

GAME OVER FOR MINORS? ANALYZING THE CONSTITUTIONALITY OF ILLINOIS' RESTRICTIONS ON VIDEO GAME SALES

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I. INTRODUCTION

Beginning in the 1980s, video games have steadily grown into a major part of our entertainment culture. The early games, such as *Pac-Man*, *Asteroids*, and *Pong*, paved the way for many of the multi-player, action-packed games with nearly life-like graphics available today. The early video game industry was mainly made up of simple computer games and consoles, such as the Atari system. Now, the industry is a highly competitive and lucrative business with multinational corporations such as Nintendo, Microsoft, and Sony fighting for control of the market. As the video game industry continues to grow, the producers of video games spend more time and effort to produce the very best game experiences they can create. Often, video games now feature full scripts and storylines, much like television series or feature films. The video game industry now sees itself as a competitor and legitimate alternative to television and film. In fact, video game sales in 2004 totaled \$7.3 billion, which was only \$2 billion less than movie box-office revenue.¹ In addition, many famous actors now lend their voices to characters in video games. For example, the 2004 hit game *Grand Theft Auto: San Andreas* included characters voiced by James Woods, Samuel L. Jackson, and Chris Penn.² Some video game franchises, such as *Tomb Raider* and *Resident Evil*, have become so successful that feature films are created based on the video games, and even more films based on games are on the way from Hollywood.³

As video games and the supporting technology have improved and continued to grow in popularity, many of those who were young children and

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1. Paul K. McMasters, *Inside the First Amendment: A More Mature Approach to Video-Game Violence*, GANNETT NEWS SERVICE, Feb. 21, 2005, available at LEXIS, News Library.
2. *Grand Theft Auto: San Andreas*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0402224/> (last visited Sept. 4, 2005). The previous title in the *Grand Theft Auto* series included the voices of Ray Liotta, Dennis Hopper, Tom Sizemore, and Burt Reynolds. *Grand Theft Auto: Vice City*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0314123/> (Last visited Sept. 4, 2005).
3. Kim Peterson, *'Halo' To Hit Big Screen*, SEATTLE TIMES, Feb. 5, 2005, available at LEXIS, News Library.

teenagers when video games first became popular are now adults. These adults, who have grown up with video games, now make up a large percentage of video game players overall with the average age of players continuously increasing. According to the Entertainment Software Association, the average video-game player (often called a “gamer”) is now thirty years old.⁴ Because their audience is growing up, video game producers are working hard to create more mature and adult-themed games to continue to appeal to those original consumers. Video games, no longer seen as only toys for children, are now a major part of the entertainment industry for all age groups. This has resulted in a trend of many of the most popular games being originally targeted for adults, but younger children and teenagers often want to play them as well because they are such popular games. However, this creates a problem when children are playing video games that were created for and targeted toward adults to play. Often, these games contain adult themes with violent or sexually explicit content, much like a typical R-rated film. Although the video game industry has self-imposed a ratings system for these games, many are concerned that it is too easy for children to obtain these violent and sexually explicit video games that were originally intended for adults.

In late 2004, Illinois Governor Rod Blagojevich made headlines when he announced his plan to propose legislation to restrict minors’ access to violent and sexually explicit video games.⁵ Illinois is not the first government to attempt to limit minors’ access to violent or sexually explicit video games. Federal judges have struck down all past attempts at similar restrictions as unconstitutional because they violated the free speech protections of the First Amendment.⁶

This Comment will examine the previous case law regarding restrictions on violent and sexually-explicit video games and whether video games should be considered protected speech under the First Amendment. Next, this Comment will closely examine Illinois’ proposed restrictions under the proper standard of review and determine whether these restrictions would likely withstand a legal challenge. Finally, this Comment will examine possible alternatives that may be more effective in achieving the goal of limiting minors’ access to violent and sexually explicit video games within the confines of the First Amendment.

4. Al Swanson, *Video-Games Ban Challenged*, UPI, Mar. 17, 2005, available at LEXIS, News Library.

5. John Chase & Grace Aduroja, *Governor Targeting Violent Video Games*, CHI. TRIB., Dec. 16, 2004.

6. Chase & Aduroja, *supra* note 5. These decisions have not deterred state and local governments from attempting to regulate violent games, as more than twenty various jurisdictions began efforts to regulate video games in 2004 alone. McMasters, *supra* note 1.

II. EXISTING LAW & LEGAL BACKGROUND

Various state and local governments across the country have attempted to ban or restrict the sale of violent video games in recent years. Most of these attempts have had very limited, if any, success. Some of the areas that attempted to restrict violent games include the City of Indianapolis, St. Louis County, and the State of Washington.⁷ Typically, the local ordinances or statutes are challenged in court by companies involved with manufacturing and distributing video games that seek an injunction to prevent the ordinance from taking effect. The plaintiffs in these suits allege that video games are protected speech under the First Amendment, and the restrictions are unconstitutional limitations on free speech. So far, each restriction has been overturned by the courts.⁸

In 2000, the City of Indianapolis enacted an ordinance that required a public arcade to restrict minors' access to any video games containing graphic violence or sexually explicit content.⁹ The ordinance specified that any game that contained this type of content was deemed "harmful to minors."¹⁰ Any video game that was harmful to minors was to be set at least ten feet apart from the rest of the games and separated by a curtain or other partition, and minors were not allowed in the area unless they were accompanied by a parent or guardian.¹¹ A group of companies in the business of manufacturing, distributing, and displaying video games filed suit against the City in federal court, seeking a preliminary injunction to prevent the ordinance from going into effect.¹² The plaintiffs did not object to the City restricting minors' access to games with "strong sexual content," but they argued that the restrictions on violent games violated the First Amendment protection of freedom of speech.¹³ The district court found "at least some contemporary video games include protected forms of expression" and fall under the First Amendment.¹⁴ However, the district court still concluded that the City had a reasonable basis for enacting the ordinance and denied the plaintiffs' request

7. Dave McKinney, *Gov Targets Violent Video Games; Seeks Laws to Punish Merchants for Selling, Renting Them to Kids*, CHI. SUN-TIMES, Dec. 16, 2004, at 3, available at LEXIS, News Library.

8. Tresa Baldas, *Push to Regulate Video Games Comes Up Empty; Illinois The Latest State in Attempt to Ban Games; Litigation Picks Up*, NAT'L L. J., Jan. 10, 2005, at 6, available at LEXIS, News Library.

9. Am. Amusement Machine Ass'n v. Kendrick, 115 F. Supp. 2d 943, 946 (S.D. Ind. 2000).

10. *Id.* at 946.

11. *Id.* at 947.

12. *Id.* at 945.

13. *Id.* at 946.

14. *Id.* at 954.

for a preliminary injunction.¹⁵ The plaintiffs immediately appealed to the Seventh Circuit Court of Appeals.

The Seventh Circuit reversed the district court's ruling and granted the preliminary injunction after determining the Indianapolis ordinance was unconstitutional.¹⁶ The court determined that the City of Indianapolis did not present the compelling interests necessary to justify the restrictions on protected expression.¹⁷ Judge Posner, writing the opinion for the Seventh Circuit, stated that children have First Amendment rights, and a state must show a compelling interest in protecting children from proven harms resulting from violent video games in order to successfully restrict minors' access to those games.¹⁸ Judge Posner further noted that children should not be shielded from the harsh reality of the world, and protecting children from "violent descriptions and images . . . would leave them unequipped to cope with the world as we know it."¹⁹

The Seventh Circuit also drew comparisons between violence in video games and violence seen in literature, movies, and television. Judge Posner stated that literature, like video games, is most enjoyable when the author succeeds in bringing the reader into the story to interact with the characters.²⁰ Judge Posner listed several classic works of literature with graphic descriptions and scenes of violence and mentioned how the City did not feel compelled to require adult supervision while children read these stories.²¹ The Seventh Circuit concluded that most of the video games the City was attempting to restrict were essentially stories of some kind, even a zombie-killing game entitled *The House of the Dead*.²² These stories included in the video games may not be "distinguished literature," but they still included many classic themes that appeal to children, such as self-defense and fighting against overwhelming odds.²³ The City presented studies to support its claim that violent games harmed children by increasing aggressive thoughts and behavior, but the Seventh Circuit rejected these claims, stating "[t]he studies do not find that video games have ever caused anyone to commit a violent act," and the

15. *Id.* at 981.

16. *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001).

17. *Id.*

18. *Id.* at 576.

19. *Id.* at 577.

20. *Id.*

21. *Id.* Some of the violent stories from classic literature that Judge Posner expressly mentions include: "the Odyssey, with its graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants; or . . . the stories of Edgar Allen Poe, or the famous horror movies made from the classic novels of Mary Wollstonecraft Shelley (*Frankenstein*) and Bram Stoker (*Dracula*)." *Id.*

22. *Id.*

23. *Id.*

studies “do not support the ordinance.”²⁴ In addition, the court pointed out the studies never suggested that the interactive character, as opposed to the violent images, caused the increased aggressive feelings, and thus concluded, “violent video games are not any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.”²⁵

The Seventh Circuit concluded that the ordinance “curtails freedom of expression significantly,” and the City of Indianapolis did not present any compelling justification for this restriction so the plaintiffs were entitled to the preliminary injunction.²⁶ The court did not specify what additional evidence the City should have provided or any specific amendments that might allow the ordinance to pass the First Amendment test.²⁷ However, Judge Posner left a potential door open for a later ordinance to succeed when he suggested, “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, a more narrowly drawn ordinance might survive a constitutional challenge.”²⁸

In 2003, the Eighth Circuit also granted an injunction to prevent a similar statute from taking effect in St. Louis, Missouri when it decided *Interactive Digital Software Ass’n v. St. Louis County*.²⁹ St. Louis County passed an ordinance in October 2000, which made it illegal to knowingly “sell, rent, or make available” video games containing graphic violence and strong sexual content.³⁰ This ordinance mainly applied to retailers and video rental stores, so it was slightly different than the ordinance in *Kendrick*, where the restrictions applied to arcade-type video games in public places.³¹ Again, as in *Kendrick*, the plaintiffs did not object to the restrictions on games with strong sexual content.³² The district court decided that video games were not entitled to First Amendment protection and dismissed the case, which prompted the plaintiffs to appeal.³³ The Eighth Circuit took note of the elements of video games including the “pictures, graphic design, concept art, sounds, music, stories, and narrative” and determined video games are entitled to First Amendment protection.³⁴ The County, the defendants in the case, argued that the interactive nature of the video games distinguished them from

24. *Id.* at 578.

25. *Id.* at 579.

26. *Id.*

27. *Id.*

28. *Id.* at 580.

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

30. *Id.* at 956.

31. *Id.*; *Kendrick*, 244 F.3d at 579.

32. *Interactive Digital*, 329 F.3d at 956 n.1.

33. *Interactive Digital*, 329 F.3d at 956.

34. *Id.* at 957.

literature, film, or other types of protected speech, but the court rejected this argument.³⁵ The court drew an analogy between video games and books that allow the reader to make choices to determine the direction of the story, which “can be every bit as interactive as video games.”³⁶

Following its conclusion that video games are protected expression under the First Amendment, the Eighth Circuit next applied a strict scrutiny standard to the ordinance.³⁷ The ordinance restricted video games based on their content, which required the County to show a compelling state interest that was narrowly tailored to achieve those interests.³⁸ To demonstrate a compelling interest, the County “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”³⁹ The County claimed the ordinance was aimed at protecting minors from psychological harm associated with violent video games as well as assisting parents to guard their children’s well-being.⁴⁰ The Eighth Circuit determined the County did not present enough evidence that clearly showed a direct link between violent video games and resulting psychological harm to minors.⁴¹ Further, it held the County could not rely on general feelings in society “that continued exposure to violence can be harmful to children.”⁴² The court further found that the goal of assisting parents was also not a compelling interest that justified the ordinance’s restriction on protected speech.⁴³ Because the County’s goals in enacting the statute were not compelling interests, the ordinance could not survive the strict scrutiny standard of review, and the plaintiffs were entitled to an injunction.⁴⁴

The most recent federal court to strike down a restriction on violent video games was the Western District of Washington when it decided *Video Software Dealer’s Ass’n v. Maleng* in 2004.⁴⁵ In *Maleng*, the challenged Washington state statute attempted to restrict all video games with realistic depictions of violence against law enforcement officers.⁴⁶ The district court followed the reasoning of the

35. *Id.*

36. *Id.* at 958. The Eighth Circuit mentions the “Choose Your Own Nightmare” series as an example, where the reader makes choices to lead to several different endings, depending on each choice the reader makes. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

40. *Interactive Digital*, 329 F.3d at 958.

41. *Id.*

42. *Id.* at 959 (quoting *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1137 (E.D. Mo. 2002)).

43. *Interactive Digital*, 329 F.3d at 960.

44. *Id.*

45. *Video Software Dealer’s Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

46. *Id.* at 1189.

Kendrick and *Interactive Digital* cases and agreed that video games, even violent ones, are expressive and entitled to free speech protection under the First Amendment.⁴⁷ The State of Washington, the defendants, pushed the court to consider graphic violence as falling within the definition of obscenity and therefore not enjoying protection under the First Amendment. However, the court declined expanding this definition and next analyzed whether the state could present compelling interests to justify the restrictions on protected speech.⁴⁸

Because the statute was a content-based restriction of protected speech, the court determined the statute was invalid unless the state could show that it was “necessary to serve a compelling state interest and that it [was] narrowly tailored to achieve that interest.”⁴⁹ The State of Washington put forth two interests to justify the restrictions: (1) “to curb hostile and antisocial behavior in Washington’s youth;” and (2) “to foster respect for public law enforcement officers.”⁵⁰ The State presented studies and reports to show a correlation between exposure to violence and a minor’s developing aggressive tendencies and claimed the statute would prevent or limit future aggressive violent acts towards law enforcement officers.⁵¹ However, the district court pointed out that “the Supreme Court and the Ninth Circuit have expressly rejected the idea that the possibility of future harm can justify the regulation of speech.”⁵² The district court determined the current research could not support this correlation between video games involving violence against law enforcement officers and actual violence against officers.⁵³ In addition, the statute would be ineffective because it did not restrict many of the most violent games; instead, it only restricted those games with violence toward law enforcement officers and left “vile portrayals of mutilation and murder of other persons (often women and minorities) unregulated and widely available to minors.”⁵⁴ The district court concluded that because of these weaknesses in the restrictions, the statute was not likely to significantly reduce aggression and violent acts by minors.⁵⁵

The district court further noted that even if the state’s interests were compelling, the statute did not provide the least restrictive means to achieve these

47. *Id.* at 1184.

48. *Id.* at 1185.

49. *Id.* at 1186.

50. *Id.*

51. *Id.* at 1188.

52. *Id.* See also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

53. *Maleng*, 325 F. Supp. 2d at 1188. In a footnote, the district court points out by playing video games such as *Grand Theft Auto: Vice City*, the player is not actually learning to load, aim, and fire a gun, but rather simply learning “a proven ability to manipulate a controller.” *Id.*

54. *Id.* at 1189.

55. *Id.*

goals.⁵⁶ The statute regulated all games with any violent acts towards law enforcement officers, even unintentional violence, so the regulations were not limited to the extreme and graphic violence and were far more restrictive than necessary to achieve the stated goals.⁵⁷ The court also expressed concern over the lack of specificity in the language of the statute, suggesting it left the decision of which games should be restricted up to retail clerks and managers without much guidance from the legislature.⁵⁸ The court concluded it was a problem if “the clerk might know everything there is to know about the game and yet not be able to determine whether it can legally be sold to a minor,” so the statute was unconstitutionally vague.⁵⁹ The court then granted the plaintiffs’ requested injunction.⁶⁰

III. RECENT DEVELOPMENTS

In December 2004, Illinois Governor Rod Blagojevich announced he would introduce state legislation to prevent the distribution of violent and sexually explicit video games to minors.⁶¹ Blagojevich proposed two separate bills—one dealing with sexually explicit video games and another to restrict graphically violent video games.⁶² Blagojevich was “outraged” and felt obligated to push for this legislation when he learned of an Internet game called *JFK Reloaded*, in which the player is asked to recreate the assassination of President John F. Kennedy.⁶³ In a press release, the Governor’s office singled out *Grand Theft Auto: San Andreas*, one of the best-selling games of 2004, as an example of a game that should be kept out of the hands of children.⁶⁴ According to the website established by the Governor’s office to publicize the proposal, the purpose behind the legislation is “to protect children from the psychological harm exposure to violent media causes and to prevent seemingly arbitrary violence.”⁶⁵ The stated goal of this legislative

56. *Id.*

57. *Id.* at 1190.

58. *Id.* at 1191.

59. *Id.*

60. *Id.*

61. Chase & Aduroja, *supra* note 5.

62. 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) (available at http://www.safegamesillinois.org/media/releases/12_16_2004_release.pdf).

63. McKinney, *supra* note 7, at 3.

64. Press Release, *supra* note 62. *Grand Theft Auto: San Andreas* is the latest in a series of *Grand Theft Auto* games in which the player is encouraged to “avenge the hero’s mother’s murder and restore glory to his gang by shooting police officers, burglarizing homes, committing carjackings and soliciting, fornicating with and beating prostitutes.” *Id.*

65. Governor’s Proposal, <http://www.safegamesillinois.org/proposal.php> (last visited Sept. 28, 2005).

initiative is to prevent minors' access to "games that teach them to be killers and disrespect women."⁶⁶

Governor Blagojevich claims his proposal includes a "definition comparable to obscenity statutes that routinely get upheld by courts."⁶⁷ The governor also acknowledged the earlier attempts at restricting violent games, stating the proposed legislation would be more narrowly worded than those previous attempts in order to prevent future legal struggles.⁶⁸ Blagojevich justified the restrictions by comparing the video game industry's targeting of children to the way the tobacco industry targeted minors.⁶⁹ To assist the governor in his push to pass this legislation, he created the Safe Games Illinois Task Force, consisting of First Lady Patti Blagojevich and various teachers, medical experts, and parents from across the state.⁷⁰

Governor Blagojevich's proposal was introduced to the Illinois House of Representatives on February 28, 2005 as House Bill (HB) 4023 and was sponsored by Rep. Linda Chapa LaVia.⁷¹ On March 17, 2005, the Illinois House of Representatives overwhelmingly passed HB 4023 with a 91–19 vote and sent it to the Senate for approval.⁷² The Illinois Senate voted to pass the bill on May 19, 2005 by a margin of 52–5.⁷³ Due to some minor changes made by the Senate, the House once again voted to pass the bill on May 28, 2005, this time by a 106–6 margin.⁷⁴ On July 25, 2005, Governor Blagojevich signed HB 4023 into law as Illinois Public Act 94–315 ("the Act"), and a lawsuit was promptly filed the same day challenging the constitutionality of the restrictions.⁷⁵

66. *Id.*

67. Anita Hamilton, *Video Vigilantes*, TIME, Jan. 10, 2005, at 60.

68. Eric Krol, *Governor to Lobby for Law to Limit Violent Video Games*, CHI. DAILY HERALD, Dec. 16, 2004, at 15, available at LEXIS, News Library.

69. McKinney, *supra* note 7, at 3.

70. Mike Ramsey, *Governor Launches Task Force Focusing on Violent, Sexually Explicit Video Games*, COPLEY NEWS SERVICE, Dec. 30, 2004, available at LEXIS, News Library. Governor Blagojevich also created a website to publicize the proposed legislation and task force, available at <http://www.safegamesillinois.org>.

71. Brian Mackey, *House OKs Bill Restricting Sale of Some Video Games*, STATE JOURNAL-REGISTER (Springfield, Ill.), Mar. 17, 2005, at 13, available at LEXIS, News Library.

72. *Id.*

73. Phil Davidson, *Senate OKs Video-Game Bill*, THE PANTAGRAPH (Bloomington, Ill.), May 20, 2005, at A1.

74. Phil Davidson, *House OKs Ban on Games*, THE PANTAGRAPH (Bloomington, Ill.), May 29, 2005, at A1.

75. James Kimberly, *Law Bars Violent Game Sales to Children*, CHI. TRIB., July 26, 2005, available at LEXIS, News Library. The lawsuit was filed by several associations representing retailers and the video game industry seeking an injunction to prevent the law from coming into effect. *Id.*

The Act includes two separate sections, entitled the Violent Video Games Law and the Sexually Explicit Video Games Law.⁷⁶ Illinois Public Act 94–315 defines violent games as:

realistic depictions of human-on-human violence in which the player kills, seriously injures, or otherwise causes serious physical harm to another human, including but not limited to depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.⁷⁷

Sexually explicit games are defined 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 a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast.⁷⁸

Any violation of the ban on distributing these games to minors would be a petty offense, typically punishable by a \$1,000 fine.⁷⁹ However, there is a family purchase exemption, where a family member may purchase the restricted games for a minor without violating the bill.⁸⁰ In addition, there are affirmative defenses available for the retailer if: (1) the minor shows fraudulent identification misrepresenting their age, (2) if the sales clerk intentionally and knowingly sold restricted games to minors, or (3) if the game in question was rated EC, E10+, E, or T by the Entertainment Software Ratings Board.⁸¹ The organization of the statute allows retailers to judge for themselves whether games are too violent or sexually explicit to sell to minors, using the definitions provided within the bill as a guide.⁸² In addition, the retailers should label any violent or sexually explicit video games with a large “18” sticker on the front of each individual game case.⁸³

As the bill proceeded through both chambers of the General Assembly, it was met with very little resistance politically. However, many observers predicted that the bill, if passed, would face a constitutional challenge due to its restrictions on

76. 2005 Ill. Legis. Serv. P.A. 94–315 (West) (effective Jan 1, 2006).

77. *Id.* at § 12A10(e).

78. *Id.* at § 12B10(e).

79. *Id.* at § 12A15, §12B15.

80. *Id.* at § 12A20(1), §12B20(1). The bill defines “family member” to include parents, siblings, grandparents, aunts, uncles, and first cousins. *Id.*

81. *Id.* at § 12A20, §12B20.

82. *Id.* at § 12A15, § 12B15. See also McKinney, *supra* note 7.

83. 2005 Ill. Legis. Serv. P.A. 94–315 § 12A25(a) (West); 2005 Ill. Legis. Serv. P.A. 94–315 § 12B-25(a) (West).

video games, which some courts consider protected speech.⁸⁴ These predictions were correct as a lawsuit challenging the Act was filed almost immediately after Governor Blagojevich signed the bill into law. The plaintiffs in the lawsuit, which was filed in the Northern District of Illinois, are the Entertainment Software Association (ESA), the Video Software Dealers Association (VSDA), and the Illinois Retail Merchants Association (IRMA), and they are suing Governor Blagojevich, Attorney General Lisa Madigan, and Cook County State's Attorney Richard Devine, all in their official capacities.⁸⁵ The plaintiffs are seeking an injunction that would prevent the law from coming into effect, as well as reimbursement of their attorney fees and other legal costs incurred as the lawsuit progresses.⁸⁶

This lawsuit will be closely watched around the country as it progresses, because other states are following Illinois' lead in passing laws that attempt to restrict minors' access to these games. Violent and sexually explicit video games became a major news story in the summer of 2005 when hidden sexual content was discovered in *Grand Theft Auto: San Andreas* by a computer hacker.⁸⁷ The California legislature recently approved a bill with restrictions similar to the Illinois statute, and the California bill will now be sent to Governor Arnold Schwarzenegger for him to sign.⁸⁸ In addition, Senator Hillary Clinton (D-N.Y.) has pledged to introduce federal legislation that would fine retailers \$5,000 if they sold violent or sexually explicit video games to minors.⁸⁹ If the constitutional challenge to the Illinois Act is successful, the State of Illinois may be forced to pay

84. See Baldas, *supra* note 8; Adele Nicholas, *Illinois Governor Cracks Down on Violent Video Games*, CORP. LEGAL TIMES, Feb. 2005, at 56, available at LEXIS, News Library; Mike Riopell, *Why A Violent Video Game Ban Would Face A Legal Challenge*, CHI. DAILY HERALD, Mar. 9, 2005, at 7, available at LEXIS, News Library; Ray Long & Erika Slife, *Debate on Violent Video Games; Kids, Get This Straight: Aliens Bad, People Good*, CHI. TRIB., Mar. 17, 2005, at 1, available at LEXIS, News Library; Davidson, *supra* note 73, at A1.

85. Complaint, Entertainment Software Ass'n v. Blagojevich, No. 05C-4265 (N.D. Ill. Jul. 25, 2005) (on file with author).

86. *Id.* at 23.

87. Dave Davies, *'Adults Only' Rating Is No Game*, SAN ANTONIO EXPRESS-NEWS, July 29, 2005, at 3F, available at LEXIS, News Library. *GTA: San Andreas* was originally rated Mature (ages 17 and up) for its adult themes such as graphic violence, language, criminal activity, and sexual inferences, but there was no public uproar over the game until the explicit sexual content was discovered, nearly a year after its initial release for the Playstation 2. The game was re-rated as Adults Only (ages 18 and up) and was temporarily pulled from most store shelves across the country. *Id.*; Josh Morris, *Rated 'M' For Misjudgment*, THE SHORTHORN (via U-Wire), Sept. 9, 2005, available at LEXIS, News Library.

88. Rob Fahey, *California Passes Violent Game Restriction Legislation*, Sept. 12, 2005, http://www.gamesindustry.biz/content_page.php?aid=11455.

89. Allie Shah, *A Story of Sex, Lies, and Video Games; 'San Andreas' Sparks Latest Fracas in Battle Over Cultural Boundaries*, STAR TRIBUNE (Minneapolis, MN), July 23, 2005, at 1A, available at LEXIS, News Library.

for the plaintiffs' costs and legal fees.⁹⁰ For example, following the *Maleng* decision, the State of Washington had to pay \$500,000 in attorney fees after the statute was struck down.⁹¹ If the Illinois statute is held unconstitutional as a result of this current lawsuit, then these other proposals will need to take a different approach to achieve this goal of limiting minors' access to violent and sexually explicit video games.

IV. ANALYSIS

The district court laid out the proper analysis to determine the constitutionality of these types of restrictions on video games in *Interactive Digital*.⁹² First, the court examines whether video games in general are entitled to free speech protection under the First Amendment.⁹³ Next, the court will determine what standard of scrutiny should be applied to the restrictions and then apply that standard to the current facts.⁹⁴ Finally, the court reviews whether the language of the restrictions is vague and overbroad.⁹⁵ In addition to the typical court analysis, this Comment will explore other possible alternatives or solutions to this issue to which Illinois legislators may turn in order to better achieve the goal of limiting minors' access to graphically violent or sexually explicit video games.

A. Video Games Are Considered Protected Speech Under the First Amendment.

Initially, the very early video games were not considered protected speech and were compared to other entertainment devices like pinball machines and other games.⁹⁶ However, as technology advanced throughout the 1990s and games became more complex, many courts began to look at video games as possible speech due to their messages and storylines.⁹⁷ Although the Supreme Court has not yet specifically faced the issue of whether video games are protected speech, both the Seventh and Eighth Circuits agree that at least some video games are

90. Davidson, *supra* note 73, at A1.

91. *Id.*

92. 200 F. Supp. 2d 1126 (E.D. Mo. 2002).

93. *Id.* at 1132.

94. *Id.*

95. *Id.*

96. Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 149 (2004).

97. Nathan Phillips, *Interactive Digital Software Ass'n v. St. Louis County: The First Amendment and Minors' Access to Violent Video Games*, 19 BERKLEY TECH. L.J. 585 (2004).

considered protected expression under the First Amendment.⁹⁸ The Eighth Circuit makes a more inclusive claim than the Seventh Circuit, suggesting that video games are “as much entitled to the protection of free speech as the best of literature.”⁹⁹ Instead of providing a similar blanket statement that all video games are protected speech, the Seventh Circuit seems to adopt the district court’s technique in *Kendrick* of individually reviewing each game in question to determine whether the games contain expressive elements.¹⁰⁰ In *Kendrick*, the court emphasized that nearly every game has a story or message to express, even games such as *The House of the Dead*.¹⁰¹ The Seventh Circuit reversed the district court’s decision and determined that all of the disputed games in *Kendrick* were entitled to free speech protection.¹⁰²

Therefore, whether a court applies the Seventh Circuit’s individual review or the broader inclusions of the Eighth Circuit, there is a very minimal standard of storyline and overall message that a video game must meet in order to qualify as protected speech under the First Amendment.

B. Any Proposed Regulations on Violent Video Games Must Withstand Strict Scrutiny in Order to be Constitutional Because They are Restrictions on Protected Speech.

The Eighth Circuit stated in *Interactive Digital* that the limitations on violent video games were a content-based restriction on protected speech.¹⁰³ The court then applied a strict scrutiny standard to the restrictions because content-based restrictions are “presumptively invalid, and the County therefore bears the burden of demonstrating that the ordinance is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end.”¹⁰⁴ To date, no restrictions on video games have successfully withstood a strict scrutiny standard of review when their constitutionality was challenged.¹⁰⁵

The restrictions in Illinois Public Act No. 94–315 are also content-based restrictions of protected speech, so they must also withstand strict scrutiny. In order to be constitutional and withstand a strict scrutiny standard of review, the

98. *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001); *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003).

99. *Interactive Digital*, 329 F.3d at 958 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

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

101. *Id.* at 577.

102. *Id.* at 578.

103. *Interactive Digital*, 329 F.3d at 958.

104. *Id.*

105. *See, e.g., Kendrick*, 244 F.3d at 580; *Interactive Digital*, 329 F.3d at 960; *Video Software Dealer’s Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).

State of Illinois must show the restrictions are necessary to serve compelling state interests and that they are the least restrictive possible method to achieve the stated compelling interests.

C. Although They Are Not Entirely Necessary, the Restrictions on Sexually Explicit Games May Be Acceptable.

Most courts have agreed that restrictions on sexually explicit video games do not generally violate the free speech protections of the First Amendment. In both *Kendrick* and *Interactive Digital*, the plaintiffs did not dispute the restrictions on sexually explicit video games and only argued against the restrictions on violent games.¹⁰⁶ In *Maleng*, the statute in question did not specifically address sexually explicit games, but the court admitted that a state would most likely be successful in banning the sale of such games to minors.¹⁰⁷ In addition, the Supreme Court has stated that obscenity is not protected speech, and a state may regulate the dissemination of sexually explicit materials to minors.¹⁰⁸ The court in *Maleng* also stated that no court has ever expanded the definition of obscenity to include “graphic portrayals of violence,” so the definition of obscenity is primarily limited to sexual materials.¹⁰⁹ However, forty-seven states throughout the country already have a harmful-to-minor statute to regulate the sale of obscene materials to minors.¹¹⁰ Illinois is included as one of these states that already has a harmful materials statute.¹¹¹ In addition, the proposed Safe Games Act would be added onto the existing harmful to minors statute, so the legislature is clearly aware of the existing statute and the purpose it serves.¹¹²

These harmful materials statutes should already prevent the sale of sexually explicit games to minors, if they truly fall within the definition of obscene. The plaintiffs in the lawsuit challenging the Act take the same point of view, arguing that “Any legitimate interest in curbing minors’ access to ‘harmful’ sexual materials, moreover, is served by the Act’s separate ‘harmful to minors’ section.”¹¹³ In addition, the plaintiffs argue that the current Act is overly restrictive because there is “no exception for material that has serious literary, artistic, political, or

106. See *Kendrick*, 115 F. Supp. 2d at 945; *Interactive Digital*, 329 F.3d at 956.

107. *Maleng*, 325 F. Supp. 2d at 1190.

108. *Ginsberg v. New York*, 390 U.S. 629, 637 (1968).

109. *Maleng*, 325 F. Supp. 2d at 1185.

110. Baldas, *supra* note 8, at 6.

111. See 720 ILL. COMP. STAT. 5/11-21 (2004).

112. See 2005 Ill. Legis. Serv. P.A. 94-315 (West). The proposed Act amends the Harmful Material statutes at 720 ILL. COMP. STAT. 5/11-21 and adds Articles 12A & 12B to the same section. *Id.*

113. Complaint, *supra* note 85, at 14.

scientific value.”¹¹⁴ Therefore, the Sexually Explicit Video Games Law is not completely necessary legislation, but it may be upheld if it faces a constitutional challenge. Governor Blagojevich seems prepared for this possibility, since he has crafted the legislation into separate parts, so that the sexually explicit restrictions could remain even if a court did strike down his restrictions on violent games.¹¹⁵ No matter what happens with the Violent Video Games Law, the restrictions on sexually explicit games will likely be upheld unless the court finds them repetitive and unnecessary due to the existing harmful to minors statute.

D. The Current Proposed Regulations on Violent Games Are Unconstitutional and Would Not Withstand a Strict Scrutiny Review.

Within the language of the Violent Video Games Law, the State of Illinois puts forth five main compelling interests to justify the restrictions on violent games advanced by the bill.¹¹⁶ These are listed in the legislature’s findings in Section 12A-5 and are as follows:

- (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.
- (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.¹¹⁷

The sponsor of the bill in the House, Rep. Linda Chapa LaVia, claimed a new study by Harvard University supports the legislature’s findings that children suffer post-trauma stress and increased aggression from extensive playing of violent video games.¹¹⁸ Rep. Chapa LaVia and Governor Blagojevich hope this new empirical evidence will be the key to withstanding constitutional challenges and succeeding where other attempts at restricting video games have failed.¹¹⁹ However, most recent studies have disagreed to some extent about whether violent

114. Complaint, *supra* note 85, at 3.

115. Riopell, *supra* note 84.

116. 2005 Ill. Legis. Serv. P.A. 94-315 (West).

117. *Id.*

118. *House Oks G-Rod’s Video Game Ban*, CHI. TRIB., Mar. 17, 2005, at 8, available at LEXIS, News Library.

119. *Id.*

video games actually influence children and teenagers to behave violently themselves.¹²⁰ Several studies have found a correlation between increased aggression and violent games, but some First Amendment scholars argue that “aggression is not the same thing as violence, and correlation does not equal causation.”¹²¹ The State of Illinois cannot simply use the language “compelling interest” to pass strict scrutiny; the state must successfully convince a court that their interests actually are compelling and that there were no less-restrictive alternatives available.

Before the House of Representatives passed HB 4023 on March 17, 2005, there was extensive debate on the restrictions as some lawmakers expressed their doubts about the bill.¹²² Some lawmakers questioned whether a game that depicted killing of aliens would fall under the statute because the bill specifies “human-on-human violence.”¹²³ Rep. Chapa LaVia responded by suggesting that “[k]illing an alien wouldn’t fall under the bill,” unless the alien “pretended to be a human. Then it would fall under this bill because it’s human against human.”¹²⁴ This explanation severely lacks clarity and would not assist retailers who are trying to determine if they should restrict a particular game. If a game that features the killing of aliens is not considered violent, then this bill would likely not restrict access to popular first-person shooter games filled with gore, such as *Halo 2* or *Doom 3*, simply based upon the idea that the enemies the player is asked to brutally kill are all aliens or zombies. This is similar to an attribute of the unconstitutional statute in *Maleng*, where the only games restricted included violence against law enforcement officers and did not restrict games with other types of victims.¹²⁵ However, the National Institute on Media and the Family recently named *Halo 2* and *Doom 3* two of the top five games for children to avoid due to their extremely violent nature.¹²⁶ If the Violent Video Games Law does not

120. Melissa Healy, *Is It Just A Game;? Virtual Violence Has Parents and Politicians Worried About Real-World Aggression. The Science Behind Those Fears Hasn’t Made it to the Next Level*, L.A. TIMES, Sept. 12, 2005, at F1, available at LEXIS, News Library (summarizing varying results of several recent psychological studies on the effects of violent video games on children’s behavior).

121. Robert D. Richards & Clay Calvert, *Target Real Violence, Not Games*, CHRISTIANSCIENCE MONITOR, Aug. 1, 2005, at 9, available at LEXIS, News Library. “Robert D. Richards and Clay Calvert are professors of communications and law at Pennsylvania State University and codirectors of the Pennsylvania Center for the First Amendment.” *Id.*

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

123. *Id.*

124. *Id.*; H.B. 4023, 94th Gen. Assem. (Ill. 2005).

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

126. Hamilton, *supra* note 67, at 60. Of the top five games to avoid for children, only two actually involved violence against humans. *Doom 3*, *Halo 2*, and *Resident Evil: Outbreak* all involved killing zombies, demons, aliens, and other various monsters. *Id.*

prevent the sale of games such as these to minors, it is entirely ineffective and does not achieve its stated goals.

Other lawmakers brought up questions involving whether the bill would restrict games based on James Bond films or even a Brothers Grimm fairy tale, because of small amounts of realistic violence in those games.¹²⁷ Some lawmakers, even those who voted for the bill, openly suggested that it is “unconstitutional as drafted.”¹²⁸ Rep. Bill Black argued that parents, not the state government, should be responsible for what games their kids play and accused some lawmakers of voting for the bill simply to avoid negative publicity even though it seems clear the bill will be overturned on a constitutional challenge.¹²⁹ In fact, Governor Blagojevich actually voted against a similar bill in 1999 when he was a U.S. Representative.¹³⁰ Blagojevich claims that he was against the federal bill partially because it was not strict enough, but the federal bill actually had tougher maximum penalties than the Illinois Violent Video Games Law does.¹³¹

These questions raised by the legislature indicate a certain degree of vagueness within the bill’s language, and they also show the trouble that a retailer may have when determining which games should be restricted. President of the Entertainment Software Association (ESA) Douglas Lowenstein worried that the lack of clear definitions and guidelines “clearly puts thousands of retail employees and hundreds of companies across Illinois at substantial risk” because they must determine which games should be restricted.¹³² During the debate in the House, some lawmakers questioned whether this bill would require a retailer to know everything about each game they sell.¹³³ President of the Interactive Entertainment Merchants Association (IEMA) Hal Halpin also expressed concern, stating that depending upon retailers “to determine what constitutes appropriate content is lunacy.”¹³⁴ David Vite, President and CEO of the Illinois Retail Merchants

127. Long & Slife, *supra* note 122.

128. *Id.* Rep. Lou Lang stated that the bill was unconstitutional because the standards, penalties, and interpretations are all vague. However, he still supported the bill because he felt the games in question are “disgusting, violent, and horrible games.” In addition, lawmakers were worried that anyone who voted against the bill would be portrayed in the media as in favor of children playing violent games, so most simply voted to pass the bill. *Id.*

129. Mackey, *supra* note 71.

130. Mike Riopell, *Governor’s Changing Video Game Tune*, CHI. DAILY HERALD, Jan. 14, 2005, at 1, available at LEXIS, News Library. The 1999 federal bill was sponsored by Rep. Henry Hyde (R-IL) in the wake of the Columbine killings and was defeated in the House of Representatives. Blagojevich joined with most Congressional Democrats in voting against the bill. *Id.*; *See also* Children’s Defense Act of 1999, H.R. 2036, 106th Cong. (1999).

131. *Id.*

132. *Videogames*, CONSUMER ELECTRONICS DAILY, Mar. 18, 2005, available at LEXIS, News Library.

133. Mackey, *supra* note 71.

134. *Videogames*, *supra* note 132.

Association, vowed to fight the passage of the bill and commented that the bill's "[a]mbiguous definitions do not make good law."¹³⁵ Vite continued by praising Blagojevich's valid goal of protecting minors, but he disagreed with the method, stating that "the effort to punish retailers for selling legitimate products is at best flawed and at worst unconstitutional."¹³⁶ The district court in *Maleng* also addressed these concerns, stating, "[t]he real problem is that the clerk might know everything there is to know about the game and yet not be able to determine whether it can legally be sold to a minor."¹³⁷ These concerns show the risk that this lack of guidance from the legislature could lead to major problems for retailers.

Since the standards for determining which games should be restricted are extremely vague, it is highly likely that retailers could disagree on what games fall under the statute. It is possible to have a hypothetical situation where a manager at a Best Buy may decide to restrict a particular violent game, but a manager at a Circuit City across the street does not think the game is violent enough to be restricted. This creates a situation where the game is only restricted in some stores and not others, which is clearly not the goal of the Act. According to the Act, Circuit City could be punished in this hypothetical situation simply because one manager made a judgment call, and the state disagreed with the individual judgment. On the other hand, there could also be stores that restrict way too many games, in order to ensure that they are not at risk of violating the law because of such a murky standard of violence. This concern is expressed by the plaintiffs in *Entertainment Software Association v. Blagojevich*, as they argued that the Act "creates a chilling effect on a great deal of speech, as game creators and retailers will respond to the Act's uncertainty by self-censoring, depriving adults and children of access to undeniably protected expression."¹³⁸

In addition, if the State is going to monitor the retailers' decisions to restrict games, then the State will also presumably be judging the games and determining which ones should be restricted. If the State is making this judgment call regardless of what the retailers do, they should not leave this decision up to the retailers' discretion and risk the possibility of retailers deciding differently. However, this would require the State to review every single game and notify all retailers whether to restrict the sale of each particular game to minors. On the

135. Adele Nicholas, *Illinois Governor Cracks Down on Violent Video Games*, CORP. LEGAL TIMES, Feb. 2005, at 56, available at LEXIS, News Library.

136. *Id.*

137. *Maleng*, 325 F. Supp. 2d at 1191. The court questioned whether games based on cartoons such as *The Simpsons* or *Looney Tunes* would be 'realistic' enough to fall within the definition of the statute restricting games with violence against "law enforcement officers." The court was also unsure about other games such as *Dukes of Hazzard*, *Age of Empires*, and *Splinter Cell*. *Id.* at 1190.

138. Complaint, *supra* note 85, at 2.

other hand, if the State will not be judging the games themselves, then there is no way to monitor whether the stores are restricting the correct games and the restricted games will vary from store to store.

Furthermore, there are many games that do not involve gruesome killing that still realistically depict “human-on-human violence.”¹³⁹ Many sports games, such as football for example, include constant violence between human characters. David Vite of the Illinois Retail Merchants Association also acknowledged the possibility that a hockey game could fall under the bill’s definition of violent content.¹⁴⁰ There is nothing in the statute that discusses how much violence is necessary for a game to be restricted. The plaintiffs in *ESA v. Blagojevich* expressed concern that “[e]ven if only a small portion of a game contained content that theoretically met the Act’s definitions, the entire game would be suppressed.”¹⁴¹ Although most retailers would probably not restrict football games, some stores may be so concerned about potential punishment that they will ban the sale to minors of any games including any violence whatsoever, including football or hockey games, simply due to the lack of guidance from the legislature. Clearly, this is not the intended result of Governor Blagojevich and the Illinois legislature. These risks and possible poor results show that the Act’s language is not the least restrictive means to achieve the State’s compelling interests, so the restrictions on violent video games are unconstitutional.

E. The State Should Look to Alternative Solutions to Achieve the Goal of Limiting Minors’ Access to Violent Video Games.

The current language of Illinois’ Violent Video Games Law is vague and does not provide a definite standard to determine which violent games should be restricted, so the bill will probably not withstand a constitutional challenge. Rather than passing a bill that seems doomed to be overturned by a court, the legislature should examine alternative, more effective methods of successfully working towards the stated goal of limiting minors’ access to violent video games.

One way to possibly avoid a constitutional challenge would be to consider a law with alternate language. In order to have a chance of being successful and upheld by the courts, a restriction on violent video games needs to be narrowly tailored to achieve the goal of limiting minor’s access to violent games. In *Kendrick*, Judge Posner suggested that if the restricted video games lacked the expressive elements that qualified them as protected speech, “a more narrowly

139. 2005 Ill. Legis. Serv. P.A. 94-315 (West).

140. Nicholas, *supra* note 135, at 56.

141. Complaint, *supra* note 85, at 15.

drawn ordinance might survive a constitutional challenge.”¹⁴² However, this does not simply mean that any narrowly tailored restriction will pass constitutional muster. Instead, the bill’s language must be narrowly tailored and can only restrict games that do not qualify as protected speech because they have very limited expressive qualities.

In order to be narrowly tailored, the language of the statute would need to lay out a very precise standard to determine which games should be restricted, and this decision should not be left up to retailers. The language of the statute should include a definite standard of how much violence and what type of violence would cause a game to be restricted. In addition, a more narrowly tailored statute should specifically address whether violence against aliens, zombies, or other non-human creatures would cause a game to be restricted. Overall, the restrictions should provide everyone, including parents, retailers, and video game producers, considerable notice so they can have reasonable expectations about whether a game would be restricted. However, this option is not very attractive because even a narrowly tailored statute is not guaranteed to be effective because it can only restrict the games that lack any expressive qualities.

Another option the legislature could choose is to put more support behind the existing video game industry ratings, called the ESRB (Entertainment Software Rating Board) ratings system.¹⁴³ The ESRB was established in 1994 by the Entertainment Software Association and self-regulates the video game industry by assigning ratings as all games are released.¹⁴⁴ The ESRB follows the game industry closely and recently updated its ratings by adding a new category for 10-13 year-old gamers.¹⁴⁵ The current ESRB ratings are as follows: EC (Early Childhood)—suitable for ages 3 and older; E (Everyone)—suitable for ages 6 and older; E10+ (Everyone 10+)—suitable for ages 10 and older; T (Teen)—suitable for ages 13 and older; M (Mature)—suitable for ages 17 and older; and AO (Adults)—suitable for adults only.¹⁴⁶ According to the ESRB, many retailers do not carry Adult-Only games in their stores, and most retailers have pledged to ask for identification before selling an M-rated game to ensure the buyer is at least 17.¹⁴⁷ Following a lawsuit in Florida, Best Buy recently agreed to a nationwide policy of

142. *Kendrick*, 244 F.3d at 580.

143. About ESRB, Entertainment Software Rating Board, <http://www.esrb.org> (last visited Sept. 28, 2005).

144. *Id.* The ESRB also works hard to provide parents with numerous resources about the ratings system and the games themselves so they can make educated decisions about what games their children should play. *Id.*

145. Stanley A. Miller II, ‘E10+’ *Fine-Tunes Ratings Game*, MILWAUKEE J. SENTINEL, Mar. 8, 2005, at 4, available at LEXIS, News Library.

146. *ESRB*, *supra* note 143.

147. *ESRB*, *supra* note 143.

asking for identification of anyone who appears to be twenty-one or younger and is purchasing a game rated M (Mature).¹⁴⁸

It seems logical that the State of Illinois could have simply built its legislation around these ratings, since they already exist and are well-known by retailers, parents, and gamers. However, the language of the Violent Video Games Law condemns the self-regulating ratings system by suggesting the ratings are “not adequately enforced.”¹⁴⁹ When announcing his proposal, Governor Blagojevich pointed out the results of a 2003 Federal Trade Commission study that concluded minors were able to successfully purchase M-rated games 69% of the time.¹⁵⁰ Later in the statute, though, the State requires retailers to post signs notifying customers of the ESRB ratings and also to provide booklets explaining the ratings. Because the State did not incorporate the ESRB ratings within the statute and instead created their own standards, the restrictions advocated by the statute will be confusing and ineffective. If the State felt that the ESRB ratings were sufficient but are just not enforced enough, the simpler and more effective route to accomplish the State’s goals may have been to apply the restrictions based precisely upon the ESRB ratings and restricting the sale of any M or AO games to minors, thus focusing on the enforcement of the pre-existing ratings system. However, the bill does not encourage better enforcement of the ESRB ratings; instead it offers a different set of standards to classify games, implying that the ESRB ratings are not sufficient. The bill seems to contradict itself on this issue by trying to replace the ESRB ratings, but at the same time, requiring stores to display them prominently so parents can learn more about the ESRB.

A prominent First Amendment lawyer, Paul McMasters, suggested that instead of passing legislation, politicians should “focus more of their energy on public-awareness campaigns, the independent rating system, and encouraging vendors to ‘card’ more unaccompanied minors.”¹⁵¹ This would not involve passing legislation, but only supporting a drive to get the message out to the public that parents need to be aware and involved in what video games their children are playing. There are a significant percentage of video games developed specifically for adults, just like the film industry, and parents need to be aware of whether their children are playing appropriate games. Since no legislation is needed, there is no risk that a court will later overturn it. This publicity campaign would bring the public’s attention to the issue and hopefully encourage parents to learn the ESRB ratings system and take a more active role in monitoring the games their children play.

148. Baldas, *supra* note 8, at 6.

149. 2005 Ill. Legis. Serv. P.A. 94-315 § 12A-5(b) (West).

150. Hamilton, *supra* note 67, at 60.

151. McMasters, *supra* note 1.

A final option would involve working together with the entertainment industry to create a stronger and more effective ratings system for video games. For instance, one option would be to change the ESRB video game ratings to coincide with the movie ratings system that everyone is familiar with. Instead of ratings such as E, T, and MA, the ratings could simply use the well-known standards of G, PG, PG-13, and R for video games. Everyone should be well aware of the film ratings system and know what each classification means, so parents would no longer have to worry about learning several new ratings standards. Video games and movies are regulated very much the same way, yet there is not currently a large public push for legislation to restrict the access of minors to R-rated movies. Instead the government allows the movie industry to regulate itself. A universal ratings system would accomplish the State's goals, where minors could only buy R-rated games with a parent or guardian present, much like how a minor can only view a R-rated movie with a parent or guardian accompanying them. It has been suggested by some that video games, TV, and film should all share a universal ratings system in order to make it easier on parents to understand what the ratings mean.¹⁵² Some private companies already use a universal ratings system to rate TV, movies, and video games, and provide their ratings to parents who pay a small subscription fee.¹⁵³ However, a sweeping change such as a universal ratings system will likely occur only if the video game industry agrees to implement it on a national level; it is not logical or effective to only implement a new ratings system in only one state. Therefore, it is not likely that the video game industry will adopt the motion picture ratings system to regulate and classify their games.

The examples listed above are just a few of the alternatives the State could pursue in order to more effectively reach their goal of limiting minors' access to violent video games without passing legislation that will likely be held unconstitutional when challenged in court. Each of these alternative solutions is a less restrictive means of pursuing the State's goal and would be a better route to take than for the legislature to pass the Violent Video Games Law.

V. CONCLUSION

152. Ann Oldenburg, *Ratings System Runs Adrift*, USA TODAY, Jul. 28, 2005, at 1D, available at LEXIS, News Library.

153. *Id.* One example is Los-Angeles based PSV Ratings, who provides ratings available at <http://www.currentattractions.com>. The service costs \$20 a year to subscribe and it "assigns ratings to movies, TV series, DVDs, and video games based on rules designed by a board of educators, child psychologists, and child psychiatrists, all of whom are parents." *Id.*

Illinois' proposed regulations on violent video games will likely be determined to be an unconstitutional restriction of protected speech when they are challenged in court, especially since *Kendrick* is the governing precedent within the Seventh Circuit, where the lawsuit was filed by the ESA. The restrictions contain vague definitions and leave important decisions, such as whether to restrict a specific game, up to retailers without much guidance from the legislature. The language within the bill is not any more narrowly tailored than the overturned regulations in *Kendrick*, *Interactive Digital*, and *Maleng*, and the State of Illinois rejected less restrictive alternative methods of achieving its stated goal. Therefore, the Violent Video Games Law will not withstand a strict scrutiny review and should be overturned as unconstitutional. However, the restriction on sexually explicit games may be upheld as falling within obscenity laws, even though they are not necessary, so the violent games portion of the bill will probably be cut out. Governor Blagojevich has a very admirable goal in preventing minors' from unlimited access to violent and sexually explicit video games, but there are better and more effective methods to work toward this goal. The Illinois legislature should examine some of these alternative methods instead of passing unconstitutional laws that waste the state's time and money by defending the law in court and potentially paying attorney fees for the video game industry. The State should work hard to promote the ESRB ratings system and get the message out that parents should pay attention to the video games their children are playing. However, the ultimate responsibility lies with parents because regulating video games is not a job for Governor Blagojevich or the Illinois legislature.