes involving aggressive conflict”).

68. *Id.* (“graphic and realistic-looking depictions of physical conflict. May involve extreme

“sexual violence.”⁶⁹

Assessments of the effectiveness of the ESRB’s rating program are mixed.⁷⁰ In its most recent review of the program, the Federal Trade Commission, while providing suggested improvements such as moving the content descriptors from the back to the front of the video game box, gave the industry’s ratings disclosures a positive overall assessment.⁷¹ However, the FTC reported results from its 2003 “mystery shop” program that sixty-nine percent of unaccompanied children aged thirteen to sixteen years old were able to purchase video games rated M-Mature.⁷² This finding represented a modest improvement from the FTC’s previous nationwide undercover surveys in 2000⁷³ and 2001.⁷⁴ In addition, the FTC noted additional data from other studies, indicating that seventy-five percent of boys under seventeen reported they have played games from the notoriously violent “Grand Theft Auto” series.⁷⁵

In a series of moves echoing that of the television V-Chip, three major video game manufacturers announced in late 2005 that the next generation of video game consoles will include parental controls, which will allow parents to restrict a child’s access to games based upon their ESRB ratings.⁷⁶ The technology, according to the industry’s trade association, is similar to the V-Chip used in televisions and is a useful tool for parents interested in controlling their children’s exposure to violent video games.⁷⁷ Likewise reflecting a desire to self-regulate

and/or realistic blood, gore, weaponry, and/or depictions of human injury and death.”).

69. *Id.* (“depictions of rape or other sexual acts”).

70. *See infra* notes 71–75 (describing FTC findings on the effectiveness of ESRB ratings).

71. *See* FTC Report, *supra* note 50, at iii (noting “the game industry’s rating disclosure requirements go far to ensure that parents have access to rating information when considering product purchases”).

72. *Id.* at 26 and Appendix B (describing the FTC’s 2003 “mystery shop” program in which the Commission, through a contractor, recruited thirteen to sixteen-year olds in thirty-nine states to attempt to purchase M-Mature rated video games).

73. *Id.* at 26 (noting that the 2000 survey found eighty-five percent of children between thirteen to sixteen years old were able to purchase M-Mature rated video games).

74. *Id.* (noting that the 2001 survey found seventy-eight percent of children between thirteen to sixteen years old were able to purchase M-Mature rated video games).

75. *Id.* at 27 (quoting results of a 2003 Gallup poll, with statistics showing that respondents age thirteen to fifteen more likely than those age sixteen to seventeen to have played these games). The “Grand Theft Auto” series is among the games often noted for its violent content. *See supra* note 9 (discussing “Grand Theft Auto”).

76. Press Release, Entm’t Software Ass’n, All New Video Game Consoles to Include Parental Controls (Nov. 28, 2005), *available* at http://www.theesa.com/archives/2005/11/all_new_video_g.php (noting announcements by Microsoft, Nintendo and Sony). Unlike the V-Chip, industry rather than government regulators led these moves. *Id.*

77. *Id.* (noting that the video game console makers have “voluntarily stepped up to take

rather than face more intensive government regulatory oversight, the nation's largest cable television companies announced in late 2005 plans to introduce family-friendly channel packages.⁷⁸ Similarly, wireless telecommunications carriers announced guidelines designed to limit children's access to adult content and services.⁷⁹

B. Scientific Inquiry into the Effects of Video Game Violence

The essence of the debate regarding video game violence is whether exposure to such violence during childhood may result in deleterious effects, particularly violent behavior.⁸⁰ Research investigating this hypothesis has fallen into three general categories: field studies,⁸¹ cross-sectional studies,⁸² and longitudinal studies.⁸³

In assessing the results of these studies, the Federal Communications Commission and other bodies have noted the lack of consensus concerning the focus, rigor and number of available studies.⁸⁴ However, the most vigorous aspect of the debate is whether the studies indicate a *correlation* between video game violence and violent behavior, or whether those studies can in fact be used as evidence of *causation*.⁸⁵ The difference between the two is critical and central to the debate regarding the constitutionality of laws restricting minors' access to violent video games.⁸⁶

concrete steps to put the power to regulate the games kids play where it belongs—in the hands of parents, not government, retailers or anyone else”).

78. Ken Belson & Geraldine Fabrikant, *Cable Relents on Channels for Family*, N.Y. TIMES, Dec. 13, 2005, at C1 (noting that cable companies are “yielding to pressure from regulators, lawmakers and interest groups”).

79. *Wireless Carriers Take Aim at Adult Content*, HIGHTECHMAGAZINE.COM, Nov. 9, 2005, available at <http://hightechmagazine.com/managearticle.asp?C=100&A=8363> (reporting that wireless carriers will require parental permission before providing sexually explicit or gambling-related content to phones used by children under eighteen).

80. See FCC Notice of Inquiry, *supra* note 43, at 3 (noting that deleterious effects on children are at the core of concern about media violence).

81. *Id.* (describing field studies as those in which subjects are shown video programming, then the subjects' short-term post-viewing behavior is monitored).

82. *Id.* (defining cross-sectional studies as those which conduct surveys of subjects, at a single point in time, regarding their viewing behavior and overall conduct).

83. *Id.* (describing longitudinal studies as those which survey the same subjects over many years to determine the effects of exposure to video programming).

84. *Id.* at 5 (noting widespread dispute regarding “not just the nature and quality, but even the amount, of scholarship,” and comparing various sources which state the total number of studies of violence in the media as ranging between 200 and 3,500).

85. *Id.* at 4 (quoting the Fed. Trade Comm'n, *Marketing Violent Entertainment to Children* [2002], noting “A majority of the investigation into the impact of media violence on children find that there is a high correlation between exposure to media violence and aggressive and at times violent behavior. . . . Regarding causation, however, the studies appear to be less conclusive.”).

86. See *infra* Parts II.B.1 and II.B.2 (describing lack of consensus regarding correlation versus

1. Studies/Authorities Acknowledging No Proof of Causation

Numerous authorities, including the United States Surgeon General, the Federal Trade Commission, and the Federal Communications Commission, have noted the lack of consensus within the scientific community regarding a causal relationship between violent programming and violent behavior.⁸⁷ Researchers, including those who frequently advocate in support of legislation restricting access to video games, such as Dr. Craig Anderson, likewise acknowledge the difficulty in establishing a causal link.⁸⁸

For instance, a 2005 review of the existing studies, designed to explore themes in recent work and recommend directions for future research, was presented to the American Psychological Association (APA).⁸⁹ After reviewing more than a dozen recent studies, the authors concluded that no clear consensus exists regarding any potential harm to children resulting from violent video game play.⁹⁰ Likewise, other

causation).

87. See, e.g., U.S. Surgeon Gen., *Youth Violence: Report of the Surgeon General*, App. 4-B, at 1 (2001).

Current psychological theory suggest that the interactive nature of many of these new media may affect children's behavior more powerfully than passive media such as television. Research to test this assumption is not yet well developed, and accurate measurement is needed to determine how much violence children are actually exposed to through various media—and how patterns of exposure vary among American youths.

Id. See also Fed. Trade Comm'n, *Marketing Violent Entertainment to Children*, Executive Summary, at I (2000).

Scholars and observers generally have agreed that exposure to media violence alone in entertainment media does not cause a child to commit a violent act and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes and violence. Nonetheless, there is widespread agreement that it is a cause for concern.

Id. See also FCC Notice of Inquiry, *supra* note 43, at 5 (noting “widely different” assessments of the quality and quantity of research).

88. Clay Calvert & Robert D. Richards, *The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric*, 11 VILL. SPORT & ENT. L.J. 203, 222 (2004) (quoting Barbara F. Meltz, *Child-Caring: Legislation Would Target Violence in Video Games*, BOSTON GLOBE, May 22, 2003, at H1, H8) (describing Dr. Craig Anderson as “the nation’s pre-eminent researcher on the effect of exposure to violent video games”). Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings and Behavior in the Laboratory and in Life*, 78 J. OF PERSONALITY & SOC. PSYCHOL. 772 (2000) [hereinafter Anderson & Dill Article] (stating “the research to date on video game effects is sparse and weak in a number of ways”).

89. Jessica M. Nicoll & Kevin M. Kieffler, *Violence in Video Games: A Review of the Empirical Literature*, Paper Presented at the Annual Meeting of the American Psychological Association (August 19, 2005) (on file with Loyola University Chicago Law Journal).

90. *Id.* at 4.

[N]o clear consensus has arisen as to whether violent video game content is harmful to

researchers have noted multiple problems with past studies.⁹¹

In response to this need, and addressing oft-cited concerns regarding the lack of longitudinal studies on the effects of video game violence,⁹² researchers at the University of Illinois announced publication in 2005 of the results of the first longitudinal study of a video game.⁹³ In it, the authors endeavored to address deficiencies cited in prior research, which had been criticized for being too short, unduly artificial, not representing the social context of game play, and overly reliant on very young test subjects.⁹⁴ The study, which focused upon a highly violent video game,⁹⁵ revealed no strong evidence of a link to aggressive tendencies or behaviors, suggesting a lack of a connection with real-world aggression.⁹⁶

2. Studies/Authorities Implying Causal Relationship

On August 17, 2005, the American Psychological Association (APA)

players or predictive of future aggressive behavior,” and “disparity in the present research literature and the absence of clear and compelling scientific evidence from the psychological community demonstrating harmful and lasting effects of violent video games on behavior has signaled the need for novel studies in this area

Id.

91. *E.g.*, *Effects of Media on Child Health: Hearing on H.R. 4023 Before the Ill. H.R. Judicial I Civil Law Comm.*, 94th Gen. Assemb. (Mar. 9, 2005) (statement of Dr. Michael Rich, Director, Center on Media and Child Health, Children’s Hospital Boston, Harvard Medical School) (on file with Loyola University Chicago Law Journal) [hereinafter Rich/Harvard Testimony] (stating that “research to date has been both limited and hampered by research designs that have lagged behind game technology”).

92. *See supra* note 83 (defining longitudinal study). *See, e.g.*, Dmitri Williams & Marko Skoric, *Internet Fantasy Violence: A Test of Aggression in an Online Game*, 72 COMM. MONOGRAPHS 217, 220 (2005) [hereinafter Williams & Skoric Study] (“longitudinal study is badly needed”) (quoting C. Anderson & B.J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Effect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 PSYCHOL. SCI. 353, 359 (2001)).

93. Press Release, University of Illinois at Urbana-Champaign, No Strong Link Seen Between Violent Video Games and Aggression (Aug. 9, 2005), at 1, *available at* <http://www.news.uiuc.edu/news/05/0809videogames.html> (announcing results from “the first long-term study of online videogame playing”). *See also* Williams & Skoric Study, *supra* note 92, at 218 (stating that “because the field has failed to demonstrate long-term causal links between game playing and aggression, we undertake the first longitudinal field study of a game.”)

94. Williams & Skoric Study, *supra* note 92, at 219–20 (discussing the authors’ attempts to address “two potentially major gaps to be bridged” regarding method and generalizability.)

95. *Id.* at 221 (describing the “combat and conflict” video game Asheron’s Call, the focus of the study, which the authors characterize as including “repetitive graphic violence,” with a sustained pattern in which “blood oozes and flies, and creatures writhe and scream when they are reduced to gory corpses.”).

96. *Id.* at 228–29 (stating the study revealed “no strong effects associated with aggression” and that the results support suggestions that “violent games do not necessarily lead to increased real-world aggression”).

adopted a resolution recommending that all violence be reduced in video games and interactive media marketed to children and youth and implying a causal relationship between violent video games and violent tendencies.⁹⁷ The resolution notes decades of studies revealing the impact of televised violence on the aggressive behavior of children and youth and references more than seventy articles, studies and media reports.⁹⁸

The language of the APA resolution does not directly assert that a causal relationship has been scientifically demonstrated; nevertheless, it strongly implies that one exists.⁹⁹ For instance, the resolution references published works, which it suggests demonstrate that exposure to violent interactive video games increases aggressive behavior, angry feelings and physiological arousal, and decreases helpful behavior.¹⁰⁰

One of the most prominent articles relied upon by the APA was authored by Craig A. Anderson and Karen E. Dill who reported on a pair of studies (one correlational and one experimental).¹⁰¹ The correlational study examined the relationship between long-term exposure to violent video games and several outcome variables¹⁰² by having 227 undergraduates complete questionnaires.¹⁰³ The questionnaires gathered information on the undergraduates' past video game play, including the level of violence of their favorite games and their self-reported behaviors such as irritability and delinquency.¹⁰⁴ The researchers concluded that violent video game play was positively related to aggressive behavior.¹⁰⁵

97. Am. Psych. Ass'n, *Resolution on Violence in Video Games and Interactive Media*, Aug. 17, 2005, available at <http://www.apa.org/releases/resolutiononvideoviolence.pdf> [hereinafter APA Resolution].

98. *Id.* at 1 (stating that "decades of social science reveals the strong influence of televised violence on the aggressive behavior of children and youth"). *Id.* at 2–5 (listing references, including various studies, reports and articles).

99. See *infra* note 100 (describing APA Resolution).

100. See APA Resolution, *supra* note 97, at 2 (noting "comprehensive analysis of violent interactive video game research suggests" such outcomes).

101. Anderson & Dill Article, *supra* note 88, at 772 (summarizing the outcome of two studies).

102. *Id.* at 776. The variables included aggressive behavior, delinquency, academic achievement and worldview. *Id.*

103. *Id.* at 777 (describing self-report questionnaires generally).

104. *Id.* (noting examples of questions designed to reveal irritability, such as "I easily fly off the handle with those who don't listen or understand" and "I don't think I'm a very tolerant person").

105. *Id.* at 782 (noting "the positive association between violent video games and aggressive personality is consistent with a developmental model in which extensive exposure to violent video games (and other violent media) contributes to the creation of an aggressive personality").

The experimental study examined the effects of violent video game play on aggressive thoughts, behaviors, and worldview by having 210 undergraduates play video games in laboratory settings, and then complete cognitive and behavioral measures designed to measure aggressive behavior.¹⁰⁶ The cognitive measure was a reading reaction time task, which calculates the speed with which a subject reads aloud aggressive words, such as “murder,” versus control words, such as “report.”¹⁰⁷ The behavioral measure was the Taylor Competitive Reaction Time Task, which places subjects in competition with one another to push a button faster than their opponent.¹⁰⁸ The loser of each round receives a “noise blast,” with aggressive behavior defined as the intensity and duration of the noise blasts the subject chooses to deliver to the opponent.¹⁰⁹ Consistent with their assessment of the results of the correlational study, the researchers concluded that the experimental study indicated that violent video game play was positively related to increases in aggressive behavior in experiment subjects.¹¹⁰

3. Brain Studies

The lack of clear evidence of causation and the essentially correlational nature of studies like that of the Anderson & Dill study are widely acknowledged, including by the researchers themselves.¹¹¹ Much attention, therefore, has been directed to recent studies, principally those conducted at the Indiana University School of Medicine, focused on the potential effects of violent video games on brain functionality.¹¹² The Center for Successful Parenting, a non-profit

106. *Id.* at 783–84 (describing study methodology). The games played were *Myst*, a non-violent video game, and *Wolfenstein 3D*, a violent video game in which players use a variety of weapons to fight Nazi guards, with the goal of killing Adolf Hitler. *Id.* at 784.

107. *Id.* at 784 (detailing reading reaction time task, which presents aggressive words, such as murder, with three types of control words; the control words for this study were of three types, including anxiety words (“humiliated”), escape words (“leave”), and control words (“consider”).

108. *Id.* (describing Taylor Competitive Reaction Time Task as a “widely used and externally valid measure of aggressive behavior”).

109. *Id.* (noting “aggressive behavior is operationally defined as the intensity and duration of noise blasts the participant chooses to deliver to the opponent”).

110. *Id.* at 787 (stating that in both studies, “violent video game play was positively related to increases in aggressive behavior”).

111. *Id.* at 772 (noting “what is needed is basic theory-guided research on the effects of playing violent video games”). “[T]he correlational nature of Study 1 means that causal statements are risky at best. It could be that the obtained video game violence links to aggressive and nonaggressive delinquency are wholly due to the fact that highly aggressive individuals are especially attracted to violent video games.” *Id.* at 782.

112. CTR. FOR SUCCESSFUL PARENTING, BRAIN STUDY: CAN VIOLENT MEDIA AFFECT REASONING AND LOGICAL THINKING?, available at <http://sosparents.org/Brain%20Study.htm> (stating that “Most data in the area has been subjective. This Indiana University School of

organization dedicated to reducing media violence, funds the Indiana University research.¹¹³

The Indiana University School of Medicine brain data includes two distinct sets of research.¹¹⁴ The first set, released in December 2002, remains unpublished and focuses upon the brain functionality of aggressive adolescents diagnosed with disruptive behavior disorder (DBD).¹¹⁵ The study determined that brain-based differences exist between DBD and nonaggressive adolescents.¹¹⁶ The study evaluated brain activation patterns in response to stimuli from a violent James Bond-themed game and from an exciting, but nonviolent game.¹¹⁷ However, among the nonaggressive (non-DBD) subjects, the researchers found differences in brain function dependent upon the amount of previous violent media exposure.¹¹⁸ These findings caused the researchers to theorize that differences in brain response may depend upon “past violent media exposure.”¹¹⁹

Medicine study is groundbreaking in that it seeks objective scientific data.”). *See also* Rich/Harvard Testimony, *supra* note 91 (mentioning research using functional magnetic resonance imaging (fMRI) to “examine the brain activations of children when exposed to violent compared to non-violent material,” being conducted at the Center on Media and Child Health, Children’s Hospital Boston, Harvard School of Public Health).

113. CTR. FOR SUCCESSFUL PARENTING, MISSION STATEMENT, *available at* <http://sosparents.org/Our%20Mission.htm> (detailing the organization’s mission against media violence, including enlisting experts, continuing clinical research, initiating economic research and activating a national awareness campaign).

114. *See infra* note 115 (describing brain studies).

115. Press Release, Ind. Univ. Sch. of Med., Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity (Dec. 2, 2002) (on file with Loyola University Chicago Law Journal) (announcing presentation of results by study authors at the 88th Scientific Assembly and Annual Meeting of the Radiological Society of North America on December 2, 2002). *See also* Press Release, Radiological Soc’y of N. Am., Violent Video Games Trigger Unusual Brain Activity in Aggressive Adolescents (Dec. 2, 2002), *available at* <http://www.ee.duke.edu/~jshorey/MRIHomepage/violent.html> [hereinafter RSNA Release] (announcing release of results by study authors at annual meeting). *See also* E-mail from Vincent P. Mathews, M.D., Department of Radiology, Ind. Univ. School of Med. (Sept. 15, 2005, 11:51 CST) (on file with Loyola University Chicago Law Journal) [hereinafter Dr. Mathews E-Mail] (stating that the results of the 2002 study have “not been published”). *See also infra* note 122 (describing the attributes of DBD adolescents).

116. RSNA Release, *supra* note 115, at 1 (quoting study co-author Vincent P. Mathews, M.D., professor of radiology and chief of neuroradiology at Indiana University School of Medicine, noting “adolescents with DBD have different brain structure and brain activation patterns than nonaggressive adolescents”).

117. *Id.* at 2 (describing the video games played by two sets of nineteen adolescents).

118. *Id.* (noting that nonaggressive adolescents with high violent media exposure had different brain activation patterns than nonaggressive youths with low violent media exposure).

119. *Id.* (quoting lead investigator Dr. Mathews, stating “there may actually be a difference in the way the brain responds depending on the amount of past violent media exposure through video games, movies and television”).

The 2002 preliminary findings led to the initiation of a second brain study building on the results of the earlier study.¹²⁰ In this instance, the results were published.¹²¹ This second study included seventy-one participants aged thirteen to seventeen years, including both a control group and a group diagnosed with DBD.¹²² In a first visit to the laboratory, both test subjects and their parents completed an interview and questionnaire regarding past violent video game play activity.¹²³ In a follow-up visit, researchers used functional magnetic resonance imaging (fMRI)¹²⁴ while the test subjects performed a counting Stroop task, which requires subjects to press buttons corresponding to the number of visual stimuli simultaneously presented, to measure the brain functionality of the adolescents.¹²⁵

The Indiana University researchers found more reduced frontal lobe activity in the aggressive DBD subjects versus the control non-aggressive subjects.¹²⁶ However, they also reported differences in frontal lobe activation associated with previous media violence exposure.¹²⁷ Specifically, the study indicated that, while performing the counting task, the frontal lobe activation within the brains of non-aggressive adolescents who had reported high previous exposure to media violence resembled that seen in aggressive DBD adolescents.¹²⁸ Because the frontal lobes, specifically the prefrontal cortex, are believed to be involved in emotional control, the researchers suggested that reduced functionality patterns observed in the study may indicate that impairments in this area may predispose adolescents to aggressive

120. Press Release, Ind. Univ. Sch. of Med., Media Violence Linked to Concentration, Self-Control (June 9, 2005) (on file with Loyola University Chicago Law Journal) [hereinafter Indiana 2005 Release] (referring to the “preliminary results, released in December 2002”).

121. Vincent P. Mathews et. al., *Media Violence Exposure and Frontal Lobe Activation Measured by Functional Magnetic Resonance Imaging in Aggressive and Nonaggressive Adolescents*, 29 J. OF COMPUT.-ASSIST. TOMOGR. 287 (2005).

122. *Id.* at 288 (noting that the DBD adolescents were those with “at least one significant symptom of aggressive behavior toward people, animals or property within the past six months”).

123. *Id.* (explaining that questionnaires measured past television and video game viewing for the past week and the past year).

124. *Id.* at 287 (noting fMRI is “functional magnetic resonance imaging,” a neuroimaging technology).

125. *Id.* at 288–89 (describing counting Stroop task as a method of presenting visual stimuli to test subjects, which allows researchers to measure both accuracy and brain functionality).

126. *Id.* at 287 (stating “[f]rontal lobe activation was reduced in aggressive subjects compared with control subjects”).

127. *Id.* (summarizing conclusion that “[o]ur findings suggest that media violence exposure may be associated with alterations in brain functioning whether or not trait aggression is present”).

128. *Id.* at 289, 291 (stating that the frontal lobes of the brain, specifically the dorsolateral prefrontal cortex, are “involved in attentional control” and in “emotional control”).

behavior.¹²⁹

The innovative nature of the Indiana University studies is clear¹³⁰ and has generated interest among legislators both in Congress and in the states where legislation has been adopted to curb minors' access to violent video games.¹³¹ In addition to the aforementioned brain functionality studies, Indiana University research teams have published additional articles in 2005 examining the relationship between "executive functioning"¹³² and media violence exposure in adolescents with and without DBD.¹³³ The articles reported Indiana University studies in which DBD and non-DBD adolescents and their parents completed interviews and questionnaires regarding the youths' exposure to media violence, including both violent television programming and violent video game play.¹³⁴ In one article, the researchers noted a pattern of poorer executive functioning among adolescents who reported greater past exposure to violent media.¹³⁵

Likewise, legislative attention has been focused upon research underway at Harvard Medical School through the Center on Media and

129. *Id.* at 291 (stating hypothesis that results may reflect neural impairment "involved in emotional regulation that predisposes [adolescents with high media violence exposure] to aggressive behavior").

130. *Id.* (stating "the relation of media violence to brain functioning has not been reported previously").

131. *See, e.g.*, Press Release, Office of Senator Hillary 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> (citing "groundbreaking new study" by Indiana University School of Medicine). *See also, e.g.*, Ill. Gen. Assemb., 94th Sess. Debate, at 20, Mar. 16, 2005 (statement of Rep. Chapa LaVia) [hereinafter Chapa LaVia Testimony], available at <http://www.ilga.gov/house/transcripts/htrans94/09400031.pdf> (citing "new research" from Indiana University).

132. *See* Press Release, Ind. Univ. Sch. of Med., Self-Control May Be Affected by Violent Media Exposure (May 26, 2005), available at http://medicine.indiana.edu/news_releases/viewRelease.php4?art=339 [hereinafter Self-Control Release] (defining executive functioning as "a person's ability to control and direct their thoughts and behavior").

133. *See, e.g.*, William G. Kronenberger et al., *Media Violence Exposure in Aggressive and Control Adolescents: Difference in Self- and Parent-Reported Exposure to Violence on Television and in Video Games*, 31 *AGGRESSIVE BEHAV.* 201, 201-16 (2005) [hereinafter Kronenberger I]. *See also* William G. Kronenberger et al., *Media Violence Exposure and Executive Functioning in Aggressive and Control Adolescents*, *J. OF CLINICAL PSYCHOL.*, June 2005, at 1 [hereinafter Kronenberger II].

134. *See* Kronenberger I, *supra* note 133, at 1, and Kronenberger II, *supra* note 133, at 1 (explaining the details of each study, including the samples, procedures and results of each). Both studies were funded by grants from the Center for Successful Parenting. *Id.*

135. *See* Kronenberger II, *supra* note 133, at 1 (noting results indicate "media violence exposure is related to poorer executive functioning").

Health, Children's Hospital Boston.¹³⁶ However, researchers characterize the results as "pilot data," and no results have yet been published.¹³⁷

C. Judicial Response to Pre-2005 Legislation

Legislation seeking to curb minors' access to violent video games has been passed and subsequently struck down by federal courts as violating First Amendment free speech guarantees in Indianapolis, Indiana,¹³⁸ St. Louis County, Missouri,¹³⁹ and the State of Washington.¹⁴⁰ This section will review First Amendment jurisprudence as related to restrictions on video game access and the rationales of the courts in each case.¹⁴¹

1. First Amendment Jurisprudence

The First Amendment restricts legislative impediments upon free speech.¹⁴² Historically, some types of speech have been considered outside the scope of the First Amendment.¹⁴³ This "unprotected speech" is still covered under the First Amendment, but the Supreme Court has created boundaries for valid government regulation.¹⁴⁴ One

136. See Chapa La Via Testimony, *supra* note 131, at 21 (mentioning Harvard Medical School research).

137. Rich/Harvard Testimony, *supra* note 91, at BL00247-48.

Finally, we are using functional MRI to examine the brain activations of children when exposed to violent compared to non-violent material. Pilot data indicate that unique areas of a child's brain are activated with violence—primitive areas on the right side of the brain, which predominantly processes negative material. When viewing violence, the amygdale, our "fight or flight" center, and motor planning areas are activated. To our surprise and concern, what also fired was the posterior cingulate, the brain center that is activated in post-traumatic stress disorder patients when they relive their traumas. This is an area of long-term, permanent memory encoding, the "survivor's ROM" if you will, and it explains why we see increasing aggressiveness with increased exposure to violent material.

Id.

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

139. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003), *reh'g en banc denied*, No. 02-3010, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003).

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

141. See *infra* Parts II.C.2-4 (describing the three federal court opinions).

142. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

143. DANIEL A. FARBER, THE FIRST AMENDMENT 13 (2d ed. 2003) (noting this type of speech includes "incitements to violence, libel, obscenity, fighting words and commercial advertising").

144. *Id.*

such example is speech considered to be obscene.¹⁴⁵ The Supreme Court has adopted a three-part test for obscenity, focusing upon the offensiveness of the material in question.¹⁴⁶ In order to avoid First Amendment protections, proponents of the SGIA and similar laws have attempted to connect the violence in video games with obscene speech.¹⁴⁷ However, the courts have treated violent and obscene speech as distinct types of speech.¹⁴⁸

Regardless of the type of speech, when reviewing laws that potentially infringe upon First Amendment rights, courts apply strict scrutiny.¹⁴⁹ Restrictions on fundamental rights, such as speech, are reviewed under strict scrutiny in order to safeguard “substantive values of equality and liberty.”¹⁵⁰ Accordingly, restrictions are valid only if narrowly tailored to serve compelling state interests.¹⁵¹

2. The Seventh Circuit and *American Amusement Machine Association v. Kendrick*

In 2000, the City of Indianapolis passed an ordinance seeking to limit the access of minors under the age of eighteen to arcade video games that depict graphic violence.¹⁵² The video game industry sought a preliminary injunction against the ordinance, which the District Court

145. *Id.*

146. *Miller v. California*, 413 U.S. 15 (1973) (establishing the current Supreme Court obscenity test).

The basic guideline for the trier of fact must be:

- a) whether the ‘average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, . . .;
- b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citation omitted); see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 909 (2d ed., 1988) (explaining the Supreme Court’s three-part test for obscenity cases). See also TRIBE, *supra* note 146, at 904–19 (providing a background to the trials and tribulations of the Supreme Court and obscene speech).

147. *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 574 (7th Cir.), *cert denied*, 534 U.S. 994 (2001).

148. *Id.*

149. TRIBE, *supra* note 146, at 798–99.

150. *Id.* at 1451.

151. *Id.* at 798–99 (noting content-based restrictions upon free speech are subject to strict scrutiny and “valid only if necessary to serve a compelling state interest and . . . narrowly drawn to that end”).

152. *Kendrick*, 244 F.3d at 573. The ordinance defined graphic violence as “visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration (disfigurement).” *Id.*

denied, holding that the industry was unlikely to succeed on the merits of its First Amendment challenge.¹⁵³ The industry appealed, and the Seventh Circuit Court of Appeals, in an opinion written by Judge Richard A. Posner, reversed the lower court.¹⁵⁴ Judge Posner's powerfully written opinion has been described as particularly influential in helping shape the outcome of later, similar cases.¹⁵⁵

First, the opinion addressed the City of Indianapolis' assertion that violence can be bracketed with sex and treated as obscene, thereby limiting its protection under the First Amendment.¹⁵⁶ The court rejected this argument, stating that violence and obscenity are distinct categories and the product of different concerns.¹⁵⁷ The legislative purpose of the ordinance in question was based not upon video games being offensive, but rather upon a belief that video games cause harm to minors.¹⁵⁸ Therefore, the court refused to include violent imagery in the category of obscene speech unprotected by the First Amendment.¹⁵⁹

Next, the court considered the free speech protections of children, clearly stating that children have First Amendment rights, and found that a conditioning of those rights is a curtailment upon them.¹⁶⁰ The protection of children's First Amendment rights is fundamental to the functioning of a democracy in which eighteen-year olds have the right to vote, and therefore they must be allowed to form political views before they come of age.¹⁶¹

153. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943 (S.D. Ind. 2000). An injunction is a court order preventing an action, which is obtained if a complainant proves there is no adequate or complete remedy at law and irreparable injury will result if not granted. BLACK'S LAW DICTIONARY 629 (7th ed. 2000).

154. *Kendrick*, 244 F.3d at 572–73. The Seventh Circuit panel also included Judges Diane P. Wood and Ann Claire Williams. *Id.* at 572. Judge Posner was appointed to the U.S. Court of Appeals for the Seventh Circuit in 1981 and served as chief judge from 1993 to 2000. Richard A. Posner Faculty Bio, <http://www.law.uchicago.edu/faculty/posner-r/>. Judge Posner is Senior Lecturer in Law at the University of Chicago. *Id.*

155. *See, e.g., Conkey, supra* note 14, at 2 (calling Judge Posner's opinion "the most influential videogame decision"); 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, 2–3 (2002) (describing Judge Posner's opinion as "erudite," "cogent," and "laudable").

156. *Kendrick*, 244 F.3d at 574.

157. *Id.* The court noted that obscenity is proscribed because it is offensive, while violent imagery is alleged to be harmful. *Id.* *See supra* Part III.C.1 (discussing First Amendment jurisprudence).

158. *Kendrick*, 244 F.3d at 575 (stating the purpose of the ordinance as a "belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence").

159. *Id.*

160. *Id.* at 576.

161. *Id.* at 577 (stating people are unlikely to become responsible citizens if "they are raised in

The court then considered whether the images from which the city was attempting to protect children were in some way unique.¹⁶² Judge Posner cited *The Odyssey*, *The Divine Comedy*, *War and Peace*, *Frankenstein*, *Dracula* and *Grimm's Fairy Tales* as examples that demonstrate society's enduring and unchanging fascination with violence, from which it is both impossible and unwise to entirely shield children until they reach the age of eighteen.¹⁶³ Moreover, the court dismissed as superficial and erroneous the arguments that video games are unique because they are interactive in nature, noting that all literature—including not only books, but also media such as television and movies—is interactive.¹⁶⁴

Having concluded, therefore, that the law in question was a content-based effort by the City of Indianapolis to regulate protected non-obscene expression, its constitutionality was subject to strict scrutiny.¹⁶⁵ The court noted that it could not rely on conventional wisdom regarding the presumed harmful effects of violent video games.¹⁶⁶ Judge Posner then considered the social science evidence in support of the ordinance by the City, determining the two studies wholly unpersuasive and as offering no support for a causative relationship between violent video games and violent behavior.¹⁶⁷ The court noted the studies did not support the ordinance and found no evidence that the games in the studies resembled those targeted by the ordinance, or that the images in the games had ever caused anyone to commit a violent act.¹⁶⁸

Judge Posner's opinion closed with, in effect, guidance for the inevitable future legislative attempts to craft laws restricting violent

an intellectual bubble”).

162. *Id.* (stating “[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture high and low” and shielding children from it would “not only be quixotic, but deforming; it would leave them [children] unequipped to cope with the world as we know it”).

163. *Id.* See also William Li, Note, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, 467 (2003). “[N]obody goes to the theater, or switches on the tube, to view a movie entitled *The Village of the Happy Nice People*.” *Id.* (quoting RICHARD WALTER, SCREENWRITING: THE ART, CRAFT, AND BUSINESS OF FILM AND TELEVISION WRITING 27 (1992)).

164. *Kendrick*, 244 F.3d at 577 (noting “the better it is, the more interactive”).

165. *Id.* at 576 (stating that “the grounds must be compelling and not merely plausible”).

166. *Id.* at 578 (rejecting governmental reliance upon “what everyone knows” about alleged ill effects of video games).

167. *Id.* The defendant relied primarily on the work published in 2000 in the *J. OF PERSONALITY AND SOCIAL PSYCH.* by Anderson & Dill. *Id.* See Anderson & Dill Article, *supra* note 88. See also *supra* Part II.B.2 (describing the 2000 Anderson & Dill article, reporting results of a correlational study and an experimental study).

168. *Kendrick*, 244 F.3d at 578.

video games.¹⁶⁹ It suggested that a more narrowly crafted ordinance might survive a constitutional challenge, particularly if the games in question did not have the unrealistic, cartoonish appearance of some of those considered in this case, and portrayed violence in a more realistic fashion.¹⁷⁰ Judge Posner ended the decision by noting that common sense dictated the outcome of this case, but that such a common sense conclusion could be overcome in the future with robust scientific evidence.¹⁷¹ The United States Supreme Court denied certiorari.¹⁷²

3. The Eighth Circuit and *Interactive Digital Software*

An ordinance very similar to Indianapolis' was passed later in 2000 by St. Louis County, Missouri, making it unlawful for any person to sell or rent graphically violent video games to minors without the consent of a parent or guardian.¹⁷³ The video game industry promptly challenged the law in federal court.¹⁷⁴ After denying the industry's motion for summary judgment, the District Court dismissed the complaint and upheld the ordinance's constitutionality.¹⁷⁵ The Eighth Circuit Court of Appeals, with an opinion written by Judge Morris Sheppard Arnold,

169. *Id.* at 579.

170. *Id.* at 579–80 (suggesting alleged harm of video game violence might be more plausible if the games “used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries”).

171. *Id.* at 579.

Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative. Common sense is sometimes another word for prejudice, and the common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been.

Id. Judge Posner frequently cites common sense in his writings, emphasizing its appropriate application in the law, balancing both its importance as a judicial tool and the fact that common sense is often merely an excuse for prejudice. See generally Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988). “[Practical reason] includes anecdote, introspection, imagination, common sense, intuition . . . , empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, ‘induction’ . . . , ‘experience’ Miscellaneous and unrigorous it may be, but practical reason is our principal set of tools for answering questions large and small.” *Id.* at 838–39. “What is called ‘common sense’ is a mass of insights that is very loose, imprecise, and unstructured, and is often just another name for prejudice and complacency.” Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1715–16 (2001) (noting “[d]oubt stimulates inquiry; confidence in one's intuitions leads to premature closure”).

172. *Am. Amusement Mach. Ass'n v. Kendrick*, 534 U.S. 994 (2001).

173. *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126, 1128 (E.D. Mo. 2002). Prior to passing the ordinance, two hearings were held, where testimony was heard from education and psychology experts in favor of the law, as well as from representatives of the video game industry who opposed the law. *Id.* at 1129.

174. *Id.* at 1131. Plaintiffs challenged the ordinance on First Amendment grounds. *Id.*

175. *Id.* at 1141. The district court found that the video game industry had failed in establishing “that video games are a protected form of speech under the First Amendment.” *Id.*

later reversed, holding the ordinance violative of the First Amendment.¹⁷⁶ In the Eighth Circuit opinion, Judge Arnold repeatedly cited the Seventh Circuit holding in *American Amusement Machines Association v. Kendrick*.¹⁷⁷

The court began by holding that video games are a protected form of free speech, noting the lack of legal significance of the fact that they appear in a novel medium.¹⁷⁸ In fact, the court emphasized that the status of video games as expressive content is demonstrated by St. Louis County's efforts to restrict access to them due to the alleged content-based harms potentially befalling those who play them.¹⁷⁹

Second, Judge Arnold addressed the County's arguments regarding the fact that video game technology allows players to skip expressive content, moving directly to action-oriented segments.¹⁸⁰ The court observed the same is true of videocassettes or DVDs and noted that modern technology that allows increased control over content did not render that content unprotected by the First Amendment, nor did the interactive nature of the video games.¹⁸¹ Therefore, after concluding that video games merit the full protection of the First Amendment,¹⁸² and holding that violent images cannot fall under the legal definition of obscenity, Judge Arnold evaluated the County's ordinance under the strict scrutiny standard.¹⁸³

Echoing the Seventh Circuit review of similar evidence, the court described the social science studies offered by the County as ambiguous, inconclusive or irrelevant and noted that much of the

176. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) *reh'g en banc denied*, No. 02-3010, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003). The Eighth Circuit panel also included Judges Pasco Middleton Bowman II and William J. Riley. *Id.* at 954. Judge Morris S. Arnold was appointed to the U.S. Circuit Court of Appeals for the Eighth Circuit in 1992. Judge Morris S. Arnold Papers, http://archives.uca.edu/special_collection/m91-02.htm. He is the former Dean of the Indiana School of Law at Bloomington. *Id.*

177. *Interactive Digital Software Ass'n*, 329 F.3d at 960. Judge Arnold cites Judge Posner's opinion in *Kendrick* four times. *Id.* at 957, 957, 957, and 959. See *supra* Part II.C.2 (discussing the Seventh Circuit *Kendrick* decision).

178. *Interactive Digital Software Ass'n*, 329 F.3d at 957 (finding "no reason" why a "novel medium" such as video games are not entitled to the same protection as other speech).

179. *Id.* (stating "we find it telling that the County seeks to restrict access to these video games precisely because their content purportedly affects the thought or behavior of those who play them").

180. *Id.* (noting that videocassettes and DVDs allow the viewer to skip or isolate scenes).

181. *Id.*

182. *Id.* at 958 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)) (clarifying that video games are "as much entitled to the protection of free speech as the best of literature").

183. *Id.* at 958. See *TRIBE*, *supra* note 146 (explaining strict scrutiny standard of constitutional review).

research was conducted using adult subjects, not minors.¹⁸⁴ The court deemed the testimony offered by the County's experts inadequate to support the claim of harm from video games.¹⁸⁵ Also following Judge Posner, Judge Arnold's opinion discussed the need to avoid the temptation to make law simply because society in general might believe that video games are harmful; following Supreme Court rulings, where First Amendment rights are at stake the Government's obligation is to provide more than anecdotal evidence.¹⁸⁶

Finally, the court rejected the County's argument that the First Amendment rights of minors may be abridged as a means of aiding parental authority, holding that the government cannot silence protected speech in the name of assisting parents.¹⁸⁷ The Eighth Circuit Court of Appeals denied a request for rehearing *en banc*, and no further appeal was filed.¹⁸⁸

4. State of Washington and *Video Software Dealers Association*

In May 2003, legislators in the State of Washington passed a law outlawing the sale or rental of violent video games to minors.¹⁸⁹ The law was immediately challenged by the video game industry with a suit in the United States District Court for the Western District of Washington.¹⁹⁰ Chief Judge Robert S. Lasnick permanently enjoined enforcement, finding the law unconstitutional and repeatedly citing the previous holdings of the Seventh and Eighth Circuits.¹⁹¹

The court began by finding video games to be expressive content and

184. *Interactive Digital Software Ass'n*, 329 F.3d at 959 (characterizing the studies as a "small number").

185. *Id.* (calling the conclusion of the studies offered a "vague generality [that] falls far short of a showing that video games are psychologically deleterious").

186. *Id.* at 959 (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000)) ("[T]he Government must present more than anecdote and supposition").

187. *Id.* at 960 (holding that the state cannot violate free speech freedoms by "wrapping itself in the cloak of parental authority").

188. *Interactive Digital Software Ass'n v. St. Louis County*, No. 02-3010, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003).

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

190. *Id.*

191. *Id.* at 1191. Judge Lasnick cites to the *Kendrick* and/or *Interactive Digital Software Assoc.* decisions six times. *Id.* at 1183, 1184, 1184, 1184, 1186 and 1190. See *supra* Part II.C.2 (discussing the Seventh Circuit *Kendrick* decision); *supra* Part II.C.3 (discussing the Eighth Circuit *Interactive Digital Software Association* decision). Judge Robert S. Lasnick is the Chief Judge of the U.S. District Court for the Western District of Washington. Robert S. Lasnick Bio, http://www.judges.org/nccm/nccm_boards/advisory_council/lasnick.htm. He was appointed in 1998. *Id.*

entitled to the full protection of the First Amendment.¹⁹² The court further held that the games are not subject to the obscenity exception,¹⁹³ and expressly declined to expand the definition of the obscenity exception to include violent images.¹⁹⁴

Echoing the holdings of the Seventh and Eighth Circuits, Judge Lasnick likewise found that minors have First Amendment rights and that the State cannot restrict protected speech simply because minors may be part of the audience.¹⁹⁵ Therefore, the court held that since the video games at issue had the full protection of the First Amendment, strict scrutiny applied.¹⁹⁶

The court found the State's purported interest of combating hostile and antisocial behavior, including violence and aggression toward police officers, compelling but noted that simply stating a compelling government interest is inadequate.¹⁹⁷ Specifically, the court noted that the research and expert opinions presented by the defendants could not produce a showing that exposure to violent video games (including those depicting violence to law enforcement officers) was likely to lead to actual violence against officers.¹⁹⁸ In fact, Judge Lasnick noted that none of the research offered proved causation or an increase in actual, real-life violence.¹⁹⁹ Moreover, most of the studies offered by the State were not focused upon violent video games but focused instead on violent television programming, and none were designed to study aggressive behavior toward law enforcement officers.²⁰⁰

192. *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1184.

193. *Id.* (noting the games, although "obnoxious," deserve the protection of free speech). See FARBER, *supra* note 143, at 133 (listing obscenity as one of the traditional exceptions to First Amendment protection).

194. *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1185 (stating "the Court declines defendants' invitation to expand the narrowly-defined obscenity exception to include graphic depictions of violence").

195. *Id.* at 1186. See *supra* Part II.C.2 (discussing the Seventh Circuit *Kendrick* decision); *supra* Part II.C.3 (discussing the Eighth Circuit *Interactive Digital Software Association* decision).

196. *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1186. See TRIBE, *supra* note 146 (discussing the strict scrutiny doctrine).

197. *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1187 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664–65 (1994) (stating "it must demonstrate the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

198. *Id.* at 1188 (noting, nevertheless, that "virtually all of the experts agree that prolonged exposure to violent entertainment is one of the constellation of risk factors for aggressive or anti-social behavior").

199. *Id.* (finding "no causal connection between playing violent video games and real-life violence has been established.").

200. *Id.*

In conclusion, the court held that the law was not narrowly tailored, was far broader than would be necessary to support the state's goals, and was unconstitutionally vague.²⁰¹ Judge Lasnick closed the opinion by offering guidance on how future attempts to regulate violent video games might be found constitutional, including the need for more narrowly tailored statutes, and more focused and effective scientific studies.²⁰²

D. The Generation Gap: The Eternal Desire to Squelch Youth Culture

In the Seventh Circuit's opinion in *Kendrick*, Judge Posner sounded a cautionary note regarding the urge to suppress youth culture.²⁰³ In doing so, he hinted at the folly of repeating the excesses of past eras, when largely ineffectual efforts were made to suppress the cultural and artistic passions of youth.²⁰⁴ Commentators have noted that each generation in turn tends to be alarmed about the moral vulnerability of successive generations.²⁰⁵ The urge to shield younger generations from allegedly harmful and scandalous influences is a constant temptation for adults and policy-makers.²⁰⁶

201. *Id.* at 1190–91.

202. *Id.* at 1190. While noting that the court cannot offer advisory opinions, Judge Lasnick suggested that key considerations for future legislatures considering similar laws should be:

- does the regulation cover only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act?
- does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? and
- do the social scientific studies support the legislative findings at issue?

Id.

203. *Am. Amusement Mach Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001) (stating “[w]e are in the world of kids’ popular culture. But it is not lightly to be suppressed”).

204. *Id.* (noting that “although it seems unlikely, some of these games, perhaps including some that are as violent as those in the record, will become cultural icons”).

205. See Rupal Ruparel Dalal, *Congress Shall Make No Law Abridging Freedom of Speech—Even if it Causes Our Children to Kill?*, 25 SETON HALL LEGIS. J. 357, 361 n.24 (2001) (citing Catherine J. Ross, The Association of American Law Schools, Section on Mass Communications Law 1997 Annual Conference Panel: *Sex, Violence, Children & The Media: Legal, Historical & Empirical Perspectives*, 5 COMMLAW CONSPECTUS 341, 349 (1997) (stating that “nearly every new type of entertainment that has emerged—from dime novels to the Internet—has raised concern about its potential for causing immoral conduct and disorderly behavior on the part of children”). See also Calvert & Richards, *supra* note 88, at 208–09 (describing the “age-old story that pits the protection of children from speech and its supposed deleterious effects against the First Amendment rights of children to receive that speech”).

206. See MARJORIE HEINS, *NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH* 7 (2001) (discussing the history’s enduring enthusiasm for censorship on behalf of children).

[T]he continued popularity of censorship designed to protect, shield, indoctrinate, or socialize young people, dramatized the durability and emotional power of the belief

A classic example of the eternal temptation by older generations to shield children from negative influences is the effort to ban comic books during the 1940s and 1950s.²⁰⁷ The first comic book was introduced in the United States in 1934, and comics grew swiftly into a hugely popular cultural phenomenon.²⁰⁸ By the 1940s, comic books had become increasingly violent, with war, western, romance, crime and horror stories very popular.²⁰⁹ Statistics surfaced reporting seventy percent of comic books were filled with objectionable material,²¹⁰ and comic books were often publicly blamed for robberies, burglaries, murders, suicides and juvenile delinquency.²¹¹ In response, some legislatures banned the sale of violent comic books to children, with the legislation later being overturned as unconstitutional.²¹² In the 1950s, the anti-comic book fervor grew, with increasing belief amongst the public that children emulated the violent behaviors they saw in comic books, turning normal children into criminals, rapists, perverts, and murderers.²¹³

The parallels between the comic book hysteria and today's efforts to restrict minors' access to violent video games are significant.²¹⁴ Some

that minors are harmed by sexual expression—or, depending upon one's values, by speech about violence, drugs, alcohol, suicide, religion, racism, or other troublesome themes. Unexamined assumptions continue to dominate this debate, with questionable consequences not only for the First Amendment freedoms of all of us but for the moral and intellectual development of youngsters themselves.

Id. See also JUDITH LEVINE, SHOOTING THE MESSENGER: WHY CENSORSHIP WON'T STOP VIOLENCE 24–25 (2001) (discussing the effect of media on youth violence).

What is outrageous in one era is ho-hum in another. But the generation gap has been around for at least two centuries. Since there has been anything resembling youth culture, adults have been exercised about its forms of expression. Frank Sinatra called Elvis Presley's music "the most brutal, ugly, desperate, vicious form of expression it has been my misfortune to hear," and "the martial music of every . . . delinquent on the face of the earth."

Id.

207. David Jay Gabriel, *A Brief History of First Amendment Issues in Comic Books*, New York City Comic Book Museum, at 2 (July 2, 2001), available at www.nyccomicbookmuseum.org/exhibits/pdf/ComicsCode_paper.PDF.

208. *Id.*

209. *Id.*

210. See *id.* at 3 (citing PAUL SASSIENIE, THE COMIC BOOK: THE ONE ESSENTIAL GUIDE FOR COMIC BOOK FANS EVERYWHERE 49 (1994) (noting the objectionable material included "scenes of sadistic torture" and "suggestive and salacious actions")).

211. *Id.*

212. *Id.* See, e.g., *Katzev v. Los Angeles County*, 341 P.2d 310, 318 (Cal. 1959) (finding comic book ban unconstitutional).

213. Gabriel, *supra* note 207, at 5–6 (discussing criticism of comic books and public hearings held by a Senate subcommittee).

214. See *infra* Part III.A (outlining the legislative outcry regarding video games).

commentators have noted the fact that most video game opponents and denouncers are people who have not actually played them.²¹⁵ Others predict that video games hysteria will disappear once the generation that has grown up playing games grows old enough to wield political influence.²¹⁶ In his warning to resist legislating based upon unproven conventional wisdom, Judge Posner seemed to caution against allowing “common sense” to cause us to repeat the prejudicial excesses of the past.²¹⁷

III. DISCUSSION

On July 25, 2005, the SGIA was signed into law.²¹⁸ Less than five months later, and just weeks shy of the new law’s January 1, 2006 implementation date, the law was permanently enjoined by a federal district court.²¹⁹ The State filed an appeal to the Seventh Circuit Court of Appeals.²²⁰ This Part begins by reviewing the legislative history of the SGIA and outlines its provisions, including the legislative findings likely to be most closely scrutinized by the appellate court.²²¹ Next, this Part reviews Federal District Judge Matthew Kennelly’s permanent injunction striking down the SGIA.²²²

A. The Legislative History of The Safe Games Illinois Act (House Bill 4023)

The SGIA’s initial and most outspoken advocate has been Illinois Governor Rod Blagojevich.²²³ In December 2004, Governor Blagojevich initially proposed legislation banning the sale or rental of

215. Malcolm Gladwell, *Brain Candy*, THE NEW YORKER, May 16, 2005, at 88–89 (citing STEVEN JOHNSON, EVERYTHING BAD IS GOOD FOR YOU (2005)).

216. Conkey, *supra* note 14, at A6.

[Doug Lowenstein, president of the Entertainment Software Association] likens the criticism of video games to fears in the 1950s that rock ‘n’ roll would destroy society’s moral fiber. “Lo and behold, after listening to the Grateful Dead and acid rock and Jefferson Airplane, they grew up to be lawyers and congressmen . . . Ten years from now, we won’t be having this conversation because the people running this country will have grown up playing video games.”

Id.

217. *See supra* notes 203–04 (noting Judge Posner’s cautionary comments).

218. *See supra* notes 10–11 and accompanying text (describing passage of the SGIA).

219. *See Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1055 (N.D. Ill. 2005) (noting issuance of injunction against implementation of the SGIA).

220. *See supra* note 18 (noting filing of Notice of Appeal).

221. *See infra* Part III.A (discussing legislative history and provisions of the SGIA).

222. *See infra* Part III.B (detailing the injunction against implementation of the SGIA).

223. *See infra* Part III.A (describing the Governor’s promotional efforts on behalf of the SGIA).

violent video games to children.²²⁴ Later that month, he began a highly promoted campaign of meetings with parents across the state to discuss his proposal.²²⁵ The Governor next appointed the Illinois Safe Games Task Force to gather information on the impact of violent video games, develop strategies for parents in coping with the challenges they present, and give recommendations to the Governor.²²⁶ Also, within a month of his initial announcement, Governor Blagojevich launched a website for parents, designed to help them learn about the effects of violent video games, report inappropriate games and report Illinois retailers selling such games to minors.²²⁷

In early February 2005, the Governor made his proposed bill a featured aspect of his annual Illinois State of the State address.²²⁸ In it, he compared violent video games to cigarettes and alcohol: vices from which children need to be shielded. He then urged Illinois lawmakers to join him in helping parents by passing a law that criminalizes minors' access to violent video games featuring simulations of murder, rape, decapitation and dismemberment.²²⁹ In addition, he attacked the effectiveness of the existing system of ESRB ratings,²³⁰ and described a "sting operation" of Illinois video game retailers, conducted by Illinois State Representative Paul Froehlich,²³¹ in which kids were able to purchase video games rated as unsuitable for children seventy-five percent of the time.²³²

224. Blagojevich Proposal Release, *supra* note 16.

225. Press Release, Office of the Governor, Gov. Blagojevich Meets With Parents Across the State, Discusses Plan to Prohibit Sale or Distribution of Violent and Sexually Explicit Video Games to Minors (Dec. 20, 2004), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3590>.

226. Press Release, Office of the Governor, Gov. Blagojevich Appoints Taskforce of Parents, Top Community Leaders, Childhood Health Experts and Teachers to Help Combat Influence of Violent and Sexually Explicit Video Games (Dec. 30, 2004), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3605>.

227. *Id.*

228. IL State of the State, *supra* note 2, at 11.

229. *Id.* (urging legislative restrictions on games "where kids spend their free time simulating acts of murder, rape, decapitation and dismemberment").

230. *Id.* *See also* Game Rating Guide, *supra* note 49 (detailing ESRB video game rating system).

231. Illinois General Assembly – Representative Biography – Paul D. Froehlich, <http://www.ilga.gov/house/Rep.asp?GA=94&MemberID=1068> (last visited Mar. 24, 2006). Rep. Froehlich (R-Schaumburg) represents Illinois' 56th District. *Id.*

232. IL State of the State, *supra* note 2, at 18. *See also* Fusco, *supra* note 5, at 12 (describing "sting operation" conducted by the Illinois State Crime Commission and State Rep. Froehlich, in which the fifteen-year-old grandson of the Commission's treasurer visited fifteen stores to attempt to purchase games rated "Mature;" he was successful in purchasing the games in eleven of fifteen stores).

On February 28, 2005, Governor Blagojevich and Illinois State Representative Linda Chapa LaVia²³³ introduced House Bill No. 4023, known as the Safe Games Illinois Act.²³⁴ As originally introduced, the bill provided for fines of \$5,000 per offense, effective January 1, 2006.²³⁵ The bill was assigned to the House Judiciary I-Civil Law Committee, where two amendments were adopted making the proposed legislation more immediate, comprehensive and punitive.²³⁶ Significantly, the new House amendments made the legislation effective immediately²³⁷ and added a prohibition against the sale or rental of any violent or sexually explicit video game through a self-scanning checkout mechanism.²³⁸

The amended bill was adopted by the House Judiciary I-Civil Law Committee on March 9, 2005, and was applauded by the Governor's office in a press release hailing the legislature's action as "landmark" legislation.²³⁹ The bill was debated²⁴⁰ and passed by the full Illinois House of Representatives on March 16, 2005, by a ninety-one to nineteen margin.²⁴¹

The Governor's advocacy of the legislation continued throughout the spring of 2005, with press releases regularly issued that encouraged swift passage of the legislation by the Senate.²⁴² In the Senate,

233. Illinois General Assembly – Representative Biography – Linda Chapa LaVia, <http://www.ilga.gov/house/Rep.asp?GA=94&MemberID=1022> (last visited Mar. 24, 2006). Rep. Chapa LaVia (D-Aurora) represents Illinois' 83rd District. *Id.*

234. Press Release, Office of the Governor, Gov. Blagojevich Introduces Legislation to Keep Excessively Violent and Sexually Explicit Video Games Out of the Hands of Illinois Children (Feb. 28, 2005), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3718>.

235. Bill Status, H.R. 4023, Ill. Gen. Assemb., 94th Sess. (2005) [hereinafter Legislative History Summary], *available at* <http://www.ilga.gov/legislation> (follow "House - Bills 4001 – 4100" hyperlink; then follow "HB4023 VIDEO GAMES-VIOLENT AND SEX" hyperlink) (outlining synopsis of bill as introduced).

236. *Id.*

237. *Id.* (outlining House Amendment No. 1).

238. *Id.*

239. Press Release, Office of the Governor, Gov. Blagojevich Applauds House Judiciary Committee for Unanimously Approving Landmark Video Game Legislation (Mar. 9, 2005), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3743>.

240. Legislative History Summary, *supra* note 235 (noting Third Reading and Standard Debate in House on March 16, 2005).

241. Press Release, Office of the Governor, 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/ShowPressRelease.cfm?SubjectID=1&RecNum=3763>.

242. Press Release, Office of the Governor, Gov. Blagojevich Denounces NARC Video Game for Encouraging Drug Use and Brutality; Reaffirms the Need for Safe Games Illinois Legislation (Mar. 21, 2005), *available at* <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3770>.

however, the bill, sponsored by Senator Deanna Demuzio,²⁴³ underwent significant amendment, largely to reverse some of the House changes.²⁴⁴ The Senate adopted three amendments, most significantly revising the effective date to January 1, 2006,²⁴⁵ reducing the fines to \$1,000 per offense,²⁴⁶ and adding affirmative defenses.²⁴⁷ The Senate amendment provided affirmative defenses if the video game sold or rented was pre-packaged and rated EC, E10+, E or T by the ESRB.²⁴⁸

The Senate overwhelmingly passed the bill by a margin of fifty-two to five on May 19, 2005.²⁴⁹ Upon its return to the House of Representatives, the revised legislation again passed by a wide margin of 106 to 6 on May 28, 2005.²⁵⁰ The Governor praised the legislators' actions, emphasizing the manner in which this "common sense" legislation demonstrated Illinois' legislative leadership.²⁵¹

On July 25, 2005, Governor Blagojevich signed House Bill 4023 into law, surrounded by parents and children in a public library in Aurora, Illinois.²⁵² As he had done consistently throughout his eight-month campaign in support of the legislation, Governor Blagojevich praised the Safe Games Illinois Act as landmark legislation designed to support parents in a common sense manner.²⁵³

243. Illinois General Assembly – Senate Biography – Deanna Demuzio, <http://www.ilga.gov/senate/Senator/asp?GA+94&MemberID=1078> (last visited Mar. 24, 2006). Sen. Demuzio (D-Carlinville) represents Illinois' 49th District. *Id.*

244. *See infra* notes 245–48 (describing Senate amendments to the SGIA).

245. Legislative History Summary, *supra* note 235 (outlining Senate Committee Amendment No. 1).

246. *Id.* (outlining Senate Committee Amendment No. 2).

247. *Id.*

248. *Id.* (describing affirmative defenses).

249. *Id.* (noting date of passage by full Senate). In the Senate, "no" votes were registered by Sen. John J. Cullerton (D-Chicago), Gary G. Dahl (R-Peru), Terry Link (D-Lake Bluff), William E. Peterson (R-Buffalo Grove) and Richard J. Winkel Jr. (R-Urbana). Voting History for HB 4023, 94th Ill. Gen. Assemb., available at <http://www.ilga.gov/legislation> (follow "House – Bills 4001 – 4100" hyperlink; then follow "HB4023 VIDEO GAMES-VIOLENT AND SEX" hyperlink; then follow "Votes" hyperlink).

250. Legislative History Summary, *supra* note 235 (noting date of revised legislation by full House). In the House, "no" votes were registered by Reps. Barbara Flynn Currie (D-Chicago), John J. Millner (R-St. Charles), Chapin Rose (R-Charleston), Ron Stephens (R-Highland), Ed Sullivan Jr. (R-Mundelein) and Jim Watson (R-Jacksonville). Voting History for HB 4023, 94th Ill. Gen. Assemb., available at <http://www.ilga.gov/legislation> (follow "House – Bills 4001 – 4100" hyperlink; then follow "HB4023 VIDEO GAMES-VIOLENT AND SEX" hyperlink; then follow "Votes" hyperlink).

251. Gov. Blagojevich Signature Announcement, *supra* note 4 ("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.").

252. *Id.* (announcing signing ceremony details).

253. *Id.*

B. The Provisions and Legislative Findings of the SGIA

The SGIA, effective January 1, 2006, amends the Illinois Criminal Code and creates two new laws, the Violent Video Games Law and the Sexually Explicit Video Games Law.²⁵⁴ Both laws provide that a person who sells or rents any violent or sexually explicit video game to a minor commits a petty offense for which a fine of \$1,000 may be imposed.²⁵⁵

The law defines a “violent video game” as one that includes depictions or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm.²⁵⁶ Significantly, the law’s definition of “sexually explicit” excludes the third prong of the traditional definition of obscenity, which protects material with serious literary, artistic, political or scientific value.²⁵⁷

The law requires video game retailers to check identification before rentals or sales are completed²⁵⁸ and forbids permitting rentals or sales using a self-scanning checkout mechanism.²⁵⁹

The law also creates new labeling and signage requirements for video game retailers, to which lower fines apply.²⁶⁰ All video games that are “violent” or “sexually explicit” as defined by this act are required to be labeled by the retailer on the front of the package with a solid white label reading “18,” in dimensions no less than two inches by two inches, outlined in black.²⁶¹ The law provides, as an affirmative defense in any prosecution arising from it, that the video game in question was pre-packaged and rated EC, E10+, E or T by the ESRB.²⁶²

254. Safe Games Illinois (Violent/Sexually Explicit Video Games) Act, Pub. Act. No. 94-315, 2005 Ill. Leg. Serv. 2147 (West) (codified at 720 ILL. COMP. STAT. 5/11-21), 720 ILL. COMP. STAT. 5 [hereinafter SGIA].

255. *Id.* §§ 12A-10, 12B-10 (defining “minor” as under age eighteen).

256. *Id.* § 12A-10(e) (defining “violent video game” as those including “depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape”).

257. *Id.* § 12B-10(e) (defining “sexually explicit video game” as 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 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”). *See* TRIBE, *supra* note 146, at 909 (listing three-prong test for obscenity).

258. SGIA, *supra* note 10 at §§ 12A-15(b), 12B-15(b).

259. *Id.* §§ 12A-15(c), 12B-15(c).

260. *Id.* §§ 12A-25(b), 12B-25(b) (listing penalties as \$500 for the first three violations, and \$1,000 for every subsequent violation).

261. *Id.* §§ 12A-25(a), 12B-25(a).

262. *Id.* §§ 12A-20(4), 12B-20(4). *See also supra* notes 52–58 (describing ESRB ratings system, including ratings EC, E10+, E and T).

With regard to both violence and sexual content, the laws begin with legislative findings.²⁶³ The Sexually Explicit Video Games Law states that the General Assembly finds such games inappropriate for minors and that the state has a compelling interest in assisting parents in protecting minor children from sexually explicit video games.²⁶⁴ With regard to violent video games, the legislature's findings imply its acceptance of studies alleging specific harm to minors as a result of violent video game play.²⁶⁵

C. Entertainment Software Association v. Blagojevich

As expected and announced prior to the law's enactment, the video game industry filed suit against the SGIA on the day it was signed by Governor Blagojevich.²⁶⁶ The Entertainment Software Association, the Video Software Dealers Association, and the Illinois Retail Merchants Association filed a complaint against Governor Blagojevich in the United States District Court for the Northern District of Illinois, asserting that the new law significantly infringed upon constitutionally protected rights of free expression.²⁶⁷ In general, the lawsuit alleged the

263. *Id.* §§ 12A-5, 12B-5 (listing legislative findings).

264. *Id.* § 12B-5.

265. *Id.* § 12A-5.

- (a) The General Assembly finds minors who play violent video games are more likely to
 - (1) exhibit violent, asocial, or aggressive behavior.
 - (2) experience feelings of aggression.
 - (3) experience a reduction of activity in the frontal lobes of the brain which is [sic] responsible for controlling behavior.
- (b) While the video game industry has adopted its own voluntary standards describing which games are appropriate for minors, those standards are not adequately enforced.
- (c) Minors are capable of purchasing and do purchase violent video games.
- (d) The state has a compelling interest in assisting parents in protecting their minor children from violent video games.
- (e) The state has a compelling interest in preventing violent, aggressive and asocial behavior, and
- (f) The state has a compelling interest in preventing psychological harm to minors who play violent video games.
- (g) The state has a compelling interest in eliminating any societal factors that may inhibit the physiological and neurological development of its youth.
- (h) The state has a compelling interest in facilitating the maturation of Illinois' children into law-abiding, productive adults.

Id.

266. Press Release, Entm't Software Ass'n, Video Game Industry to File Suit Seeking Relief From Illinois Governor's Unconstitutional Law (July 25, 2005), available at http://www.theesa.com/archives/2005/07/video_game_indu_1.php (announcing that the "computer and video game industry will file a lawsuit" against the SGIA).

267. Complaint at 1, Entm't Software Ass'n v. Blagojevich, No. 05C-4265 (N.D. Ill. July 25,

SGIA is unconstitutional under *American Amusement Machine Association v. Kendrick* as binding Seventh Circuit precedent.²⁶⁸ The suit was assigned to District Judge Matthew F. Kennelly, who after a combined two-day preliminary hearing and trial on the merits, held for the plaintiffs and issued a permanent injunction on December 2, 2005.²⁶⁹

1. Findings of Fact

Judge Kennelly's order began with two key findings of fact regarding the scientific support for Illinois' new law.²⁷⁰ First, the court reviewed the research and studies offered by the defendants in support of the SGIA and the legislative findings included in the statute, as well as the testimony of expert witnesses for both sides.²⁷¹ The court noted that the State provided seventeen scholarly articles to support the SGIA, of which fourteen were authored by the same individual, Dr. Craig Anderson.²⁷² Dr. Anderson, testifying on behalf of the State, presented support for his conclusion that violent video game play can lead to aggressive behaviors being "automatized."²⁷³

Testifying for the plaintiffs, Dr. Dmitri Williams and Dr. Jeffrey Goldstein disputed the methodology of the Anderson studies, noting problematic tests for aggression, vague definitions of aggressive

2005). The complaint also named fellow defendants Illinois Attorney General and Cook County State's Attorney. *Id.*

268. *Id.* at 2. See also *supra* Part II.C.2 (describing the Seventh Circuit's holding in *Kendrick*).

269. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1055 (N.D. Ill. 2005). The two-day hearing took place in Chicago on November 14 and 15, 2005. *Id.* at 1058. See also *supra* note 153 (explaining injunctions). Judge Matthew F. Kennelly sits on the United States District Court for the Northern District of Illinois. Judge Matthew Kennelly Biographical Data, <http://www.ilnd.uscourts.gov/JUDGE/KENNELLY/MFKBio.htm>. He was appointed to the federal bench in 1999. *Id.*

270. See *infra* Part III.C.1 (detailing the district court's findings of fact).

271. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1059–67. The state's expert witnesses for this portion of the hearing included Dr. Craig Anderson. *Id.* at 1059. See *supra* Part II.B.2 (discussing the work of Dr. Anderson). The industry's expert witnesses included Dr. Jeffrey Goldstein and Dr. Dmitri Williams. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1059. See *supra* Part II.B.1 (discussing the work of Dr. Williams).

272. See *supra* note 88 (discussing Dr. Anderson's reputation and body of work).

273. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1059. Dr. Anderson stated:

In violent video games, you rehearse the whole sequence [of aggression]. You rehearse, you practice being vigilant, that is, looking for the source of the threat. You practice identifying sources of threat. You practice making decisions about how to respond to that threat. And eventually, you actually carry out some form of action, typically a violent action to deal with that threat, clicking a mouse or something on the keyboard or a pretend sort of gun of some kind.

Id.

behavior, use of inappropriately dissimilar games for test purposes, and failure to address the context of game playing.²⁷⁴ Likewise, they testified that Dr. Anderson was unable to cite any peer-reviewed studies, which showed a causal link between violent video game play and aggressive behavior, and had also ignored results that reached conclusions different from his own.²⁷⁵

After reviewing studies and testimony, Judge Kennelly held that neither the State's expert testimony nor its offered studies established a solid causal link between violent video games exposure and aggressive thoughts or behavior.²⁷⁶ The court also noted that researchers had failed to eliminate the most plausible alternative explanation—that aggressive kids may be more attracted than others to violent video games.²⁷⁷ Likewise, the researchers had failed to demonstrate that the alleged relationship between violent video games and aggressive behavior was any greater than that with other types of media violence.²⁷⁸ Finally, the court noted its concern that the Illinois legislature failed to consider any studies critical of those offered by SGIA supporters.²⁷⁹ Judge Kennelly held, therefore, the research was insufficient to draw conclusions regarding the impact of video games on minors.²⁸⁰

As the second key finding of fact, the court considered the effect of violent video games on brain activity.²⁸¹ Testifying for the State, Dr. William Kronenberger presented his studies conducted at the Indiana University School of Medicine.²⁸² Dr. Kronenberger conceded that his studies demonstrate only a correlative, not a causal, link between media violence exposure in children and behavioral disorders or unusual brain functionality.²⁸³ Testifying for the plaintiffs, Dr. Howard Nussbaum identified two fundamental problems with Dr. Kronenberger's work.²⁸⁴ First, the studies assumed a simple one-to-one relationship between various parts of the brain and particular behaviors.²⁸⁵ In fact, Dr. Nussbaum testified that particular brain activity can affect multiple

274. *Id.* at 1062.

275. *Id.*

276. *Id.* at 1063.

277. *Id.*

278. *Id.* (identifying movies or television).

279. *Id.*

280. *Id.*

281. *Id.* at 1063–67.

282. *Id.* See *supra* Part II.B.3 for discussion of the brain-related research of Dr. Kronenberger.

283. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1065.

284. *Id.* at 1066. Dr. Nussbaum is a cognitive psychologist at the University of Chicago. *Id.*

285. *Id.*

behaviors, and specific behavior patterns can be impacted by activity from various areas of the brain.²⁸⁶ Second, Dr. Nussbaum disputed Dr. Kronenberger's assumption that decreased activity in one area of the brain is the equivalent of impaired or deficient brain activity.²⁸⁷ For instance, decreased activity can indicate growing expertise with a task.²⁸⁸ In addition, Dr. Nussbaum identified various problems with the methodology used in the brain studies used to support the SGIA, such as use of composite fMRI images and lack of control for varying characteristics of test participants, which make it impossible for conclusions to be drawn from the data as reported.²⁸⁹

The court held that the brain-related studies offered by Dr. Kronenberger could not support the conclusions he and others had drawn from them.²⁹⁰ Likewise, Judge Kennelly stated that the evidence offered no basis for the legislative findings, included in the SGIA, that violent video game play results in reduced brain functionality.²⁹¹

2. Constitutionality of the SGIA

After holding that the defendants were not immune from suit²⁹² and the plaintiffs had standing,²⁹³ the court turned its analysis to the constitutionality of the SGIA.²⁹⁴ All parties agreed that the SGIA was a content-based regulation subject to strict scrutiny.²⁹⁵ The court began by agreeing with the defendants that the state legislature had multiple compelling interests at stake, including preventing violent behavior by children, protecting children from violence and assisting parents.²⁹⁶ However, Judge Kennelly rejected the defendants' claims that the Seventh Circuit's decision in *Kendrick* was not precedential, and

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 1066–67.

290. *Id.* at 1066.

291. *Id.* See also *supra* Part III.B (stating SGIA's legislative findings regarding violent video games).

292. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1070–71 (holding that state entities or state officials are not immune under the Eleventh Amendment for suits seeking to enjoin enforcement of unconstitutional statutes). See U.S. CONST. Amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

293. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1071 (holding that each of the plaintiffs have independent standing to sue and no conflicts of interest existed among them).

294. *Id.* at 1071–72.

295. *Id.* at 1072. See *TRIBE*, *supra* note 146 (describing the strict scrutiny standard).

296. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1072.

expressly held that the *Kendrick* decision, in which the court applied strict scrutiny to a city ordinance restricting minors' access to violent video games, governed the instant case.²⁹⁷

First, the court reiterated that the defendants had not met the burden of demonstrating that playing violent video games causes youths to have aggressive thoughts or engage in aggressive behavior.²⁹⁸ In fact, Judge Kennelly noted that with the limited evidence available, it is impossible to discern which direction the causal relationship, if any, between violent video games and aggressive children, might run.²⁹⁹

Next, the court re-emphasized its finding of a lack of evidentiary support for the brain studies heavily relied upon by the defendants.³⁰⁰ The court found that the legislature's finding that violent video game play causes reductions in frontal lobe brain activity³⁰¹ was unsupported by scientific evidence.³⁰²

In addressing the State's purported compelling interest in preventing developmental harm to minors, the court noted minors' First Amendment rights and remarked that if controlling access to some speech is important in American society, that control is appropriate at the discretion of parents, not the State.³⁰³ Moreover, the court held that the SGIA's underinclusiveness indicated that the statute may not be intended to serve its proffered purpose.³⁰⁴ In addition, the court held that the vagueness of the SGIA's definition of violent video games is open to subjective interpretation and enforcement, making it highly probable that video game sellers might attempt to self-censor or restrict access to games in an overly-cautious manner, thereby impairing the rights of minors and adults alike.³⁰⁵

297. *Id.* See *supra* Part II.C.2 (describing Judge Posner's opinion in *Kendrick*).

298. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1073 (stating that defendants "have come nowhere near making the necessary showing").

299. *Id.* at 1074. The court noted that "it may be that aggressive children may also be attracted to violent video games." *Id.*

300. *Id.* The court based the reliance largely upon the fact that Dr. Kronenberger's brain studies were unavailable when the Seventh Circuit last considered the issue in 2001. *Id.*

301. 720 ILL. COMP. STAT. ANN. 5/12A-5(a)(3) (West 2005). See *supra* note 265 (citing the legislative findings included in SGIA).

302. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1074 (noting that relying totally on the work of Dr. Kronenberger, without considering alternative explanations or studies, reveals a "basic flaw in the legislature's reasoning").

303. *Id.* at 1075 (e.g., violent video games).

304. *Id.* (noting "the state may have a compelling interest in assisting parents with regulating the amount of media violence consumed by their children, but it does not have a compelling interest in singling out video games in this regard," such as targeting some media violence, but excluding other types such as violent DVDs, etc.).

305. *Id.* at 1076.

Next, the court held that by varying from the established test for obscenity in its definition of “sexually explicit,” the SGIA went beyond regulating that which is deemed obscene for minors.³⁰⁶ Therefore, rather than being subject to a less stringent standard of review, the SGIA is a content-based restriction which is subject to strict scrutiny.³⁰⁷ Consistent with the court’s analysis regarding violence, Judge Kennelly concluded that the statute is vague and not narrowly tailored.³⁰⁸

Last, the court held that the SGIA’s labeling and signage requirements are likewise subject to, and fail to meet, strict scrutiny.³⁰⁹ In so holding, Judge Kennelly noted the inappropriateness of statutory requirements for retailers to present the privately-run, self-regulatory ESRB ratings system in a manner mandated by the state.³¹⁰

For the reasons summarized above, the court held that the plaintiffs’ loss of First Amendment rights would represent irreparable injury, with no adequate legal remedy, if the SGIA took effect as planned on January 1, 2006.³¹¹ Therefore, Judge Kennelly granted a permanent injunction.³¹²

IV. ANALYSIS

Illinois’ SGIA followed a now-familiar pattern of enthusiastic and high profile political support, with a speedy and successful legal

306. *Id.* at 1078. See TRIBE, *supra* note 146 (describing the three-prong test for obscenity, which includes an exception for material of artistic value). See also *supra* note 257 (describing the definition of “sexually explicit” as included in the SGIA).

307. *Entm’t Software Ass’n*, 404 F. Supp. 2d at 1078. See TRIBE, *supra* note 146 (describing strict scrutiny doctrine).

308. *Entm’t Software Ass’n*, 404 F. Supp. 2d at 1080. The court stated:

By way of example, we cite *God of War*, one of the games submitted by plaintiffs. In this game, set in ancient Greece, a Spartan warrior named Kratos must kill Ares, the god of war. Throughout the game, he faces difficult challenges and receives assistance from legendary Greek gods, and the player learns about his difficult life from intermittent flashbacks. At the end of the game, Kratos learns that he is in fact the son of Zeus and becomes a god. During the game, there are several scenes depicting women whose breasts are visible. In one scene, the main character is shown near a bed where two bare-chested woman are lying. It appears that the main character may have had sexual relations with the women. Because of this one scene, a game such as *God of War*, which essentially parallels a classic book like *The Odyssey*, likely would be prohibited based on one scene without regard to the value of the game as a whole. Such a sweeping regulation on speech—even sexually explicit speech—is unconstitutional even if aimed at protecting minors.

Id.

309. *Id.* at 1081–82. See TRIBE, *supra* note 146 (describing strict scrutiny doctrine).

310. *Entm’t Software Ass’n*, 404 F. Supp. 2d at 1082.

311. *Id.*

312. *Id.* at 1082–83. See also *supra* note 153 (describing an injunction).

challenge by the video game industry.³¹³ However, the state's judicial defeat and the district court's strongly-written order appear to have done little to dampen the zeal of not only the State of Illinois to appeal Judge Kennelly's decision, but also of other legislators to pass similar laws.³¹⁴ This Part examines the historical, cultural and political factors which fuel the legislative enthusiasm for laws restricting free expression in mediums like video games.³¹⁵ First, it will note the federal district court's appropriate adherence to precedent in its analysis of the constitutionality of the SGIA and the relationship between correlation and causation that underlines it.³¹⁶ Next, this Part will review the role of industry self-regulation.³¹⁷ This subsection will explore the role the ESRB plays in efforts to restrict video games.³¹⁸ Next, this Part will discuss the role of common sense and how it influences legislation impacting video games.³¹⁹ Finally, it will review the political forces, which may impact the issue, and suggest the potential political gains may be too compelling for many legislators to resist.³²⁰

A. Entertainment Software Association v. Blagojevich: *Correctly Discerning Between Correlation and Causation*

In his holding in *Entertainment Software Association v. Blagojevich*, Judge Kennelly appropriately adhered to precedent by following the key holdings of the Seventh Circuit in *Kendrick*.³²¹ That is, the district court echoed the appellate court's earlier holding that restrictions upon minors' access to video games represent content-based regulations subject to strict scrutiny, and therefore the defendant has the burden of demonstrating that the restrictive law is narrowly-tailored to serve a compelling state interest.³²²

Consistent with the Seventh Circuit's earlier analysis, Judge Kennelly

313. See *supra* Part II.C (describing previous video game laws found unconstitutional).

314. See *supra* note 22 and accompanying text (describing introduction of federal law two weeks after the SGIA was found unconstitutional).

315. See *infra* Part IV (including analysis of video game legislation and factors surrounding it).

316. See *infra* Part IV.A (considering correlation and its relationship to causation).

317. See *infra* Part IV.B (discussing industry self-regulation).

318. See *infra* Part IV.B (describing historical restriction of youth culture).

319. See *infra* Part IV.C (discussing the concept of common sense and how it is variously interpreted).

320. See *infra* Part IV.D (discussing political influences).

321. Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005). See *supra* Part III.C (reviewing the district court's holding). See also Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir.), cert. denied, 534 U.S. 994 (2001) (striking down similar legislation to the SGIA); *supra* Part II.C.2 (reviewing the circuit court's holding).

322. Kendrick, 244 F.3d at 574.

correctly discerned that the key issue impacting the constitutionality of video game restrictions is proving a causative relationship between the games and harm to children, versus a mere correlative one.³²³ In fact, the similarity of the outcomes of the previous federal cases regarding laws attempting to restrict access to video games by minors has been suggested by some observers as signaling a “death knell” for the use of currently-available social science to demonstrate causation and support statutory video game restrictions.³²⁴

Notably, as Judge Kennelly stated in his opinion, many of the researchers *themselves* did not suggest the inferential leap the legislators made in the SGIA; that is, patterns observed in initial studies can be used as evidence that violent video game exposure has a causative relationship to violent behavior.³²⁵ For instance, regarding the fMRI brain functionality studies, researchers from Indiana University urged caution in use of the brain-functionality data they released.³²⁶ Likewise, the Indiana University research team studying the brain’s executive functioning stressed that the research had not yet resulted in proof of causation.³²⁷

In marked difference to the cautious tones of the researchers and scientists, lawmakers and advocates of restrictive video game laws often imply that scientific proof of causation already exists.³²⁸ For instance, Dr. Craig Anderson, the oft-cited authority in researching the connection between media violence and violent behavior,³²⁹ frequently begins articles, studies and public comments by reciting the details of the Columbine High School shootings, in which thirteen people were

323. See *supra* Part II.B.1 and Part II.B.2 (describing correlation and causation).

324. See Calvert & Richards, *supra* note 88, at 222 (“When viewed together, the rejection of social science evidence at the appellate court level in both American Amusement Machine Association [Kendrick] and Interactive Digital Software Association should signal the death knell for the use of current, general social science research on video games to support access-limitation ordinances.”).

325. *Entm’t Software Ass’n*, 404 F. Supp. 2d at 1065 (noting a scientist’s concession that his studies demonstrated only a correlative, not causative, link between media violence exposure and behavioral disorders).

326. Press Release, Ind. Univ. Sch. of Med., Media Violence Linked to Concentration, Self-Control (June 9, 2005), available at http://medicine.indiana.edu/news_releases/viewRelease.php4?art=346 (quoting William Kronenberger, Ph.D., stating “more research is needed before conclusions can be drawn that media exposure causes the brain activation differences” observed).

327. Self-Control Release, *supra* note 132 (discussing a study investigating the relationship between media violence exposure and executive functioning and stating the data “shows a correlation but it does not pinpoint the cause”).

328. See *infra* note 330 (citing to articles discussing video game research).

329. See *supra* note 88 (describing Dr. Anderson’s reputation and work).

murdered and twenty-three wounded by students Eric Harris and Dylan Klebold.³³⁰ Dr. Anderson cites this tragic story because Harris and Klebold were reportedly habitual players of the violent video game Doom.³³¹ Dr. Anderson repeatedly describes these horrible episodes and others, even when the material to follow offers no causative support for the inference that the video game caused Harris and Klebold to become cold-blooded killers.³³²

Likewise, advocates of video game restrictions often mention negligence and products liability lawsuits brought against video game manufacturers by the families of children murdered in school shootings, but they fail to mention the fact that such suits have been uniformly rejected by courts.³³³

Passionate rhetoric implying a linkage between violent video games and negative impacts to children may not be inappropriate for public policy advocates; however, lawmakers are held to a higher standard when writing statutes that potentially infringe upon fundamental constitutional rights such as free expression.³³⁴ In his holding in *Entertainment Software Association v. Blagojevich*, Judge Kennelly held that Illinois lawmakers failed to meet that standard and correctly found the SGIA to be an unconstitutional infringement on free

330. See, e.g., Craig A. Anderson & Brad Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analysis of the Scientific Literature*, 12 PSYCHOL. SCI. 353, 353 (2001) (noting the Columbine massacre and other school shootings); Craig A. Anderson & Christine R. Murphy, *Violent Video Games and Aggressive Behavior in Young Women*, 29 AGGRESSIVE BEHAV. 423, 423 (2003) (noting school shootings in first paragraph); Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. OF ADOLESCENCE 113, 113 (2004) (noting Columbine and other school shootings).

331. Anderson & Bushman, *supra* note 330, at 353 (detailing that Harris and Klebold reportedly played a “customized version of Doom with two shooters, extra weapons, unlimited ammunition and victims who could not fight back—features that are eerily similar to aspects of the actual shootings”).

332. See *supra* note 275 and accompanying text (noting Dr. Anderson’s inability to show causation of aggressive activity by violent video game play).

333. See, e.g., *James v. Meow Media, Inc.* 300 F.3d 683, 701 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) (affirming the District Court’s dismissal of all claims, including negligence and products liability, brought by parents of murdered students against video game companies and other defendants).

334. *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that a gender-based differential in alcohol sale laws, allowing women to buy certain types of beer at age eighteen but restricting such sale to men until age twenty-one, is unconstitutional). The Court disputed the state legislature’s reliance on various statistical studies. *Id.* The Court stated it is “unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business.” *Id.*

speech.³³⁵

B. The Role of Industry Self-Regulation

The most important and visible aspect of the Entertainment Software Rating Board's self-regulatory efforts focuses on the ongoing rating of video games.³³⁶ The ESRB's efforts have received largely mixed comments from the Federal Trade Commission³³⁷ and others.³³⁸ Legislators and elected officials in Illinois, however, have been more negative about the performance of the ESRB's self-regulatory efforts, both in terms of preventing the sale or rental of inappropriate videos to minors and regarding the accuracy of the ESRB's ratings.³³⁹ Governor Blagojevich has stated flatly that the ESRB system is inadequate and ineffective at preventing minors' access to adult content.³⁴⁰

In light of this stinging criticism of both enforcement at the retail level and accuracy of the ratings themselves, it is noteworthy that the SGIA provided as an affirmative defense to prosecution under the law if the video game is rated EC, E10+, E or T.³⁴¹ Likewise, the newly introduced federal legislation mirrors these affirmative defenses, based upon ESRB ratings.³⁴² However, in Judge Kennelly's injunction enjoining implementation of the SGIA, the court noted the inappropriateness of piggybacking a statute onto an industry self-regulatory system, implying that this inappropriately delegates authority to the ESRB.³⁴³ Legislative sponsors of the bill in Illinois argued that the potential conflict was solved by the SGIA's separate definitions of

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

336. *See supra* Part II.A (explaining the ESRB rating program).

337. *See supra* notes 71–75 and accompanying text (describing the mixed assessments from the FTC).

338. *See* THE HENRY K. KAISER FAMILY FOUNDATION, *supra* note 36, at 3 (noting a study in which a panel of parents often disagreed with video game ratings determined by the ESRB).

339. *See supra* notes 230–32 and accompanying text (describing an independent “sting operation” conducted by Illinois State Rep. Paul Froelich and the Illinois State Crime Commission, in which a fifteen-year-old boy was allowed to purchase “Mature” rated video games at eleven of the fifteen Illinois stores he visited).

340. *See* Gov. Blagojevich Signature Announcement, *supra* note 4, at 1–2 (stating “the video game industry has not developed an effective self-regulation system that keeps adult material out of the hands of minors”).

341. *See supra* Part III.B (describing provisions of the SGIA).

342. *See* Federal Bill Announcement, *supra* note 22, at 3 (noting “retailers would have an affirmative defense . . . if they have a system in place to display and enforce the ESRB system”).

343. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1082 (N.D. Ill. 2005) (noting “[t]he signage and brochure requirements [of the SGIA] require retailers to take the ESRB rating system—a message developed by the video game industry and supported by retail merchants—and present it in a manner mandated by the State”).

“sexually explicit video game” and “violent video game.”³⁴⁴ However, it is clear that the ESRB, should it choose to alter its standards could allow more video games to fall into the ratings that enjoy the protection of the affirmative defenses.³⁴⁵ The conflict is clear between legislative attempts to demonize the ESRB system, while at the same time leaning upon it from a legal and regulatory standpoint.³⁴⁶

C. The Uncommon Nature of Common Sense

Lawmakers and advocates in Illinois have referred to the SGIA as an example of “common sense lawmaking.”³⁴⁷ As is frequently noted, however, conventional wisdom and popularly held notions of common sense are not always compatible with constitutionally protected rights.³⁴⁸ Occasionally included in discussion of potential video game restrictions is the potential link between excessive video game play by children and the increasing trend toward childhood obesity.³⁴⁹ Some legislators have encouraged additional research on this topic and cite this potential link as additional support for statutory video game restrictions.³⁵⁰ However, when legislative bodies, including Illinois, have considered the epidemic of obesity, the result has been new laws

344. See *supra* Part III.B (describing provisions of the SGIA). See also Ill. Gen. Assemb., 94th Sess. Deb., at 22 (Mar. 16, 2005) (statement of Rep. Chapa LaVia) available at <http://www.ilga.gov/house/transcripts/htrans94/09400031.pdf> (detailing arguments for and against passage of the proposed legislation). Arguing against opposition to the bill, State Rep. Chapa La Via stated:

Myth #2. The Bill allows a nongovernmental third party to determine what constitutes a violent or sexually explicit video game under the law effectively delegating the Legislator’s [sic] function to a private entity. False. The General Assembly determines in the definition of ‘violent and sexually explicit games’ which games are inappropriate for minors and those definitions put retailers and manufacturers on notice of which games are covered.

Id.

345. See *supra* Part II.A (describing the ESRB ratings system).

346. See *supra* note 343 (discussing Judge Kennelly’s holding regarding the SGIA’s labeling and signage requirements).

347. See, e.g., Blagojevich Proposal Release, *supra* note 16 (describing the video game restrictions as “common sense.”)

348. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 10 (2003) (“Common sense and the dictates of the law, including the Constitution, are not always the same thing.”).

349. See, e.g., Rich/Harvard Testimony, *supra* note 91, at BL00246 (“There is growing evidence that video game play may contribute to obesity, probably through increasing sedentary behavior in otherwise active children.”).

350. See, e.g., Senator Hillary Clinton, Speech to the Kaiser Family Foundation (Mar. 8, 2005), available at <http://clinton.senate.gov/news/statements/details.cfm?id=233740> (describing The Children and Media Research Advancement Act, newly-proposed legislation addressing links between media consumption and childhood obesity).

like the Illinois Commonsense Consumption Act, which is designed to restrict lawsuits against industry and emphasize *individual* responsibility.³⁵¹ There is a notable disparity in the legislature's treatment of these two topics, and the differing way common sense is reflected regarding individual and parental responsibility.³⁵²

Similarly, a startlingly incompatible view of legislative common sense is evident when comparing the SGIA with Illinois' laws for gun ownership.³⁵³ If implemented, the SGIA would restrict the sale or rental of violent video games to minors under the age 18.³⁵⁴ However, Illinois law allows the sale of firearms excluding handguns to minors below age 18 if they have a valid Firearm Owners Identification Act (FOID) card.³⁵⁵

The juxtaposition of these two laws is striking, as they would allow a teenager with parental permission to purchase an *actual* shotgun, but not a video game depicting use of a *virtual* shotgun.³⁵⁶ Of course, the teenager's parent can purchase the violent video game for the minor, but SGIA includes no "parental permission" exception to allow the minor to purchase the game for himself or herself, unlike a teenager with a FOID card who can purchase firearms independently.³⁵⁷

In his opinion in *Video Software Dealers Association v. Maleng*, Judge Lasnick commented upon the issue of reality versus play, noting that no amount of skill at shooting virtual guns in video games teaches a person to fire an actual gun.³⁵⁸ Likewise, Judge Posner noted, in

351. Illinois Commonsense Consumption Act, Pub. Act. No. 93-848 Section 1, 2004 Leg. Serv. 2347 (West) (codified at 745 ILL. COMP. STAT. 43).

352. Compare, e.g., SGIA, *supra* note 10 (de-emphasizing parental responsibility by placing burden of video game regulation upon the state and industry) with Illinois Commonsense Consumption Act, *supra* note 351 (emphasizing personal responsibility by eliminating consumer obesity related cause of action against businesses).

353. See *infra* note 355 and accompanying text (discussing Illinois gun laws).

354. SGIA, *supra* note 10, at §§ 12A-15, 12B-15.

355. 430 ILL. COMP. STAT. 65/4 (2004) [hereinafter FOID]. FOID cards can be obtained by minors under age 18 with consent of a parent or guardian. *Id.* No minimum age is noted in the Illinois statute for FOID card qualification. *Id.*

356. Compare FOID, *supra* note 355 and accompanying text (discussing the FOID law) with SGIA, *supra* note 10 and Part III.A (discussing the provisions of the SGIA).

357. See SGIA, *supra* note 10, at §§ 12A-15, 12B-15 (listing statutory requirements, which do not include an exception or affirmative defense for parental permission).

358. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1189 n.4 (W.D. Wash. 2004) ("[a] proven ability to manipulate a controller and push buttons will not teach a person to load, aim or fire a gun"). *But see* Garry, *supra* note 5, at 141 (referring to lawsuits that describe some violent video games as "firearms trainers" and "murder simulators"). One proponent of the idea that virtual gunplay can act as training for use of actual firearms is Lt. Col. Dave Grossman, credited with pioneering "killology," the study of killing. Biography-Dave Grossman, <http://www.killology.com/bio.htm> (last visited Mar. 24, 2006). *But see* GERALD JONES, KILLING

Kendrick, that “[t]he issue in this case is not violence as such, or directly; it is violent images”³⁵⁹

Notably, the common sense driving the enthusiasm for video game restrictions is not supported by relevant crime statistics.³⁶⁰ For instance, based on the rhetoric of some promoters of video game restrictions, one would expect a dramatic rise in the rate of violent crimes in school settings given the popularity of violent video games during the past decade.³⁶¹ Contrary to this reasonable expectation, the U.S. Department of Education reports the rate of violent crime against students ages 12–18 dropped *in half* between 1992 and 2002.³⁶²

Likewise, the conventional wisdom perceiving video games as a youth epidemic largely ignores evidence that games are becoming a larger and more accepted part of modern culture.³⁶³ For example, the

MONSTERS 166–67 (2002) (disputing Grossman’s theories regarding similarities between modern video games and military training tools, contributing to desensitization of children to violence).

There are problems with Grossman’s argument, however. Effective conditioning requires structured application and a well-controlled environment, which is scarcely what gamers are experiencing when they’re fiddling with a video game in their own rooms or messing around an arcade with hundreds of other kids. . . . What our kids are doing with their video games is playing and they know it. Games have always been part of military training, and nearly all competitive games have a warlike subtext. . . . Just because shooter games remind us of real shooting and military training doesn’t mean that kids experience them as such when they play, any more than they experience plastic army men or chess pieces as real warriors.

Id.

359. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575 (7th Cir.) *cert. denied*, 534 U.S. 994 (2001).

360. *See infra* note 362 and accompanying text (indicating decrease in violent crime rates, despite a belief that video games increase violent behavior and aggression).

361. *See supra* note 330 and accompanying text (discussing Dr. Anderson’s frequent focus on school murders). *See also* Part II.A (describing growth of video game industry).

362. Press Release, U.S. DEP’T OF EDUC., Violent Crime Rate Against Students Drops, New Report Says (Nov. 29, 2004), *available at* <http://www.ed.gov/print/news/pressreleases/2004/11/11292004.html>. The report tracks statistics for theft and violent crimes, as well as bullying, hate-crimes, and drug and alcohol abuse. *Id.* The report also notes that not only have violent incidents declined in schools, but also the incidence of students bringing weapons to school. *Id.* *See also* JONES, *supra* note 358, at 167 (arguing that evidence does not support an increase in actual violence attributable to video games).

Certainly video games haven’t had any significant impact on real-world crime. “The research on video games and crime is compelling to read,” said Helen Smith, forensic psychologist, youth violence specialist and author of *The Scarred Heart*. “But it just doesn’t hold up. Kids have been getting less violent since those games came out. That includes gun violence and every other sort of violence that might be inspired by a video game.”

Id.

363. *See infra* notes 364–65 and accompanying text (noting examples of increasing acceptance of video game culture in adult life and academia).

average age of video game players has risen to thirty-seven years old.³⁶⁴ The emergence of video game-related curriculums now offered at more than one hundred universities in North America reflects the complexity of video games and their increasing acceptance as an art form.³⁶⁵ Growing acceptance of gaming culture in higher education is mirrored by research acknowledging the positive role electronic gaming can play in early childhood development.³⁶⁶

Finally, the prudence of “common sense” legislation becomes more suspect in light of the costs to taxpayers of drafting, advocating, passing and mounting the inevitable legal defenses to such legislation.³⁶⁷ For instance, the price tag incurred by taxpayers in the State of Washington for legal defense costs of its unsuccessful attempt to restrict minors’ access to some violent video games was estimated at tens of thousands of dollars.³⁶⁸

364. Electronic Software Association Facts and Research, ENTERTAINMENT SOFTWARE ASSOCIATION, http://www.theesa.com/facts/gamer_data.php?printable=1 (last visited Mar. 24, 2006) (reporting forty-three percent of video game players are eighteen to forty-nine years old and the average game player is thirty-seven years old).

365. Seth Schiesel, *Video Games Are Their Major, So Don't Call Them Slackers*, N.Y. TIMES, Nov. 22, 2005, at A1 (reporting examples such as a master's level program in entertainment technology at Carnegie-Mellon begun in 1999, undergraduate and Ph.D. programs in interactive media at Georgia Institute of Technology, and programs at the University of Southern California, University of Central Florida and Parsons New School for Design).

“The skills and methods of video games are becoming a part of our life and culture in so many ways that it is impossible to ignore,” said Bob Kerrey, the former Nebraska senator who is now president of the New School “But if you just look at the surface of people playing games, you are missing the point, which is that games are all about managing and manipulating information,” Mr. Kerrey said.

Id.

366. See THE HENRY K. KAISER FAMILY FOUNDATION, *supra* note 36, at 2.

Some researchers who study electronic gaming believe that it may provide the “training wheels” for computer literacy. The design features of the most popular interactive games have been found to improve skills such as spatial visualization and visual attention. There are indications that practicing spatial skills with video games can reduce differences in these skills among boys and girls.

Id.

367. See Press Release, Entm't Software Ass'n., Video Game Industry Files for \$644,545 in Attorney's Fees From State of Illinois Related to Its Unconstitutional Video Game Sales Law, (March 16, 2006), available at http://www.theesa.com/archives/2006/03/video_game_indu_4.php?printable=1 (announcing the petition seeking reimbursement for \$644,545 in legal fees incurred opposing the SGIA and quoting the ESA president stating the petition is consistent with the association's "belief that the public has a right to know how much of their tax dollars were spent defending a statute that everyone knew from the start was unconstitutional ...").

368. See Calvert & Richards, *supra* note 88, at 208 (citing Dan Richman, *Judge Blocks Law Curbing Some Violent Video Games*, SEATTLE POST-INTELLIGENCER, July 11, 2003, at A1) (estimating the cost of the unsuccessful court battle at \$90,000).

D. Is the Political Upside of Video Game Laws Simply Irresistible?

The introduction of legislative proposals for new, highly similar video game restrictions just weeks after federal judicial decisions striking down those previously passed indicates video game restrictions represent a political issue of unusual seductiveness.³⁶⁹ Support for the legislation typically is bipartisan.³⁷⁰

Some observers have noted that the issue is so popular that legislators vote for proposed bills regardless of their apparent unconstitutionality.³⁷¹ Review of the legislative record associated with the passage of Illinois' SGIA reveals that for some state representatives, the lure of a politically popular bill may have outweighed their personal concerns regarding its ability to withstand judicial scrutiny.³⁷²

369. See *supra* note 22 (describing the December 16, 2005 introduction of new federal legislation to protect children from inappropriate video games).

370. See *supra* notes 249–50 and accompanying text (noting overwhelming margins of victory for the SGIA in both houses of Illinois' General Assembly).

371. Michael Higgins & John Chase, *Judge Zaps State Law on Video Games*, CHI. TRIB., Dec. 3, 2005, at 20 (noting that David Vite, president of the Illinois Retail Merchants Association, had indicated that “it was obvious the law was unconstitutional, but that legislators voted for it because of its potential political benefits.”).

372. See Ill. Gen. Assemb., 94th Sess. Deb., at 30–31 (Mar. 16, 2005) (statement of Rep. Lou Lang) available at <http://www.ilga.gov/house/transcripts/htrans94/09400031.pdf>. Rep. Lang (D-Skokie), stated the following in floor debate:

I support this Bill. . . . But the truth of the matter is that 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 interpretation of the statute is vague and because of that, courts all over this country have held Bills that look just like this unconstitutional. . . . Now, I know that many times on this floor the Constitution doesn't have a whole lot of meaning. And, in fact, today I'm gonna vote for this Bill knowing that it's unconstitutional. But it would be far better to fix this Bill right now before we send it over to the Senate and wait for them to fix it or to wait for a court to fix it

Id. Rep. Lang subsequently voted “yes” for the SGIA. Voting History for HB 4023, 94th Ill. Gen. Assemb., available at <http://www.ilga.gov/legislation> (follow “House - Bills 4001 – 4100” hyperlink; then follow “HB4023 VIDEO GAMES-VIOLENT AND SEX” hyperlink; then follow “Votes” hyperlink). Similarly, Rep. William Black (R-Danville), stated the following during the same House debate:

[I]f any of us think the Bill is patently unconstitutional as written and then we vote for it anyway, ya know, that's the game we've played here for years. We vote for some Bills so that we can go home and say, “I'm tough on this or I did that.” And then hope that the Supreme Court will bail us out of an action that we took. Ladies and Gentlemen of the House, where do you stop? . . . Ladies and Gentlemen, “Let me suggest to you that sometimes standing up for the First Amendment is one of the toughest things we can do. It is not an easy task.” But that is what [sic] we're elected. We make some difficult decisions. . . . I'm asking you today to stand up for the First Amendment. I'm asking you today to tell parents, “That's your responsibility, not mine.”

Id. at 34–36. Rep. Black subsequently voted “yes” for the SGIA. Voting History for HB 4023, 94th Ill. Gen. Assemb., available at <http://www.ilga.gov/legislation> (follow “House - Bills 4001 –

Although dwarfed by apparent popular support for aggressive anti-video game legislation, there are commentators and groups in opposition.³⁷³ For instance, some legal commentators note legislative efforts to help parents are essentially less sound than allowing parents to maintain control over decisions regarding what speech their children will be exposed to.³⁷⁴ Others, while noting that regulation of some sort may be possible, advocate less broad-brush and expansive restrictions than those previously attempted.³⁷⁵ Not unlike the bipartisan

4100” hyperlink; then follow “HB4023 VIDEO GAMES-VIOLENT AND SEX” hyperlink; then follow “Votes” hyperlink).

373. See *supra* notes 10–14 and accompanying text (describing the introduction of legislation to prohibit the sale of violent video games to the young). Enthusiasm for curbing violent video games has become so prevalent, it has been the subject of parody in a national satirical newspaper. See *New Video Game Designed to Have No Influence on Kids’ Behavior*, THE ONION, Dec. 15, 2005, at 1 (satirically reporting the fictitious release of “Stacker,” a “first-person vertical crate-arranger” game garnering praise from parents’ groups which “lauded its unstimulating visuals, utter lack of storyline, and non-immersive game play.”). Interestingly, much of the published legal scholarship in favor of legislative restrictions on minors’ access to violent video games consists of student-authored Notes. See, e.g., Nathan Phillips, Note, *Interactive Digital Software Ass’n v. St. Louis County: The First Amendment and Minors’ Access to Violent Video Games*, 19 BERKELEY TECH. L.J. 585, 586 (2004) (advocating local legislation strengthening ratings enforcement), Bonnie B. Phillips, Note, *Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of First Amendment Rights of Minors*, 36 IND. L. REV. 1385, 1386–87 (2003) (arguing in favor of narrowly-tailored restrictions on video games for minors); Scott A. Pyle, Note, *Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance that Passes Constitutional Muster*, 37 VAL. U. L. REV. 429, 433 (2002) (proposing ordinances designed to survive constitutional scrutiny); Kevin E. Barton, Note, *Game Over! Legal Responses to Video Game Violence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 133, 162 (2002) (arguing that governments have a “duty” to pass video game restrictions); but see Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. M.S.U.-D.C.L. 51, 113 (2003) (advocating restriction of violent video games to minors, particularly first-person shooter games).

374. Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 178–79 (1998).

[I]t is probably sounder to leave parents, rather than the government, with the ultimate decision here [regarding exposure to speech]. Children of the same age vary widely in maturity, and parents usually know their child’s maturity better than do prosecutors, judges, or juries. If parents believe there’s educational value in giving their children access to supposedly “obscene-as-to-minors” material, there’s good reason to defer to that judgment. And the notion that parents should, absent some powerful reason to the contrary, have discretion about how to raise their children buttresses this view.

Id.

375. Gregory K. Laughlin, *Playing Games With the First Amendment: Are Video Games Speech and May Minors’ Access to Graphically Violent Video Games be Restricted?*, 40 U. RICH. L. REV. 481, 545 (2006).

Attempts to completely prevent minor children from accessing graphically violent video games from birth to the age of majority are hopelessly naive, doomed to fail and likely to be counterproductive. Such games are here to stay. The primary method of addressing this issue is for parents to rear their children to find such displays of

complexion of support for such legislation, video game bans are opposed by groups on both sides of the political spectrum, including both groups traditionally considered highly liberal³⁷⁶ and those viewed as staunchly conservative.³⁷⁷

Finally, commentators have noted the tragic irony of widespread legislative efforts to shield adolescents from one, politically unpopular form of fantasy violence (video games), while American children are increasingly being bombarded with brutal images of real-life violence from post-9/11 terrorism and the Iraq war.³⁷⁸

V. PROPOSAL

Based upon the strongly worded and well-reasoned opinion by Judge Kennelly, and the multiple constitutional problems of the SGIA, the permanent injunction issued against the SGIA should be affirmed by the Seventh Circuit Court of Appeals.³⁷⁹ Nevertheless, the political attractiveness of video game restrictions appears to guarantee many more such laws in the future.³⁸⁰ In the previous cases in which laws

violence as offensive as they do and to have a sophisticated understanding of the motives and messages intended by those who supply them with such content.

Id.

376. See, e.g., *ACLU Comments to the Federal Communication Commission re: MB Docket No. 04-261, the Matter of Violent Television Programming and Its Impact on Children*, (Sept. 15, 2004), available at <http://www.aclu.org/freespeech/censorship/11463leg20040915.html> (detailing the ACLU's concerns regarding the constitutionality of governmental regulation of violent programming, and the adequacy of research purporting to demonstrate links between violent programming and violent behavior).

377. See, e.g., Adam Thierer, *Regulating Video Games: Must Government Mind Our Children?*, TechKnowledge, (Cato Inst., D.C.), June 24, 2003, available at <http://www.cato.org/tech/tk/030624-tk.html> (noting the Cato Institute's concern regarding inadequacy of research, belief that the industry's self-regulatory plan is working, concern regarding the threat of "full-blown censorship" and belief in the importance of parental responsibility).

378. 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, 99 (2005). "[G]overnment seems more concerned about censoring fictional images of fantasy violence than it does about controlling images of real-life violence from wartime situations. Put more bluntly, legislative bodies focus on fake violence but not real violence." *Id.*

379. See *supra* Part III.C (summarizing the opinion of the District Court).

380. See Clay Calvert, *The First Amendment, The Media and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325, 334-35 (2005) (stating that "politicians and precedent do not mix").

The second important lesson could easily be called, "If at first, or second, or third you don't succeed, then try, try again." That appears to be the maxim for some politicians that never seem to let judicial precedent, grounded in constitutional concerns for the First Amendment protection of free speech, get in the way of proposing new legislation that has a slim-to-none chance of standing up in court. A wall of insurmountable precedent is never too high, it seems, for some politicians to try to hurdle in order to

restricting minors' access to violent video games were held unconstitutional, the courts provided guidance regarding how future legislation might be developed to withstand strict scrutiny.³⁸¹ In light of that jurisprudence and the status of scientific evidence to date, this Part provides a suggested blueprint for future legislation.³⁸²

First, the drafting of legislative findings must be disciplined, concise and free of over-broad conclusions, as sloppiness in this area results in statutes that are easily disputed by the published comments of the scientific researchers themselves.³⁸³ Legislators must ensure that the law itself and the legislative record remain free of hyperbole and exaggeration, which cannot be defended under strict judicial scrutiny.³⁸⁴

Second, social scientific data offered in support of the laws during legal challenges must include *only* that which focuses upon video game exposure, uses appropriately-aged test subjects, and demonstrates causation.³⁸⁵ Studies that are merely observational, or at best designed to indicate a correlational relationship, will not meet the burden of adequately supporting content-restrictive legislation and should not be submitted in support.³⁸⁶ Ideally, submitted studies should be published and peer-reviewed.³⁸⁷ The litigation strategy of extremely large amounts of material, much of it irrelevant, does not help the argument for constitutionality.³⁸⁸ In fact, litigators' decisions to provide vaguely supportive, but not directly applicable information, has been counter

heap more legislative litter on courts, with taxpayers left to pay the bill of defending the new laws.

Id.

381. *See supra* Part II.C.2 (describing Judge Posner's opinion for the 7th Circuit), Part II.C.3 (describing Judge Arnold's opinion for the 8th Circuit), and Part II.C.4 (describing Judge Lasnick's opinion for the Western District of Washington).

382. *See infra* Part V (summarizing six proposals to create video game legislation that will survive judicial scrutiny).

383. *See supra* Part II.B.3 (noting cautionary statements by researchers at Indiana University).

384. *See, e.g.*, *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1063 (N.D. Ill. 2005) (noting lack of evidence in the legislative record to support the legislature's inferences).

385. *See, e.g., id.* at 1058 (noting studies submitted into evidence, including some which focused on violent media other than video games or using inappropriately-aged subjects).

386. amfAR Aids Research, <http://www.amfar.org/cgi-bin/iowa/bridge.html>. Observational studies are defined as those that observe without altering or influencing the process being studied, but are prone to bias. *Id.*

387. *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 1344 (16th ed. 1989) (defining "peer review" as the "evaluation of the quality of the work effort of an individual by his or her peers"). Peer review is defined as a scholarly process used to force authors to meet the standards of their discipline. *See id.* Publications that have not undergone peer review are likely to be regarded with suspicion by professionals in many fields. *See id.*

388. *See Entm't Software Ass'n*, 404 F. Supp. 2d at 1058 (observing the large volume of studies submitted into evidence).

productive.³⁸⁹

Third, in response to Judge Posner's comments regarding the lack of realism inherent in cartoonish video games,³⁹⁰ games entered into the record in support of challenged legislative restrictions must be only those most realistic in plot and artistic style.³⁹¹ Submission into the judicial record of games featuring aliens, monsters, dragons and other fantasy contribute to restrictive laws being found unconstitutional.³⁹²

Next, a parental exception should be included, so that it is not unlawful for a minor with parental permission to purchase or rent any video game, including instances in which the parent is present with the child at the time of purchase or the minor is renting on a family account from a pre-approved list of titles.³⁹³ Inclusion of this exception would help overcome the argument that without such an exception, a law such as Illinois' SGIA can be more restrictive with regard to minors' purchase of games depicting *virtual* use of firearms, versus the purchase of *actual* firearms themselves.³⁹⁴

Fifth, the legislature must proactively address the constitutional challenge associated with placing regulatory authority in the hands of the industry, allowing the operation of a statute to rest upon a rating system maintained by an independent industry group with no government input or oversight.³⁹⁵ This is particularly obvious in light of the heated criticism legislators have directed at the effectiveness and accuracy of the ESRB rating system.³⁹⁶ At minimum, it is inappropriate to base affirmative defenses for sale/rental of games with certain ESRB ratings, as the government has no role in determining which games receive that rating.³⁹⁷ Ultimately, legislative restrictions on minors' access to video games based upon content may not be sustainable without the government incurring some responsibility for rating content.³⁹⁸

389. See *supra* Part II.C.2-4 (identifying courts' characterization of social science data as inadequate to support legislative restrictions on video games).

390. See *supra* Part II.C.2 (discussing *Kendrick*).

391. See *Entm't Software Ass'n*, 404 F. Supp. 2d at 1081 (discussing the literary merit of the video game *God of War*).

392. See, e.g., *supra* notes 390-91 (referencing cases involving such games).

393. Compare e.g., SGIA, *supra* note 10 and FOID, *supra* note 355.

394. *Id.*

395. See *supra* Part II.A (describing independent nature of ESRB industry rating program).

396. See *supra* Part III.A (describing statements made regarding effectiveness of ESRB program during effort to pass the legislation).

397. See *supra* Part II.A (describing ESRB program).

398. See, e.g., *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1082 (N.D. Ill. 2005) (discussing the problem of mandating the use of an independent, self-regulatory program).

Finally, the legislation must be as narrowly tailored as possible, perhaps including only those video game retail/rental establishments the jurisdiction has determined are most in need of additional safeguards for minors.³⁹⁹ For instance, FTC studies indicate its national “mystery shop” surveys demonstrate that enforcement of restrictions on the purchase/rental of adult-rated games to minors is not uniform between various types of retail establishments.⁴⁰⁰ Large national retailers typically do a more robust job of posting rating information, verifying age of potential purchasers, and restricting sales to minors than other types of retailers.⁴⁰¹ In Illinois, a much heralded, legislatively driven “sting operation” was used as evidence of lack of compliance with age-based ratings.⁴⁰² In order to better support future legislation curbing access to violent video games, legislators could develop more focused jurisdiction-specific research regarding compliance; potentially pointing to problem areas, such as video sales or rentals by convenience stores.⁴⁰³ Such data could be used to demonstrate to a court the need for a specific, narrowly tailored legislative restriction on the sale or rental of certain video games to minors.⁴⁰⁴

VI. CONCLUSION

The SGIA attempted to protect minors in the state of Illinois from the perceived harms associated with violent video games. However, the social scientific data to demonstrate those harms, and a causative relationship between them and video games, remains unproven. The Seventh Circuit Court of Appeals should affirm the District Court’s permanent injunction of the SGIA.

399. *Id.* at 1077 (discussing the lack of narrow tailoring of the law).

400. *See supra* note 72 and accompanying text (describing FTC “mystery shop” program). *See generally* FTC Report, *supra* note 50 (reporting results of FTC’s fourth review of industry practice).

401. *See* FTC Report, *supra* note 50, App. B, at B-5 (noting that seven major retailers were recognized as having policies to restrict sales of games to minors: Toys ‘R’ Us, Kmart, Wal-Mart, Target, Circuit City, Staples and CompUSA).

402. *See supra* notes 230–32 and accompanying text (describing Rep. Froelich’s “sting operation” of video game retailers).

403. *See supra* note 401 and accompanying text (noting FTC’s recognition of varying levels of compliance at different types of retailers).

404. *Id.*